

**THE LEGAL SIGNIFICANCE OF UN GENERAL ASSEMBLY RESOLUTIONS
REVISTED: AN EMPIRICAL STUDY**

Rossana Deplano

**THESIS SUBMITTED TO THE UNIVERSITY OF NOTTINGHAM
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY**

March 2022

ABSTRACT

This thesis examines the processes through which the resolutions adopted by the United Nations General Assembly acquire legal significance through state practice. The United Nations Charter describes resolutions as recommendations. Hence, they are not legally binding. Yet states routinely cite resolutions with a view to asserting the existence of rights and duties under international law. By adopting an empirical methodology of research, this thesis examines how states attribute legal significance to resolutions in three different contexts: at the time of adoption at the General Assembly, within domestic law and in international practice. The findings of my study show that, contrary to the common understanding, the General Assembly is not a unitary actor. Its composition into a plenary session and six main committees each governed by their own rules of procedures and informal practices influences the way resolutions are adopted and the extent to which states attribute legal significance to them. It also shows that states attribute different degrees of legal significance to the adopted resolutions depending on context and circumstances. There appears to be no abstract attribute of resolutions *qua* resolutions that explains why states attach legal significance to them. The thesis concludes that, contrary to the existent theories on the legal significance of resolutions, the concept of legal significance of resolutions is neither a predetermined nor a unitary one. Eventually, the attribution of legal significance to resolutions is a manifestation of state will to abide by their content, not the will of the General Assembly.

Acknowledgements

I owe my deepest gratitude to Dr. Róisín Mulgrew and Professor Robert McCorquodale for supporting my research project. They have been a delightful supervisory team.

TABLE OF CONTENTS

ABBREVIATIONS	1
 CHAPTER 1 – INTRODUCTION	 3
1.1 Background of research	3
1.2 Overview of the legal effects of resolutions	4
1.3 Original contribution of the study	9
1.4 Using empiricism to understand the legal significance of resolutions	11
1.4.1 Need for empiricism	11
1.4.2 New Legal Realism	13
1.4.3 International organizations law	16
1.5 The argument in outline	18
 CHAPTER 2 – RESEARCH METHODOLOGY DESIGN	 21
2.1 Introduction	21
2.2 Aim and scope of the research design	22
2.3 Conceptualising three levels of legal significance of resolutions	23
2.3.1 Level 1: legal significance at the adoption stage	24
2.3.1.1 Counting resolutions	25
2.3.1.2 Clustering resolutions	26
2.3.1.3 Selecting the sample	26
2.3.1.4 Hypothesis and variables	28
2.3.2 Level 2: legal significance within domestic law	33
2.3.3 Level 3: legal significance international practice	37
2.4 Conclusion	39
 CHAPTER 3 – UNPACKING THE PRACTICE OF THE GENERAL ASSEMBLY	 40
3.1 Introduction	40
3.2 Convening the General Assembly	42
3.2.1 General debate	42
3.2.2 Regular sessions	45
3.2.3 Special sessions	46
3.3 Decision making powers and related functions	46
3.4 Unpacking seven decades of practice	49
3.4.1 Plenary session	52
3.4.2 First Committee	55

3.4.3	Second Committee	58
3.4.4	Third Committee	60
3.4.5	Fourth Committee	63
3.4.6	Fifth Committee	66
3.4.7	Sixth Committee	67
3.5	Conceptualising the autonomy of the General Assembly	69
3.6	Conclusion	71

CHAPTER 4 – THE LEGAL SIGNIFICANCE OF RESOLUTIONS AT THE ADOPTION STAGE 73

4.1	Introduction	73
4.2	Adopting resolutions: the empirics of text formulation	74
4.2.1.	When is normative language used in resolutions?	75
4.2.2.	Is the text of resolutions prescriptive?	78
4.2.3.	Can the text of resolutions be taken at face-value?	85
4.2.4.	How demanding are the resolutions' requirements to implement?	93
4.3	Assessing the emergent analytics	99
4.3.1	International polyarchy	100
4.3.2	General Assembly quasi-supranationalism	104
4.3.3	Scale of legal significance	110
4.4	Conclusion	112

CHAPTER 5 – THE LEGAL SIGNIFICANCE OF RESOLUTIONS WITHIN DOMESTIC LEGAL SYSTEMS 114

5.1	Introduction	114
5.2	Legal status of resolutions in domestic law	115
5.3	Functions of resolutions	119
5.3.1	Resolutions as a source of legal obligation	119
5.3.2	Resolutions as a source of political commitment	122
5.3.3	Resolutions as standard-setting documents	123
5.4	Modes of incorporation by state organs	125
5.5	The legal status of the Universal Declaration of Human Rights in domestic law	127
5.6	Conceptualising the legal significance of resolutions	132
5.7	Conclusion	134

CHAPTER 6 – THE LEGAL SIGNIFICANCE OF RESOLUTIONS IN INTERNATIONAL PRACTICE 136

6.1	Introduction	136
6.2	Functions of resolutions	137
6.2.1	Generic functions	137

6.2.1.1	Framing duties	138
6.2.1.2	Establishing rights	141
6.2.1.3	Standard-setting	143
6.2.2	Distinctive functions	145
6.2.2.1	Making determinations	146
6.2.2.2	Clarifying the normative value of resolutions	147
6.2.2.3	Explaining the significance of voting patterns	150
6.2.2.4	Supporting political claims	153
6.3	Conceptualising the legal significance of resolutions	154
6.4	Conclusion	158

CHAPTER 7 – REVISITING THE CONCEPT OF THE LEGAL SIGNIFICANCE OF RESOLUTIONS 160

7.1	Introduction	160
7.2	Legal significance as a multi-dimensional concept	161
7.2.1	Protecting states' national interests	162
7.2.2	Pursuing policy objectives	164
7.2.3	Affecting existing rights and duties	165
7.3	Legal significance and legal effects distinguished	166
7.4	From legal significance to legal obligation	173
7.5	Conclusion	179

CHAPTER 8 – CONCLUSIONS 181

BIBLIOGRAPHY 188

ABBREVIATIONS

Adelaide Law Review	Adelaide LR
African Journal of International and Comparative Law	African J Int'l & Comp L
American Journal of International Law	AJIL
Annual Review of Law and Social Science	Ann Rev Law Soc Sci
Australian Yearbook of International Law	Australian YIL
British Yearbook of International Law	BYIL
California Western International Law Journal	California West Int'l LJ
Columbia Journal of Transnational Law	Columbia J Transn'l L
Cornell Journal of International Law	Cornell J Int'l L
Cornell Law Review	Cornell L Rev
Denver Journal of International Law and Policy	Denver J Int'l L & Pol'y
Duke Law Journal	Duke LJ
European Journal of International Law	EJIL
Fordham International Law Journal	Fordham Int'l LJ
Georgia Journal of International and Comparative Law	Ga J Int'l & Comp L
Harvard International Law Journal	Harv Int'l LJ
Indonesian Journal of International Law	Indonesian J Int'l L
International and Comparative Law Quarterly	ICLQ
International Conciliation	Int'l Conciliation
International Interactions	Int'l Interactions
International Organization	Int'l Org
International Organizations Law Review	Int'l Org L Rev
International Political Science Review	Int'l Pol Sci Rev
International Political Sociology	Int'l Pol Soc
International Relations of the Asia-Pacific	Int'l Rel Asia-Pacific
Japanese Annual of International Law	Japanese Ann Int'l L
Journal of Conflict and Security Law	J Conflict & Security L
Journal of European Public Policy	J Eur Public Pol'y
Journal of International Affairs	J Int'l Affairs
Loyola University of Chicago International Review	Loyola Univ Chicago Int'l Rev
McGill Law Journal	McGill LJ
Minnesota Journal of International Law	Minnesota J Int'l L
Modern Law Review	Modern L Rev
Nigerian Law Journal	Nigerian LJ
Nordic Journal of International Law	Nordic J Int'l L
Oklahoma Law Review	Oklahoma L Rev
Oregon Law Review	Oregon L Rev
Pepperdine Law Review	Pepp L Rev
Proceedings of the American Society of International Law	ASIL Proc

Southern Methodist University Law Review	Southern Methodist Univ L Rev
University of New Brunswick Law Journal	Univ New Brunswick LJ
Vanderbilt Journal of Transnational Law	Vanderbilt J Transn'l L
Virginia Journal of International Law	Va J Int'l L

CHAPTER 1

INTRODUCTION

1.1 Background of research

The resolutions of the UN General Assembly are often described as political documents endowed with a symbolic, rather than binding, character.¹ As soft law, they are deemed to contribute to the development of international law insofar as they clarify the meaning of the UN Charter,² are determinative of legal situations³ or contribute to the development of customary international law rules.⁴ They also develop the internal law of the United Nations by apportioning the budget and conclusively deciding on financial matters.⁵ If resolutions are only political, non-binding documents, why do states adopt them? Do widely supported resolutions affect state conduct? What are the consequences of noncompliance? This study aims to ascertain why states commit to the legal principles contained in resolutions and whether they subsequently act in conformity with the resolutions. It therefore evaluates the legal significance of resolutions by looking at the policy function they serve rather than their textual formulation. The expectation is that resolutions acquire normative character only to the extent they influence state conduct, and so eventually affecting the development of international law.

The argument put forward is that states often adopt resolutions with a view to creating legally binding obligations in due course. In doing so, they often present their own interests as the interests of the international community as a whole. To that end, they often frame resolutions in normative language. In practice resolutions acquire legal significance depending on how they are used by states, both within domestic law and in their relations with each other. As a result, the legal effects of resolutions are not uniform and cannot be determined *a priori* only by looking at the text of resolutions.

This study analyses the resolutions adopted by the General Assembly over seventy-three years (1946-2018) with a view to assessing the impact they have had on state conduct and, indirectly, the development of selected areas of international law. Conducting an empirically-grounded analysis represents one of the possible ways of producing knowledge about the social reality in which international law operates.⁶ By providing a pragmatic assessment of a legal phenomenon, this study supplements, without replacing, normative and doctrinal analyses on the legal significance and effects of General Assembly resolutions. It also contributes to the development of legal theory. To that end, the inquiry relates the findings of the empirical investigation to the relevant scholarly literature with a view to examining certain theoretical assumptions about the legal significance of resolutions.

¹ J Klabbers, *An Introduction to International Institutional Law* (3rd ed, CUP 2015), 156 (describing resolutions as ‘acts which aim to influence behaviour, but without creating law’) and 163-168.

² J Castañeda, *Legal Effects of United Nations Resolutions* (Columbia University Press 1969), 122.

³ *ibid* 120-129.

⁴ *ibid* 193-196. See also A Boyle and C Chinkin, *The Making of International Law* (OUP 2007), 227 (referring to the capability of resolutions to provide evidence of *opinio juris*). For a critical view, see L Gross, ‘The United Nations and the Rule of Law’ 19(1965) *Int’l Org* 537, 541.

⁵ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 17.

⁶ As discussed in Section 1.4 below.

The following sections put the present study in context of the wider international institutional law literature, highlighting the theoretical foundations of the inquiry and its unique methodological approach to the study of the legal significance of resolutions. Section 1.2 provides an overview of the mainstream scholarly positions on the legal significance of General Assembly resolutions. It shows that the theoretical underpinnings of each scholarly position affect the subsequent assessment of the way the resolutions of the General Assembly are deemed to influence state practice, eventually contributing to the development of international law. Section 1.3 explains the original contribution of the study to the international institutional law literature in general and the specialized literature on the legal effects of General Assembly resolutions in particular.

Section 1.4 provides the theoretical justification for performing an empirically-grounded study of the legal significance of General Assembly resolutions. It shows that, in the absence of a comprehensive framework explaining the basis of obligation in international institutional law, international law is not sufficient to explain the relationship between the General Assembly and its member states. Hence, it does not explain under what conditions resolutions acquire legal significance. Conversely, using empiricism to understand the legal significance of resolutions avoids the pitfalls of reading the practice of the General Assembly through preconceived theoretical lens. The empirically-grounded analysis brings to the fore the complex web of relationships between the General Assembly and its member states, further differentiating between the degree of legal significance that states attach to resolutions at the adoption stage and after adoption, both within domestic law and in international practice. This type of analysis allows the assessment of the findings in the light of both international institutional law and general international law theory.

While Section 1.4 provides the details of the quantitative and qualitative methods utilised to evaluate the degrees of legal significance states attach to resolutions under various circumstances, Section 1.5 provides a brief outline of the content of individual chapters, constantly highlighting the connection between empirical observation and theoretical analysis in every step of the inquiry. It describes the stages leading to the conceptualisation of the legal significance of General Assembly resolutions, including the conditions leading to the creation of legally binding obligations.

1.2 Overview of the legal effects of resolutions

Since 1946 the General Assembly has adopted circa 20,000 resolutions covering virtually all areas of human activity. Some of them are rather curious, since they address matters apparently distant from the immediate needs of international cooperation. For instance, in 1946 a resolution proclaimed that the translation of the world's classics in the languages of the United Nations was a project of international concern.⁷ Similarly, in 1967 a resolution called for the increased production and use of edible proteins,⁸ while in 1986 another resolution devised a strategy to fight

⁷ UNGA res 60(I) UN Doc A/RES/60(I) (14 December 1946).

⁸ UNGA res 2319 UN Doc A/RES/2319(XXII) (15 December 1967). See also UNGA res 2416 UN Doc 2416(XXIII) (17 December 1968) and UNGA res 2684 UN Doc A/RES/2684(XXV) (11 December 1970).

locust and grasshopper infestations.⁹ More recently, a resolution described the pursuit of happiness as a fundamental element of economic development.¹⁰

Resolutions on controversial topics often attract wide attention. The Declaration on Human Cloning, for example, was adopted in 2005 by a majority of 84 to 34, with 37 abstentions.¹¹ While gathering consensus on the ban on reproductive cloning, it divided states on the legality of therapeutic cloning.¹² Likewise, the cluster of resolutions on the moratorium on the use of the death penalty¹³ and those on the use of mercenaries¹⁴ have divided states in favour of and against them on purely ideological bases. Conversely, other resolutions are generally perceived as having greatly influenced the development of international law. They include the Universal Declaration of Human Rights (UDHR),¹⁵ the Declaration on Friendly Relations among States,¹⁶ the Declaration on the Granting of Independence to Colonial Countries and Peoples¹⁷ and the Declaration on Permanent Sovereignty over Natural Resources¹⁸ to mention only a few.

The vast majority of resolutions, however, are not widely used by states, despite the fact that each resolution partakes in shaping the practice and politics of the General Assembly. Domestic courts and national legislation only refer to a limited number of resolutions. Similarly, states typically only refer to a few resolutions when putting legal arguments before international courts and tribunals. Why do only certain resolutions generate substantial impacts on state conduct while others do not? A possible explanation lies in the subject matter of resolutions, since certain resolutions require a higher degree of implementation than others. Resolutions on the regulation of armaments, for example, require positive action from their addressees¹⁹ whereas merely declaratory resolutions do not.²⁰ Another explanation lies in the way resolutions are framed. For instance, a number of resolutions have been adopted with the specific purpose of giving wide publicity to resolutions adopting declarations.²¹ However, this type of explanation is grounded on a representation of resolutions as isolated outputs which only partly reflects the reality of the practice of the General

⁹ UNGA res 41/185 UN Doc A/RES/41/185 (8 December 1986); see also UNGA res 43/203 UN Doc A/RES/43/203 (20 December 1988).

¹⁰ UNGA res 65/309 UN Doc A/RES/65/309 (25 August 2011).

¹¹ UNGA res 280/59 UN Doc A/RES/59/280 (8 March 2005).

¹² MH Arsanjani, 'Negotiating the UN Declaration on Human Cloning' (2006) 100 AJIL 164, 167.

¹³ UNGA res 69/186 UN Doc A/RES/69/186 (18 December 2014) and previous ones.

¹⁴ UNGA res 70/142 UN Doc A/RES/70/142 (17 December 2015) and previous ones.

¹⁵ UNGA res 217(III)-C UN Doc A/RES/217(III)C (10 December 1948). See also H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' 25 Ga J Int'l Comp L (1995/96) 287.

¹⁶ UNGA res 2625 UN Doc A/RES/2625(XXV) (24 October 1970). See also G Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (Springer 1979).

¹⁷ UN Doc A/RES/1514(XV) (14 December 1960). See also OY Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (Nijhoff 1966), 163-185.

¹⁸ UN Doc A/RES/1803(XVII) (14 December 1962). See also O Schachter, *Sharing the World Resources* (Columbia University Press 1977).

¹⁹ UN Doc A/RES/68/43 (10 December 2013) (requiring member states to provide information on *inter alia* national production of arms and military holdings).

²⁰ See, for instance, UN Doc A/RES/70/212 (17 February 2016) (proclaiming 11 February as the International Day of Women and Girls in Science).

²¹ See, for instance, UN Doc A/RES/217D(III) (10 December 1948) ('Publicity to be given to the Universal Declaration of Human Rights'); UN Doc A/RES/1387(XIV) (20 November 1959) ('Publicity to be given to the Declaration of the Rights of the Child'); and UN Doc A/RES/1905(XVIII) (20 November 1963) ('Publicity to be given to the United Nations Declaration on the Elimination of all Forms of Racial Discrimination').

Assembly, which is mostly organized into groups of thematic resolutions.²² A third explanation lies in the uncertainty surrounding the quality of resolutions as legal documents. Indeed, generations of scholars have engaged in the study of the legal significance of General Assembly resolutions. The mainstream contributions can be grouped into four streams of thought.

The first stream maintains that resolutions are not law *ab initio*.²³ According to this view, resolutions do not contain legal obligations,²⁴ except those regulating internal issues within the UN legal order. As recommendations, resolutions, including declarations, only generate political expectations that members of the international community will abide by them.²⁵ However, Aust and Bederman maintain that in certain cases they may produce binding effects. For instance, resolutions adopted unanimously or by consensus may be regarded as an expression of state practice and over time become accepted as reflecting customary international law.²⁶

The second stream shares the view that resolutions are law in transition.²⁷ According to this view, resolutions are not formal sources of international law²⁸ and possess different degrees of legal force. Once adopted, they may produce legal effects, which are described as the consequence that the adoption of the resolution produces in practice. However, they do not necessarily equate to legal obligation.²⁹ For example, Sloan argues that a recommendation may influence the behaviour of member states without compelling them to comply with the resolution.³⁰ Conversely, resolutions creating binding obligations are only those addressed to organs of the United Nations which are subject to the authority of the General Assembly.³¹ Hence, by affirming ‘a legitimacy which anticipates the legality of tomorrow,’³² resolutions may well contribute to the development of international law in many ways. Declarations, for instance, may be regarded as evidence of a

²² For example, between 2007 and 2018, the General Assembly has adopted 13 resolutions on the rule of law at the national and international level. Each resolution builds on and develops the previous one. See UN Doc A/RES/73/207 (20 December 2018) and previous ones.

²³ A Aust, *Handbook of International Law* (2nd ed, CUP 2010) 44 (arguing that suggestions that the resolutions of the UN General Assembly constitute a binding source of law are ‘extravagant’).

²⁴ MP Karns, ‘General Assemblies and Assemblies of States Parties’ in J Katz Kogan, I Hurd and I Johnstone, *The Oxford Handbook of International Organizations* (OUP 2016), 757, 766-767 (arguing that ‘Article 10 defines... soft law’).

²⁵ Aust (n 23) 190-191; DJ Bederman, *International Law Frameworks* (3rd ed, Foundation Press 2010) 445-45 (arguing that, as a general rule, General Assembly resolutions lack the necessary *opinio juris* for creating custom).

²⁶ Aust (n 23) 191 (referring to the ICJ *Namibia* Advisory Opinion, ICJ Rep [1971] p. 6 paras 87-116; 49 ILR 2); Bederman (n 25) 6 (referring to UN General Assembly resolution 95(I) of 11 December 1946, which affirms unanimously the principles of international law recognized by the Charter of the Nuremberg International Military Tribunal and its judgment).

²⁷ DHN Johnson, ‘The Effects of Resolutions of the General Assembly’ (1955-56) 32 BYIL 97.

²⁸ Formal sources of international law is an expression indicating the traditional methods for creating legally binding rules under international law – namely, treaties, international custom and general principles of law recognized by states. A Cassese, *International Law* (2nd ed, 2005), 153-155. See also H Thirlway, *The Sources of International Law* (2nd ed, OUP 2019), 6 (describing a formal source as ‘a formal entitlement that gives to the rule its quality as law’).

²⁹ Johnson (n 27) 111-112 (describing legal obligations as what ought to be done and legal effects as what is done).

³⁰ B Sloan, *United Nations General Assembly Resolutions in Our Changing World* (Transnational Publishers 1991), 16 and 94. See also G Fitzmaurice, ‘The Foundations of the Authority of International Law and the Problem of Enforcement’ (1956) 19 Modern L Rev 1 (‘the law is not binding because it is enforced: it is enforced because it is already binding’); Gross (n 4) 555 (arguing that resolutions containing recommendations to states fall within the category of soft law and, as a precursor of hard law, are not binding).

³¹ B Sloan, ‘The Binding Force of a “Recommendation” of the General Assembly of the United Nations’ 25 British Yearbook of International Law’ (1948) 3, 4-5; id (n 30) 94-97.

³² Sloan (n 30) 51 (citing RJ Dupuy).

consistent state practice upon which a customary rule may rest.³³ The verification of compliance with the putative customary rule, however, often proves to be difficult because of the vagueness of the wording used in the text of the resolution or the discretion left to member states to implement it.³⁴

The third stream describes resolutions as acts of states.³⁵ Like the law in transition stream, it recognizes that resolutions can produce a variety of legal effects, binding and non-binding alike.³⁶ Nevertheless, it differs from the law in transition school as it maintains that the legal effects of resolutions depend on their legal basis.³⁷ Specifically, by conceiving the General Assembly as a permanent diplomatic conference,³⁸ Asamoah describes resolutions as acts of states participating in the work of the General Assembly. As a form of state practice, resolutions directly contribute to the creation of formal sources of international law. Declarations, for example, are considered as binding because, by stating principles of international law, they contribute to the General Assembly's function of codification and progressive development of international law mentioned in the UN Charter.³⁹ Asamoah also argues that resolutions may contribute to the identification of already formed customary rules⁴⁰ while the International Law Association's Statement of Principles on Customary International Law (2000) goes as far as to say that, exceptionally, resolutions adopted unanimously or by consensus may create binding obligations for the entire community of states.⁴¹

The fourth stream maintains that resolutions are acts of the General Assembly.⁴² As the culmination of the General Assembly's deliberative and decision-making process, Castañeda argues that resolutions facilitate the achievement of the goals stated in the UN Charter.⁴³ According to this view, resolutions are sources of UN law⁴⁴ and can be divided into two groups. On the one hand, resolutions containing a recommendation are not intended to be binding.⁴⁵ On the other hand, non-recommendatory resolutions may produce a variety of legal effects. For example, internal resolutions and determinations derive their binding character from the relevant provisions of the UN Charter.⁴⁶ Similarly, as non-recommendatory resolutions, declarations may generate

³³ *ibid* 126-127.

³⁴ Sloan (n 31) 19.

³⁵ OY Asamoah, 'The Legal Effects of Resolutions of the General Assembly' (1963-64) 3 *Columbia J Transn'l L* 210, 214.

³⁶ *ibid*

³⁷ *ibid*

³⁸ Asamoah (n 17) 54 ('The United Nations is essentially a standing diplomatic conference and its resolutions should be regarded as evidence of state practice') and 62 (The United Nations is a development of the diplomatic conference and represents a form of it'). This view was also expressed by the International Court of Justice (ICJ) in the *South-West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (1962) ICJ Rep 346. See also S Rosenne, *United Nations Treaty Practice* Recueil des Cours (1954) 310.

³⁹ Asamoah (n 17) 19-20.

⁴⁰ *ibid* 13 and 46.

⁴¹ International Law Association (ILA), Committee on Formation of Customary (General) International Law, Final Report: *Statement of Principles Applicable to the Formation of General Customary International Law* (2000) 61, Statement 32.

⁴² Castañeda (n 2).

⁴³ *ibid* 1 and 3.

⁴⁴ As opposed to sources of international law, *ibid* 5-6.

⁴⁵ *ibid* 8.

⁴⁶ *ibid* 22 (referring to internal resolutions) and 134 (referring to determinations).

customary rules and general principles of international law to the extent that they modify a pre-existent legal situation in conformity with the aim and purposes of the UN Charter.⁴⁷

Related to the fourth stream of thought is the scholarly position qualifying the resolutions of the General Assembly as laws *per se*.⁴⁸ Exclusively aimed at developing the law of the United Nations, White argues that they represent a source of international law not listed in Article 38 ICJ Statute.⁴⁹ Specifically, as the legal output of a primary body of an international organization, they are not directly addressed to states. Nor do they directly contribute to the creation of any of the sources of international law listed in Article 38 ICJ Statute.⁵⁰ They rather partake in a system of ‘governance by organizations’ instead of ‘a pure Westphalian system of self-regulation by states.’⁵¹ This leads to the further conclusion that resolutions of international organizations, including those of the General Assembly, are both acts of the international organization⁵² and an autonomous source of international law,⁵³ whether considered ‘as a source of obligation for states or as a source of expectation that they will comply.’⁵⁴

The problem with the existing scholarly positions is that, in conceptualising the legal significance of resolutions, they centre the analysis exclusively on the text of individual resolutions, thus ignoring the broader political context in which resolutions operate and the purposes for which they are adopted. As a result, they end up conflating the idea of a source of law with that of a source of obligation. Schachter writes that the term source of obligation indicates a commitment to international norms, whether binding or not,⁵⁵ whereas a source of law refers to the act of creating legally binding norms.⁵⁶

Much scholarly work has elaborated on the legal significance of resolutions, classifying them on the basis of the statements contained in the text of resolutions.⁵⁷ However, this approach is rather formalistic. As a result, it does not, and cannot, explain why states commit themselves to uphold certain resolutions but not others. It is widely recognized that, in principle, the notion of the legally binding effect of a resolution is not always or necessarily clear. Schermers and Blokker, for instance, write that:

⁴⁷ *ibid* 17 (arguing that the determination of the legal effects of resolutions is the conclusion, rather than the starting point, of the analysis) and 21.

⁴⁸ N White, ‘Lawmaking’ in Katz Cogan et al (n 24) 559. See also *id*, *The Law of International Organizations* (3rd ed, Manchester University Press 2017) 148-150.

⁴⁹ Statute of the International Court of Justice, UN Charter (n 6) Annex.

⁵⁰ White (n 48) 566.

⁵¹ *ibid* 560.

⁵² *ibid* 575 (‘a resolution is not simply to be viewed as a collection of the views of states, but rather is an act of separate will by an organ of a legal person’).

⁵³ *ibid* 575 and 579.

⁵⁴ *ibid* 573.

⁵⁵ O Schachter, ‘Towards a Theory of International Obligation’ 8(2) *Va J Int’l L* (1968) 300, 302. See also WA Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoire*, vol I (CUP 2013), xcvi (arguing that the Universal Declaration of Human Rights should be considered as ‘a source of obligation’ rather than a source of law in its own right); ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, advisory opinion [2019] paras 139, 164 and 173 (arguing that General Assembly resolutions on decolonization ‘reflect’ legal obligations); *South West Africa Cases* (n 38), preliminary objections, [1962] ICJ Rep 319 (dissenting opinion of Fitzmaurice and Spender) 465 (arguing that treaties are, at best, ‘a source of obligation, not a source of law’).

⁵⁶ M Shaw, *International Law* (8th ed, 2017), 52.

⁵⁷ See, for instance, Sloan (n 30).

...this does not mean that [resolutions] have no effect on [member states]. The existence of a legal obligation provides merely one of many reasons for observing a rule and indeed, in international law, where sanctions often prove to be illusory, *the legal obligation may not even be the prime motivation behind norm compliance*.⁵⁸

General Assembly resolutions do not fit the paradigm of Article 38 ICJ Statute and, in any case, the traditional signposts contained in that provision do not explain the basis of legal obligation in contemporary international society.⁵⁹ As a result, non-binding instruments adopted by an official body not authorized by the UN Charter to lay down or impose prescriptive rules, such as the resolutions of the General Assembly, are mostly perceived as contributing to the problem of indeterminacy of obligation. As Klabbbers writes, 'strictly speaking, [resolutions] may not be law but they cannot be deemed to be devoid of legal effects'.⁶⁰

An alternative approach to the study of the normative effects of resolutions is to look at resolutions in functional terms as a specific category of acts (rather than isolated outputs)⁶¹ aimed at facilitating the achievement of the UN Charter goals, mainly by elaborating on the UN values – that is to say, the UN Charter's purposes and principles.⁶² The fact that resolutions are often framed in normative language⁶³ may be perceived as a form of international law-making with its own characteristics.⁶⁴ However, the use of international law in the text of resolutions does not by itself compel states to comply with individual resolutions. This suggests that a more contextual, evidence-based rather than formalistic, type of inquiry is needed to understand how resolutions acquire legal significance.

1.3 Original contribution of the study

This study aims at elucidating the circumstances under which certain resolutions acquire legal significance, eventually moulding state conduct. Specifically, it evaluates how states use the General Assembly to pursue their immediate interests, often by adopting resolutions framed in normative language. In order to clarify the factors exerting a pull toward compliance⁶⁵ with resolutions, the analysis discerns the connections between the normative propositions contained in the text of the resolutions and the conduct of states before and after the adoption of resolutions. By evaluating the processes through which states attribute legal significance to resolutions within domestic law and in international practice, the thesis makes a unique contribution to the literature. No scholarly work has ever examined the process of incorporation of resolutions into domestic law, especially through primary legislation and case law. Nor has the literature examined the patterns of attribution of legal significance to resolutions in states' submissions before international courts

⁵⁸ HG Schermers and NM Blokker, *International Institutional Law* (6th rev ed, Brill/Nijhoff 2018) 798-799, para 1220 (emphasis added).

⁵⁹ Schachter (n 55) 302-306.

⁶⁰ Klabbbers (n 1) 157.

⁶¹ *ibid* 163-168.

⁶² N White, *The United Nations System: Toward International Justice* (Lynne Rienner 2002), 12 and 18.

⁶³ Such resolutions are also referred to as the normative resolutions. O Schachter, 'Recent Trends in International Lawmaking' 12 *Australian YIL* (1988-89) 12.

⁶⁴ White (n 48) 575.

⁶⁵ M Koskeniemi, 'The Politics of International Law – 20 Years Later' 20 *EJIL* (2009) 7, 15.

and tribunals (as opposed to the analysis of attribution of legal significance to resolutions by judges and arbitrators sitting in international courts and tribunals).

In reviving a classic theme of international law – namely, the debate on the legal significance of resolutions – the inquiry revolves around the practice of the General Assembly for three main reasons. The first one is related to the institutional peculiarities of the General Assembly. Conceived as the deliberative body of a universal organization with separate legal personality, the General Assembly grants equal representation to all member states, empowering them to discuss any matter they deem important and to vote on those issues. However, due to their layered structure, international organizations ‘are, at one and the same time, independent from their members and fundamentally dependent on them’.⁶⁶ Consequently, the General Assembly can also be regarded as a congress of independent states.⁶⁷ Finally, the General Assembly is often described as the town hall of the world and the symbol of the moral conscience of humanity.⁶⁸ Since this view is still widely supported,⁶⁹ the General Assembly stands out as an institution which occupies a special place in the life of the international community of states. It is thus an organ particularly suited to influence state behaviour and, consequently, the development of international law.

The second reason is that the latest detailed international law studies on the General Assembly date back to the early 1990s and reflect the political and cultural climate of the Cold War period.⁷⁰ Since the end of the Cold War, the world has dramatically changed and so has the General Assembly.⁷¹ At the beginning, General Assembly resolutions were concerned with regulating the internal functioning of the United Nations and the reconstruction of post-war Europe.⁷² During the Cold War period, the General Assembly became a meeting forum mainly used by the newly independent states to create the legal basis of a new world order.⁷³ In the post-Cold War period, it is necessary to explore methodically what have been the purposes of General Assembly resolutions. A modern account of the role of the General Assembly in the twenty-first century’s globalized world is missing.

The third reason relates to the inherently political character of resolutions. As instruments of foreign policy,⁷⁴ General Assembly resolutions can directly influence state conduct in international relations and, as a result, affect the development of international law outside the traditional channels of treaty and custom. In 1976 Jennings described General Assembly resolutions as empires of paper able to submerge international law to stress the potentially violent character of

⁶⁶ Klabbers (n 1) 36.

⁶⁷ Sloan (n 30) 22; Johnson (n 27) 116-117 (referring to the UN as a standing diplomatic forum).

⁶⁸ F White, *The United Nations First Assembly: London 1946* (Stanhope 1946) 19-31.

⁶⁹ See, for instance, the UN Secretary-General’s statement on the 70th anniversary of the General Assembly’s first meeting (‘The resolutions adopted by the General Assembly may not all be acted on right away. Yet they stand as our common position on the most pressing issues of our times. These resolutions tell the story of our resolve. They reflect our conviction that the countries of the world coming together can do far more collectively than they ever could alone. Each delegate who speaks, each vote that is cast, every gavel that opens a new meeting adds a little more hope to the world’) available at < www.un.org/sg/statements/index.asp?nid=9374 > (accessed 13 June 2020).

⁷⁰ The most recent, albeit brief, account of the institutional features of the General Assembly appears in Higgins et al, *Oppenheim’s International Law: United Nations* vol II (OUP 2017).

⁷¹ MJ Peterson, *The UN General Assembly* (Routledge 2006).

⁷² MJ Peterson, *The General Assembly in World Politics* (Hyman 1990), 17-28.

⁷³ *ibid.*, 29-49.

⁷⁴ L Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed, Columbia University Press) 47.

resolutions such as those promoting a New International Economic Order, which could brush away established principles of international law if implemented by a great number of states.⁷⁵ Likewise, in 1982 Franck and Munansangu described the same group of resolutions as an exercise in normative politics.⁷⁶ An empirically-grounded account of the process leading to the formation of various degrees of legal significance of resolutions, including binding obligations, is missing.

The study also makes a broader contribution to the international organizations law literature (also known as international institutional law) in two respects. Firstly, by questioning the description of resolutions as a manifestation of the independent will of the General Assembly, it elaborates on the concept of autonomy of the General Assembly from its member states. This is an issue intimately related to the international legal personality of international organizations, which has received scholarly attention only in relation to their treaty making powers.⁷⁷ The present study extends the theoretical inquiry into the autonomy of political organs, like the General Assembly, endowed with the power of recommendation rather than binding lawmaking powers.

Secondly, in clarifying the relationship between the General Assembly and its member states from the perspective of autonomy, this study redefines the scope of functionalism, which is largely regarded as the mainstream (if not the only viable) approach to the study of the law of international organizations.⁷⁸ The central idea behind functionalism is that states delegate functions to international organizations in order to collectively achieve a given purpose. However, the concept of functionalism is undertheorized:⁷⁹ it does not explain to what extent states remain in control of the actions of the international organization, hence the scope of the latter's autonomous will and the related legal significance of the acts adopted, including resolutions.

1.4 Using empiricism to understand the legal significance of resolutions

1.4.1 Need for empiricism

Why and how states adopt resolutions is a political choice aimed at achieving a predetermined outcome whose only formal limit is represented by the purposes and principles of the UN Charter.⁸⁰ In this sense, resolutions are a means to an end and should be interpreted in the light of

⁷⁵ RY Jennings, 'The Discipline of International Law' ILA 57th Conference, Lord McNair Memorial Lecture, 1976, 13.

⁷⁶ TM Franck and MM Munansangu, *The New International Economic Order: International Law in the Making?*, UNITAR Policy and Efficacy Studies No 6, 2-3 and 14-15.

⁷⁷ The leading work is C Brölmann, *The Institutional Veil in Public International Law* (Hart 2007). Seminal studies on the relationship between legal personality of international organizations and their responsibility under international law include id, 'A Flat Earth? International Organizations in the System of International Law' (2001) 70 Nordic J Int'l L 319; N Voulgaris, *Allocating International Responsibility Between Member States and International Organisations* (Hart 2019).

⁷⁸ J Klabbers, 'Theorizing International Organizations' in A Orford and F Hoffmann, *The Oxford Handbook of the Theory of International Law* (OUP 2016), 618, 624 ('It is no exaggeration to state that the law of international organizations has been dominated by a functionalist approach'); id, 'The Transformation of International Organizations Law' 26(1) EJIL (2016) 9.

⁷⁹ See, for instance, the criticism to Klabbers' pioneering work (n 78) by leading international organizations law scholars: A Nollkaemper, 'Saving the Scarecrow' 26(1) EJIL (2016) 957, 958 (accusing Klabbers of greatly exaggerating functionalist concepts and ideas); GF Sinclair, 'The Original Sin (and Salvation) of Functionalism' 26(1) EJIL (2016) 965, 968 (arguing that functionalism is not a unified or comprehensive theory).

⁸⁰ N White (n 62) 18 (arguing that resolutions directly contribute to the achievement of the UN goals). Article 24 of the UN Charter establishes that the Security Council must perform its duties in accordance with the purposes and principles of the United Nations. The same rationale extends by analogy to the mandate of the General Assembly.

their desired outcome. It follows that the propositions contained in the text of the resolutions describe standards of conduct, which ultimately reflect the most supported state strategies inside the General Assembly.⁸¹ Such strategies change over time, thus determining that the practice of the General Assembly is not always uniform or uncontested. It is indeed possible to discern patterns of behaviour among states or groups of states.

Scholarly writings focusing on the role of state influence at the General Assembly abound.⁸² However, the international law literature on this topic is rather underdeveloped. Commentaries on UN practice, such as Finley's historical work (1988),⁸³ the study of the American Society of International Law (1995)⁸⁴ and, more recently, *Oppenheim's International Law* on United Nations (2017),⁸⁵ present a useful overview of some of the main thematic areas addressed by the decisions, including resolutions, of the political organs of the United Nations. Yet they do not provide any detailed account of the type, quantity and quality of the normative propositions contained in a sample of General Assembly resolutions. Nor do they elaborate on the legal significance or effects of resolutions.

Likewise, the empirical studies on voting behaviour at the General Assembly provide a limited perspective. They share the underlying assumption that in the General Assembly 'states are not asked to evaluate resolutions, but to choose between accepting or not accepting resolutions.'⁸⁶ Scholarly contributions can be divided in two groups. The first group analyses voting affinity with a view to elucidating foreign policy alignments (also known as voting blocs) in the General Assembly.⁸⁷ The second group examines the phenomenon of vote buying as a means for securing voting compliance of the recipients of foreign aid with their donor.⁸⁸ Motivated by a desire to understand politics in the UN, such scholarly contributions focus on voting patterns attached to the adoption of resolutions rather than the content, normative or otherwise, of resolutions. Hence, they do not explain why states abide by certain resolutions but not others.

⁸¹ RO Keohane, 'Political Influence in the General Assembly' (1966) *Int'l Conciliation* 557.

⁸² *ibid.* See also GL Wilkins, *African Influence in the United Nations, 1967-1975: The Politics and Techniques of Gaining Compliance to U.N. Principles and Resolutions* (University Press of America 1981); RE Riggs, *Politics in the United Nations: A Study of United States Influence in the General Assembly* (University of Illinois Press 1958).

⁸³ B Finley, *The Structure of the United Nations General Assembly: An Organizational Approach to Its Work, 1974-1980s* (UNIPUB/Kraus International Publications 1988).

⁸⁴ O Schachter and C Joyner (eds), *United Nations Legal Order*, 2 vols (CUP 1995).

⁸⁵ R Higgins et al (n 70).

⁸⁶ E Voeten, 'Clashes in the Assembly' 54(2) *Int'l Org* (2000) 185, 193.

⁸⁷ See, for instance, T Hovet, *Bloc Politics in the United Nations* (Harvard University Press 1960); K Jacobsen, *The General Assembly of the United Nations: A Quantitative Analysis of Conflict, Inequality, and Relevance* (Universitetsforlaget 1978); N Burmester and M Jankowski, 'Reassessing the European Union in the United Nations General Assembly' 21(10) *J Eur Public Pol'y* (2014) 1491; S Brazys and D Panke, 'Why Do States Change Positions in the United Nations General Assembly?' 38(1) *Int'l Pol Sci Rev* (2017) 70; MA Bailey and E Voeten, 'A Two-Dimensional Analysis of Seventy Years of United Nations Voting' 176 *Public Choice* (2018) 33.

⁸⁸ See, for instance, A Dreher, P Nunnenkamp and R Thiele, 'Does US Aid Buy UN General Assembly Votes? A Disaggregated Data Analysis' 136(1/2) *Public Choice* (2008) 139; A Dreher and J Sturm, 'Do the IMF and the World Bank Influence Voting in the UN General Assembly?' 151 *Public Choice* (2012) 363; DB Carter and RW Stone, 'Democracy and Multilateralism: The Case of Vote Buying in the UN General Assembly' 69 *Int'l Org* (2015) 1; W Hwang, AG Sanford and J Lee, 'Does Membership on the UN Security Council Influence Voting in the UN General Assembly?' 41(2) *Int'l Interactions* (2015) 256; K Ohtsuki, 'Buying the Best Favor: Foreign Aid for Cooperation or Convenience' 16 *Int'l Rel Asia-Pacific* (2016) 175.

International law literature and empirical studies on the resolutions of the General Assembly are worlds apart. This divergence highlights the need for scholarship to strike a better balance between legal theory and empirical analysis in order to appreciate how resolutions acquire legal significance in practice and produce legal effects. The New Legal Realist approach to international law is ideally suited to provide this contextual type of analysis.

1.4.2 New Legal Realism

Heavily grounded in pragmatism,⁸⁹ New Legal Realism does not engage in normative theory, in the sense that it does not address the question of what law is in the abstract.⁹⁰ Instead, it views law as ‘a process in which legal norms are defined through practice, through claims and counterclaims, resulting in the settlement and unsettlement of the meaning of legal norms in changing social contexts over time’.⁹¹ As a result, the New Legal Realist approach is both empirical and problem-centred: it asks how law obtains meaning, how law is practiced and how it changes over time.⁹² From this angle, legal concepts are not ‘valid for all times and in all places’, but rather play an important role in law’s application, including our own understanding thereof.⁹³ Regarded as ‘orientating concepts’, legal concepts acquire legal meaning through practice, thus determining that their legal form is context-dependent, flexible and amenable to change rather than an assumption.⁹⁴ Viewed from this angle, the normative content of resolutions is the result of a dialogue among member states taking place at the General Assembly and outside. Often stemming from compromise, the text of resolutions enjoys different levels of support not always discernible from the observation of the votes cast by states. This prompts states to extend that initial dialogue with a view to amending and clarifying the scope of the resolution’s provisions in the light of ever changing political, social and economic circumstances.

In contrast with international relations realism,⁹⁵ New Legal Realism acknowledges that international law can exercise normative force, albeit in a conditional manner.⁹⁶ Specifically, New Legal Realism calls for conditional theorizing, meaning an invitation to empirically assess ‘the

⁸⁹ G Shaffer, ‘The New Legal Realist Approach to International Law’ (2015) *IJIL* 189, 195 (‘From a jurisprudential perspective... legal realism’s approach to explanatory theory-building can be viewed as a form of pragmatism’); G Shaffer, ‘Legal Realism in International Law’ in JL Dunoff and MA Pollack (eds), *International Legal Theory: Foundations and Frontiers* (CUP, forthcoming) – available as University of California, Irvine, Legal Studies Research Paper Series No 2018-55, 2.

⁹⁰ MC Suchman and E Mertz, ‘Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism’ (2010) *Ann Rev Law Soc Sci* 555, 562 (‘pragmatist theory tends to be “normatively empty” – it does not specify a particular value-orientation’). See also Shaffer (n 89) 189 and 194; V Nourse and G Shaffer, ‘Empiricism, Experimentalism, and Conditional Theory’ (2014) *Southern Methodist Univ L Rev* 141, 150 (‘Legal realists, old and new, (ourselves included), are less interested in the general, jurisprudential question of “what is law”, than in the question of “how law is formed” and practiced’).

⁹¹ Shaffer (n 89) 193.

⁹² *ibid* 189.

⁹³ *ibid* 195.

⁹⁴ *ibid* 195-196.

⁹⁵ G Shaffer, ‘New Legal Realism and International Law’ in H Klug and S Engle Merry, *The New Legal Realism: Studying Law Globally* vol II (CUP 2016), 145, 147 (‘Legal realism is not IR realism and should not be confused with it. IR views international law as epiphenomenal because state power, and not law, determines international relations outcomes’).

⁹⁶ Shaffer (n 89) 205 (‘Any theory of international law that reduces law to the outcome of politics fails to account for law’s normativity in potentially shaping social relations. Thus New Legal Realism should be distinguished from international relations (IR) realism, and in particular structural realism’); Shaffer, in Dunoff and Pollack (n 89) 9.

conditions under which international law matters and the various ways through which it matters.⁹⁷ This requires an evaluation of how law works over time, dynamically.⁹⁸ Such type of inquiry aims at finding ‘emergent analytics’, that is to say, legal concepts that emerge from empirical analysis.⁹⁹ As Nourse and Shaffer argue, ‘[w]e need theory that focuses not on recognizing law, but understanding how law works, which focuses on law application’.¹⁰⁰ From this perspective, how resolutions acquire legal significance and the extent to which they produce legal effects, including binding obligations, is a matter of empirical assessment. As such, the inquiry remains context-specific and is not fully amenable to generalizations about the circumstances under which states rely on resolutions.

At the same time, New Legal Realism does not oppose the doctrinal (theoretical) and normative analysis of law. In particular, it does not dispute the traditional positive account of law.¹⁰¹ Rather, it complements it.¹⁰² As Shaffer argues, empiricism cannot be completely dissociated from conceptual and normative frames. Likewise, conceptual frames constitute means to assess facts.¹⁰³ He writes:

The new legal realism... stresses both the importance of empirical study and legal reasoning. On the one hand, it highlights the need to gather empirical data methodically to assess how law is operating before drawing conclusions and reaching decisions. On the other hand, it stresses the role of legal reasoning, legal craft, and legal traditions as important constraints on arbitrary power and important facilitators of social planning.¹⁰⁴

Balancing empirical observation and legal reasoning also helps to unpack assumptions about the efficacy of international law and cooperation.¹⁰⁵ In this respect, Shaffer and Ginsburg point out that ‘[e]mpirical work is not atheoretical’ but rather central to building ‘conditional theory’¹⁰⁶ – that is to say, theory built to predict variation about international law’s place and role in specific contexts and aimed at assessing when and how formal law matters.¹⁰⁷

New Legal Realism, it has been argued, can increase the risk of reductionism and scientism.¹⁰⁸ By avoiding any theoretical assumption while simultaneously advocating the use of social sciences

⁹⁷ Shaffer (n 89) 205; Nourse and Shaffer (n 90) 145.

⁹⁸ Nourse and Shaffer (n 90) 143.

⁹⁹ *ibid* 145.

¹⁰⁰ *ibid* 177.

¹⁰¹ *ibid* 150; DAJ Telman, ‘International Legal Positivism and Legal Realism’ in J Kammerhofer and J d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2016) 241, 254 (arguing that New Legal Realism ‘is informed by positivist notions about the derivation of legal norms’).

¹⁰² Shaffer (n 95) 156.

¹⁰³ Shaffer (n 89) 10.

¹⁰⁴ *ibid* 11.

¹⁰⁵ T Ginsburg and G Shaffer, ‘How Does International Law Work?’ in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010), 753, 774-775.

¹⁰⁶ G Shaffer and T Ginsburg, ‘The Empirical Turn in International Legal Scholarship’ 106 AJIL (2012) 1, 41.

¹⁰⁷ Nourse and Shaffer (n 90) 145 and 152 (pointing out that theory is not universal and timeless in its pretensions, but contingent on context).

¹⁰⁸ Reductionism is a term indicating that ‘law is constituted both by power and reason’. Therefore, it ‘cannot be reduced to power... Nor can it be reduced to doctrine’. Nourse and Shaffer (n 90) 151. Shaffer describes scientism as the risk inherent in quantitative legal studies to reduce ‘law and normativity...to explanatory factors’, thus making the empirical investigation prone to bias. Shaffer (n 89) 209.

research methods, New Legal Realism exposes itself to the risk of dissolving law into another discipline, thus reducing law's normativity to explanatory factors used by other disciplines.¹⁰⁹ As Nourse and Shaffer note, quantitative empirical work in legal academia is often prone to disciplinary bias: 'political scientists favour political explanations, sociologists favour sociological explanations and so forth.'¹¹⁰ Related to this is the risk of relativism, that is to say, reducing law's relevance to a function of external factors such as politics and ideology.¹¹¹ A counterargument is that, bearing in mind the limitations of all empirical methods,¹¹² New Legal Realism is only concerned with elucidating context-specific applications of law, including international law, with a view to assessing the conditions under which it matters. It thus provides a unique background for further normative and (conditional) theoretical thinking.

In order to perform the empirical analysis of the legal significance of General Assembly resolutions, the thesis adopts a mixed-methods research design grounded on archival research. The analysis of the legal significance of resolutions at the time of adoption includes both quantitative and qualitative analyses. The quantitative analysis, which consists of statistical analysis (both descriptive and inferential), is justified by the presence of a defined population of resolutions and related votes from which it is possible to select a sample. The qualitative analysis consists of the examination of the statements made by delegations in explanation of their votes. This choice is dictated by the impossibility of conducting interviews with delegates at the UN headquarters in New York.¹¹³ In order to gather the views of as many delegations as possible, the statements made in explanation of the votes are taken as a proxy for interviews with delegates. Such dictated choice preserves the need for equitable consideration of the views of all delegations in my research design. At the same time, it represents a limitation of the study, since the statements made in explanation of votes may not directly address the issue of legal significance of resolutions. As Macauley observes in relation to conducting qualitative analysis of law, '[s]ometimes, we have to use less rigorous methods. We should accept this as long as the scholar is appropriately humble about what she or he has proved and discloses the limits of her or his study'.¹¹⁴

The analysis of the legal significance of resolutions within domestic law and in international practice is also based on archival research – specifically, qualitative content analysis of the selected documents. Barriers to access to legal information in several jurisdictions significantly restrict the selection of relevant instruments incorporating resolutions into domestic law, such as primary legislation and case law.¹¹⁵ Similarly, the availability of statements made by states before international courts and tribunals is mostly restricted to those accessible from the official websites of a limited number of international courts and tribunals as well as the search engine of one

¹⁰⁹ V Nourse and G Shaffer, 'Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?' 95 Cornell L Rev (2009) 61, 115; Shaffer (n 89) 209.

¹¹⁰ Nourse and Shaffer (n 90) 156.

¹¹¹ Shaffer (n 89) 209-210.

¹¹² *ibid* 209.

¹¹³ According to a new internal policy of the United Nations, researchers are no longer allowed within the UN premises. Instead, they are redirected to the vast documentary collections available on the UN website.

¹¹⁴ S Macauley, 'A New Legal Realism: Elegant Models and the Messy Law in Action' in E Mertz, S Macauley and TW Mitchell (eds), *The New Legal Realism: Translating Law-and-Society for Today's Legal Practice* vol I (CUP 2016) 29, 37-38.

¹¹⁵ As detailed in Chapter 2, Section 2.3.2.

commercial provider of legal information.¹¹⁶ Such limitations are factored in and acknowledged in the assessment of the empirical findings.¹¹⁷

1.4.3 International organizations law

As mentioned above,¹¹⁸ this study aims at advancing theoretical thinking on aspects of international organizations law – in particular the autonomy of plenary organs of international organizations from their member states, their lawmaking powers and the legal effects of their acts – using the resolutions of the General Assembly as a case study. Theories and key concepts of international institutional law thus form the backdrop against which the empirical findings are assessed.

As the dominant approach to the study of international organizations law, functionalism maintains that international organizations (and their organs) are set up to perform specific functions.¹¹⁹ It thus assumes that international organizations, once created and functioning, are independent actors with an autonomous will – that is to say, entities capable of making decisions that transcend the will of individual member states. From a functionalist perspective, international organizations have traditionally been described as a force for the good, with no limits placed on what they can do in pursuit of their goals.¹²⁰ Taken to the extreme, this theory concludes that international organizations cannot be held legally accountable for the actions taken in pursuit of their goals.¹²¹

In order to counterbalance and mitigate the extreme aspect of functionalism, constitutionalism has emerged as a recent theoretical development that places emphasis on controlling the actions of international organizations against a set of posited values, such as human rights and democracy.¹²² There exist various strands of constitutionalism, ranging from the constitutionalization of the international legal system¹²³ to the constitutionalization of the legal system of specific international organizations.¹²⁴ They all share the view that, as autonomous systems, international organizations do not have unlimited powers to achieve their goals, but are constrained by international law.¹²⁵ As a theory on accountability of international organizations, it does not feature prominently in this work, except in relation to the assessment of voting patterns at the General Assembly: occasionally, scholars associate the consensus procedure with the image of the international organization as an *agora* (a forum for discussion), which is in turn considered a form of global constitutionalism.¹²⁶

¹¹⁶ As detailed in Chapter 2, Section 2.3.3.

¹¹⁷ Macauley (n 114).

¹¹⁸ See Section 1.3 above.

¹¹⁹ Klabbers (n 78).

¹²⁰ N Singh, *Termination of Membership of International Organisations* (Stevens & Sons 1958), vii (arguing that international organizations contribute to ‘the salvation of mankind’). See also Schermers and Blokker (n 58) xxv (‘Our destiny is increasingly influenced by the activities – or lack thereof – of international organizations’).

¹²¹ J Klabbers, ‘Contending approaches to international organizations: between functionalism and constitutionalism’ in J Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Elgar 2011) 3, 6-11.

¹²² *ibid* 13-14.

¹²³ See, for instance, Klabbers and Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009); N Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007).

¹²⁴ See, for instance, B Fassbender, *The United Nations Charter as the Constitution of the World* (Brill 2009); D Cass, *The Constitutionalization of the World Trade Organization* (OUP 2005).

¹²⁵ Klabbers (n 121) 15.

¹²⁶ J Wouters and P De Man, ‘International organizations as law-makers’ in Klabbers and Wallendahl (n 121) 190, 197 (referring to both consensus and unanimity).

From a functionalist perspective, decisions of international organizations are the product of the autonomous will of the international organization: while states partake in the decision-making process as members of the international organization, the outcome is attributed to the latter only.¹²⁷ This also applies to resolutions. As recommendations, the resolutions of the General Assembly have no direct or binding effect on member states.¹²⁸ Yet they contribute to the achievement of the goals of the UN Charter.¹²⁹ In this respect, they have an inherent functional quality.¹³⁰ At the same time, the broad scope of the General Assembly's Charter mandate confers a certain degree of autonomy to the General Assembly to pursue the UN goals. This allows the General Assembly to act as a norm or standard-setting institution on a wide range of areas. It follows that the process through which resolutions acquire legal significance contains an unavoidable tension between the autonomy of the General Assembly and its dependence on member states to operate. This imparts a distinctive feature to the process of adoption of resolutions.

As pointed out above, the relationship between the General Assembly and its member states is central to the decision-making process. Since resolutions are the outcome of a collective deliberation, different member states may attach different levels of significance to the text of resolutions at the adoption stage. However, once adopted, resolutions take on a life of their own. At this point, the relationship between the General Assembly and its member states acquires a new meaning. As Österdahl writes,

member states necessarily become the more or less willing executive handmaidens of the organization, if they are loyal to the organization. [...] Thus... they play a triple role with respect to the organization as, firstly, members of the organs, secondly, carrying out the public administration of the organization, and, thirdly, as *external counterparts to the organization*.¹³¹

When member states act as the external counterparts of the General Assembly, they may either act on resolutions or ignore them. If they do decide to take action, they may conduct themselves in conformity with the recommendations contained in the text of resolutions, including through incorporating them into domestic legislation or citing them in judicial proceedings (both national and international). In doing so, states attach a certain degree of significance to resolutions, irrespective of their position at the adoption stage, thus contributing to the development of the international rule of law.¹³²

¹²⁷ V Enström, 'Reasoning on powers of organizations' in R Collins and N White, *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 56, 58 ('The impact that the organization has on its members can on the one hand be pictured as arising out of the consent of members. But on the other hand, the autonomous nature of the organization adds to that decision a character which transcends that of interstate agreements'); I Österdahl 'International organizations – institutions and organs' in Klabbers and Wallendahl (n 116) 156, 163 ('states play a double role as members of the organization and as public administrative agents of the organization implementing the policies of the organization').

¹²⁸ UN Charter (n 6) art 10.

¹²⁹ *ibid* art 1.

¹³⁰ Österdahl (n 127) 168 (pointing out that, as instrument of soft law, resolutions may have political and indirect legal effects).

¹³¹ *ibid* 163 (emphasis added).

¹³² Klabbers (n 1) 7-8 (arguing that international organizations are governed by international law and represent the rule of law 'one way or another').

The considerations above show that the analysis of the legal significance of resolutions stays at the crossroads of international organizations law and general international law. Performing the inquiry requires an evidence-based analysis of the practice of states – both as members of the General Assembly and as its counterparts – and international actors, such as international courts and tribunals before which resolutions are invoked. Empirical analysis is helpful to clarify the conditions under which states rely on resolutions and the purposes for which they decide to do so. Evaluating empirical findings then allows for the elaboration of a conditional theory of the degrees of legal significance of resolutions and their implications for the development of international law. The resulting theory is conditional, as opposed to absolute, meaning that it is derived from empirical observation and remains open to subsequent modification should the context and modalities in which states and other international actors rely on resolutions change over time.

1.5 The argument in outline

This study provides the first ever empirically-grounded analysis of the legal significance of resolutions. It examines how states rely on resolutions to claim rights and frame duties under international law. Specifically, the study shows that the concept of legal significance is not unitary. It identifies three types of legal significance, which are not mutually exclusive – namely, legal significance at the adoption stage, legal significance at the domestic implementation stage and legal significance in international practice (in context of state submissions before international courts and tribunals). The structure of the study includes six chapters followed by some concluding remarks.

Chapter 2 explains the empirical research design of the study. It provides the rationale for selecting the sample of resolutions and related variables, such as voting records and statements in explanation of the vote. It also details the sources consulted for selecting the relevant domestic and international legal materials referring to General Assembly resolutions and their legal significance, such as domestic legislation and case law as well as statements by states before international courts and tribunals.

Chapter 3 explains how the General Assembly works, in theory and in practice. Aimed at updating the academic literature on the institutional aspects of the General Assembly, it provides insights into the historical evolution of the institution's working methods and practices through a combination of normative, doctrinal and empirical perspectives. The analysis shows that the General Assembly is neither a unitary nor a neutral body, thus making the discourse about the legal significance of resolutions not amenable to generalizations. The empirical findings also raise theoretical questions about the nature of the General Assembly as the representative organ of a quasi-universal international organization with a broad mandate.

The caveat in performing the analysis is that the General Assembly is not treated as a unitary body, since its structure includes a plenary session and six main committees, each governed by their own set of working methods and informal practices. Unpacking the working methods and informal practices of the General Assembly is a necessary precondition for the analysis of the legal significance of resolutions, as it reveals an aspect of the relationship between the General Assembly

and its member states known as ‘the institutional veil’.¹³³ Intimately related to the concept of international legal personality, the institutional veil is an indicator of the ‘legal transparency’ of international organizations.¹³⁴ The metaphor signifies that, unlike the corporate veil in domestic legal systems, the internal structure and functioning of international organizations – that is to say, states acting as the organs of the international organization – remains visible on the international plane (although not entirely open, as this would turn the international organization into a simple platform for inter-state relations).¹³⁵ Yet the powers of states and those of the General Assembly do not overlap: they coexist under the institutional veil by virtue of the UN Charter provisions.

Building on the findings of Chapter 3, Chapter 4 examines how states act within the General Assembly to try to achieve outcomes favourable to them. Focusing on a sample of resolutions,¹³⁶ it elaborates on how state support for resolutions takes shape through the General Assembly’s decision making process. It examines the content of the resolutions, the related voting patterns and the statements made by delegates in explanation of vote. It shows that the presence of normative provisions in the text of resolutions does not automatically or necessarily equate to a consensus of the international community to act on the resolutions. Discerning the degree of state commitment to uphold resolutions is useful to shed light on the expectations that resolutions engender as to the intention of states to treat them as binding once adopted. It thus reveals a layer of meaning about the legal significance of resolutions at the adoption stage.

Chapter 5 provides an original inquiry into the conditions under which states incorporate resolutions in domestic law through constitutions, legislation and case law. By examining both the formal legal status assigned to resolutions and the functions they serve in the domestic order of member states, the analysis elucidates how the various branches of the state (in particular, domestic courts) attribute legal significance to resolutions.

Similarly, Chapter 6 examines how states use resolutions in international practice, with a focus on legal arguments put forward by states before international courts and tribunals. In doing so, it provides an original angle of inquiry into the legal significance of resolutions, since scholarly works have examined the issue of their normative value predominantly from the perspective of the judges sitting in international courts and tribunals.

Taking stock of the preceding analysis, Chapter 7 analyses the concept of legal significance of resolutions. By focusing on the common characteristics of state practice on the use of resolutions in the three contexts examined (namely, at the adoption stage, within domestic law and in international practice), it provides a novel perspective which significantly departs from other scholarly works. The latter mostly focus on characteristics of the text of resolutions, such as the use of normative language, or certain conditions of adoption, such as voting methods and patterns. As a result, they centre the analysis on characteristics of resolutions at the adoption stage, largely

¹³³ Brölmann (n 78).

¹³⁴ C Brölmann, ‘International organizations and treaties – Contractual freedom and institutional constraint’ in Klabbers and Wallendahl (n 121) 285, 287.

¹³⁵ *ibid* 287.

¹³⁶ As detailed in Section 1.5.3.3 above.

underplaying the role of subsequent state practice in determining the legal significance of resolutions.

The study concludes in Chapter 8 that, while resolutions are formally acts of the General Assembly, they acquire legal significance and may produce legal effects only when supported by the will of individual states to bind themselves to their content.

CHAPTER 2

RESEARCH METHODOLOGY DESIGN

2.1 Introduction

The General Assembly is a complex institution. As the plenary organ of the United Nations, its membership comprises 193 sovereign states. The latter interact with the General Assembly in various guises, playing the dual role of member states and counterparts of the General Assembly. While resolutions are formally acts of the General Assembly, they are negotiated and adopted by states. The main implication is that, as states pursue their interests, the resolutions adopted may not necessarily be representative of the sentiment of the international community. Equally, the text of the resolutions adopted may or may not be indicative of the level of state support for resolutions. This suggests that an inquiry into the legal significance of resolutions requires several levels of analysis, each aimed at evaluating under what circumstances states rely on resolutions. Three main contexts, corresponding to different levels of analysis, are discernible – namely, the adoption stage, the domestic implementation stage and the use of resolutions in international practice.

In order to appreciate the degree of legal significance that states attach to resolutions in the three different contexts, the information relevant for the inquiry is not limited to the text of resolutions. It also includes consideration of the votes cast, the statements made in explanation of votes, the instruments incorporating resolutions into domestic law and relevant international materials in which resolutions feature as the basis for making legal claims. Collecting and evaluating such materials requires an empirical investigation grounded on extensive archival research. The sections below provide the details of this study's research design.

Section 2.2 outlines the scope of the research design. It clarifies how the empirical investigation is useful for theorising about legal significance of resolutions, including its limitations. Section 2.3 explains the empirical research design, including its theoretical basis and the empirical techniques used in each step of the implementation. Section 2.3.1 outlines the quantitative research design for the analysis of the legal significance of resolutions at the adoption stage. Considering that the classification system for UN documents has changed over time, sub-section 2.3.1.1 provides an overview of the rule utilised for counting the number of resolutions adopted by the General Assembly between 1946 and 2018 (included). The findings form the bedrock of the process for groupings resolutions into thematic clusters, which is a precondition for selecting the sample.

Sub-section 2.3.1.2 elaborates on the clustering process and emphasises that recourse to thematic clustering to evaluate the legal significance of resolutions at the adoption stage is a novelty in the scholarly literature. Previous studies have focused on roll-call votes in plenary session and, generally, voting patterns as a means to reconstruct the size and composition of regional groups and coalitions within the General Assembly. Sub-section 2.3.1.3 explains the sampling strategy adopted to achieve the aims of the research project while sub-section 2.3.1.4 provides the details of the hypothesis to be tested, the variables selected and the related techniques of statistical analysis.

Section 2.3.2 and Section 2.3.3 explain the rationale for conducting qualitative content analysis to assess the legal significance of resolutions within domestic law and in international practice, respectively. Both sections also examine the problems and challenges related to the process of doing multi-jurisdictional archival research, such as access to relevant legal materials (especially in English translation) for both levels of analysis. Section 2.4 concludes by arguing that a research design grounded on legal theory and combining quantitative and qualitative insights offers an innovative angle of inquiry to assess the legal significance of resolutions at the adoption and implementation stages.

2.2 Aim and scope of the research design

Current theories on the legal effects of General Assembly resolutions attempt to conceptualise the conditions under which resolutions acquire legally binding character.¹ However, they have never been exposed to empirical testing. This provides an opportunity for an empirical study to supplement the theoretical analysis by taking current scholarship as ‘a source of empirical propositions to be tested’.² An empirically-grounded study allows for a systematic study of the practice of the General Assembly,³ which is currently missing in the scholarly literature.⁴

A perceived limitation of relying on empirical methods to carry out an analysis of the legal significance of General Assembly resolutions is that, as empiricism is grounded on social sciences research methods, the inquiry necessarily unfolds along interdisciplinary lines. Critics of interdisciplinarity have pointed out that empiricism bears the risk of subsuming law’s relevance within the remit of other disciplines, such as economics, political sciences, sociology, psychology or anthropology.⁵ The argument has merit. However, it builds on a limited view of the aim and scope of empirical legal studies. Irrespective of the specific research methods adopted, the empirical analysis of international law requires that the findings are interpreted in the light of ‘doctrine, institutions, and professions to assess the ways in which international law can shape social understandings and practices in different domains.’⁶ In this sense, empirical research does not reduce law to other disciplines.⁷ Quite the contrary, by generating new knowledge about the

¹ As discussed in Chapter 1, Section 1.3.

² MC Suchman and E Mertz, ‘Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism’ (2010) *Ann Rev Law Soc Sci* 555–560; G Shaffer, ‘New Legal Realism and International Law’ in Klug, H and Engle Merry, S (eds), *The New Legal Realism: Studying Law Globally* vol II (CUP 2016), 145, 156. See also M Heise, ‘The Importance of Being Empirical’ (1999) 26 *Pepp L Rev* 807, 811.

³ RM Lawless, JK Robbennolt and TS Ulen, *Empirical Methods in Law* (2nd ed, Kluwer 2016) 4 (pointing out that one of the advantages of the empirical investigation is that it allows the researcher to conduct a systematic analysis of legal phenomena). See also BA Simmons and AB Breidenbach, ‘The Empirical Turn in International Economic Law’ (2011) 20 *Minnesota J Int’l L* 198, 199–200 and 214 ([By] ‘empirical’ we mean a systematic examination of observable phenomena from which the researcher explicitly seeks to draw broader conclusions about the way the world – or some part of it – works. [...] empirical studies give researchers the ability to systematically evaluate legal institutions in light of their goals’).

⁴ G Shaffer, ‘The New Legal Realist Approach to International Law’ (2015) *LJIL* 189, 201 (arguing that international law ‘cannot be adequately understood outside of empirical study’).

⁵ V Nourse and G Shaffer, ‘Empiricism, Experimentalism, and Conditional Theory’ (2014) *Southern Methodist Univ L Rev* 141, 149.

⁶ Shaffer (n 2) 148.

⁷ G Shaffer, ‘Legal Realism in International Law’ in Dunoff, JL and Pollack, MA (eds), *International Legal Theory: Foundations and Frontiers* (CUP, forthcoming) – available as University of California, Irvine, Legal Studies Research Paper Series No 2018-55, 14.

social reality in which international law operates, it contributes to the development of legal theory by proving or disproving unstated or axiomatic assumptions, thus refuting the argument that empiricism distorts the meaning of international legal theory.⁸

The research design of this study aims at achieving the abovementioned goals of empirical legal research in a field dominated by theoretical analysis. At the same time, it does not claim completeness, since the findings of the research are based on a selected sample of resolutions and a finite number of case studies.

2.3 Conceptualising three levels of legal significance of resolutions

How does a state commitment to uphold an international norm manifest itself? The answer is largely a matter of factual assessment requiring a theoretical framework open to empirical investigation. Schachter's conception of international obligation provides a suitable theory to determine the level of state commitment to resolutions.⁹ Specifically aimed at detecting the presence of an international obligation, it calls for an empirical investigation into selected aspects of the process of norm creation by international actors. Without making any normative claim, it sheds light on how the concept of commitment leading to a possible legal obligation is socially constructed, thus paving the way for the discovery of relevant concepts and practices related to the process of adoption and use of General Assembly resolutions.¹⁰

According to Schachter, five steps are the necessary and sufficient conditions to establish the existence of an obligatory norm (denoting full commitment with that norm). They are: the formulation of a behavioural requirement; an indication that the prescribed behaviour has been formulated by a person having the authority to perform that function; an indication of the capability or willingness of those concerned to make the requirement effective in fact; the communication of the requirement to its addressees; and an indication of responses suggesting that the requirement is perceived as authoritative.¹¹ The five steps can reasonably be regarded as the core components of a guiding concept aimed at elucidating the process of creation of state commitments at the General Assembly through the adoption of resolutions.

Adopting Schachter's conception of international obligation provides the means for conducting an empirical, rather than solely theoretical, analysis which avoids generalizations about the legal significance of resolutions. By uncovering specific relationships of conduct, law and politics originating from the decisions that states make at the General Assembly, it reveals the connections between thematic clusters of resolutions, eventually shedding light on how the broader policies of the General Assembly take shape over time. Conversely, it is neither possible nor useful to provide an *a priori* assessment of the degrees of state commitment attached to the adoption of individual

⁸ J Klabbers, 'Counter-Disciplinarity' 4(2009) Int'l Pol Soc 308, 309 and 311.

⁹ O Schachter, 'Towards a Theory of International Obligation' 8(2) Va J Int'l L (1968) 300.

¹⁰ Another theory aimed at explaining the legal meaning of re-citation in the text of General Assembly resolutions is the one proposed by Bleicher. Grounded on an alleged analogy between re-citation in resolutions and the common law doctrine of *stare decisis*, it maintains that the most cited resolutions have a significant legal content. However, this appears to be a formalistic, and mostly superficial, type of inquiry exclusively centred on the text of the resolutions. See SA Bleicher, 'The Legal Significance of Re-Citation of General Assembly Resolutions' (1969) 63 AJIL 444, 458.

¹¹ Schachter (n 9) 308.

resolutions. As Schachter writes, the existence of an international obligation must be ascertained ‘in terms of process (that is, steps taken) rather than the outcome.’¹²

A possible objection to the adoption of Schachter’s conception of international obligation is that the assessment of the degrees of state commitment emerging from the contextual analysis of resolutions is not objective. Diverse political, cultural and economic factors may preclude the existence of any truly international obligation. A counter-argument is that determining the degrees of state commitment attached to the adoption of individual resolutions is a matter of factual assessment. A pre-determined, inflexible idea of international obligation belongs to the realm of dogmatism.

The following sub-sections provide the details of the methods utilised to evaluate the legal significance of resolutions at the adoption stage and after adoption, with particular reference to the use of resolutions by states in their domestic and international practice. The structure of the research design draws insights from Schachter’s theory of obligation.

2.3.1 Level 1: legal significance at the adoption stage

The methodology adopted to perform the empirical study of resolutions at the adoption stage – that is to say, when the General Assembly adopts resolutions in plenary session, including those recommended for adoption by its committees – is predominantly quantitative. The main reason justifying recourse to statistical analysis as the principal method of inquiry is that an experimental study is not feasible. It is too onerous, and perhaps unrealistic, to try to recreate, in a controlled environment the political, economic and cultural conditions in which 193 states operate at the General Assembly. Even if that was possible, conducting observations of state practice over time would prove particularly challenging. Likewise, social network analysis would not serve the purposes of the inquiry. Although useful to reconstruct selected webs of relations among states, it remains a descriptive type of inquiry.¹³ Similarly, qualitative analysis does not lend itself to a systematic type of inquiry. It is, however, useful to interpret the meaning of the quantitative findings.¹⁴

A possible risk stemming from performing statistical analysis is that it tends to assign the same value to all the resolutions, thus possibly missing some of the political nuances of the process of bargaining commitments. For example, it does not distinguish between a declaration of principles and an ordinary resolution. One way to mitigate the potential drawbacks of the computation is to read the findings in the light of the qualitative content analysis of the meeting records, which contain the delegates’ statements in explanation of vote.

The following sub-sections provide the details of the four component parts of the research design – namely, the creation of a bespoke dataset of resolutions, the clustering of resolutions, the selection of the sample and an overview of the variables and related methods of analysis.

¹² *ibid* 307.

¹³ G Robins, *Doing Social Network Research: Network-Based Research Design for Social Scientists* (Sage 2015), 18-19.

¹⁴ A Bryman, *Social Research Methods* (5th ed, OUP 2016), 34.

2.3.1.1 Counting resolutions

The resolutions of the General Assembly are freely available for consultation on the official website of the United Nations, where they are listed chronologically and by year of adoption.¹⁵ For each resolution, the information provided includes details related to the official document number (draft text and final document), adopting body (plenary session or committees), method of adoption (with or without voting as well as votes cast in favour, against and abstentions) and subject matter.

Changes in the General Assembly's working methods and the related development of informal practices have affected the numbering of resolutions in two ways. Firstly, the official document number of each resolution has changed twice. From 1946 to 1975, resolutions have been numbered consecutively followed by the indication of the session's number provided in brackets – for instance, A/RES/1(I) and A/RES/2625(XXV). From 1976 onwards, resolutions have been numbered consecutively within each session – for instance, A/RES/54/1 and A/RES/69/1. As a result, I had to manually compute how many resolutions have been adopted since 1946.

Secondly, groups of closely related resolutions are often assigned a document number followed by a Latin letter. Such resolutions are at times listed as a group¹⁶ or as individual resolutions,¹⁷ or both.¹⁸ Furthermore, the method of adoption of individual resolutions – namely, without voting ('by consensus'), by majority and by unanimity (including by acclamation) – is at times provided for individual resolutions, at times for the group of closely related resolutions¹⁹ while sometimes it is omitted.²⁰ In order to ensure consistency in the computation process, I set the rule that individual resolutions accompanied with an indication of their method of adoption count as one resolution.²¹ Likewise, groups of closely related resolutions adopted without a vote²² and groups of unqualified resolutions²³ count as one resolution.

The resulting bespoke dataset comprises the resolutions adopted in the first 73 ordinary sessions of the General Assembly and covers the period of time between 1946 and 2018 (included).²⁴ The dataset includes all the resolutions adopted by the General Assembly in plenary session (whether unanimously, by majority vote or without voting), including those recommended for adoption by its six main committees, the General Committee and the Credentials Committee. For the purposes of this study, they represent the practice of the General Assembly.

¹⁵ Available at: <www.un.org/en/sections/documents/general-assembly-resolutions/index.html> (accessed 1 June 2021).

¹⁶ For example, UN Doc A/RES/63/108A-B (14 January 2016).

¹⁷ For example, UN Docs A/RES/70/238A (14 January 2016); A/RES/70/238B (11 April 2016); and A/RES/70/238C (8 July 2016).

¹⁸ For example, UN Docs A/RES/70/249A-C; A/RES/70/249A; A/RES/70/249B; and A/RES/70/249C (8 February 2016).

¹⁹ For example, UN Doc A/RES/63/108A-B (14 January 2016), adopted without voting.

²⁰ For example, UN Doc A/RES/36/231A-B (18 December 1981).

²¹ For example, UN Docs A/RES/70/249A; A/RES/70/249B; and A/RES/70/249C (8 February 2016).

²² For example, UN Doc A/RES/63/108A-B (14 January 2016).

²³ For example, UN Doc A/RES/36/231A-B (18 December 1981) (no indication of method of adoption is provided).

²⁴ The resolutions adopted at special and emergency sessions are not included.

2.3.1.2 Clustering resolutions

Empirical studies of resolutions have either focused on a limited timeframe of General Assembly practice²⁵ or the behaviour of states acting either individually or in groups.²⁶ In general, all quantitative studies have analysed roll-call votes, mostly in the plenary session.²⁷ A study of thematic clusters of resolutions spanning across the seven decades of practice of the General Assembly is missing.²⁸

A cursory view of the practice of the General Assembly reveals that the vast majority of resolutions do not exist in isolation from each other. Over time, they have aggregated into thematic clusters of restated resolutions. Typically, a cluster begins with the adoption of a resolution followed by the adoption of another resolution bearing the same title and an almost identical text at regular intervals (annually or bi-annually). Restatement of resolutions adopted in previous sessions can span across years, sometimes decades.

In order to perform thematic clustering, I have divided the resolutions by subject matter using the title of the resolutions provided in the UN website.²⁹ I have subsequently grouped the resulting clusters by size, voting patterns and year of adoption. Size indicates how many resolutions a thematic cluster contains. For the purposes of this study, a short cluster contains up to 10 resolutions while a long cluster 11 or more. The voting patterns criterion is useful to differentiate between resolutions adopted with or without voting. In relation to resolutions adopted without a vote, a cluster is considered contested if it includes resolutions presenting great discrepancies in voting patterns or uncontested if it comprises resolutions adopted by consensus, unanimity or quasi-unanimity. Finally, the year of adoption criterion allows to differentiate between thematic clusters initiated in the 21st century – that is to say, from the 55th regular session onwards, which I refer to as recent developments – and older clusters.

2.3.1.3 Selecting the sample

The selected sample consists of resolutions contained in thematic clusters. The relevant clusters of resolutions have been selected through a non-probabilistic method – namely, purposive

²⁵ D Panke, *Unequal Actors in Equalizing Institutions: Negotiations in the United Nations General Assembly* (Palgrave 2013); GL Wilkins, *African Influence in the United Nations, 1967-1975: The Politics and Techniques of Gaining Compliance to U.N. Principles and Resolutions* (University Press of America 1981).

²⁶ See, for instance, CF Alger, GM Lyons and JE Trent, *The United Nations System: The Policies of Member States* (United Nations University 1995); RE Riggs, *Politics in the United Nations: A Study of United States Influence in the General Assembly* (University of Illinois Press 1958).

²⁷ See, among many, T Hovet, *Bloc Politics in the United Nations* (Harvard University Press 1960), 20-21; K Jacobsen, *The General Assembly of the United Nations: A Quantitative Analysis of Conflict, Inequality, and Relevance* (Universitetsforlaget 1978), 33; H Newcombe et al, *Nations on Record: United Nations General Assembly Roll-Call Votes (1984-1986)* (Peace Research Institute – Dundas 1988).

²⁸ E Gartzke and C Schneider, 'Data Sets and Quantitative Research in the Study of Intergovernmental Organizations' in Bob Reinalda (ed), *Routledge Handbook of International Organization* (Routledge 2013), 41 (describing quantitative analysis of international organizations' practice in general as a relatively young field of research).

²⁹ (n 15)

sampling.³⁰ In context of a study on the legal significance of resolutions, probabilistic sampling appears neither possible nor desirable for two main reasons.

Firstly, each resolution possesses unique traits and characteristics. For instance, resolutions are adopted with different majorities and cover a wide spectrum of subject matters. This casts doubt on the possibility of making generalizations about their legal significance. Therefore, drawing a random sample (which is in theory representative of the entire population of resolutions adopted) does not appear useful to conduct the present analysis. For the same reasons, drawing a systematic sample – that is to say, selecting a resolution at regular intervals, such as 1 every 100 resolutions adopted – does not serve the purposes of this study.

Secondly, as explained in sub-section 2.3.1.2 above, resolutions tend to cluster around thematic areas. Selecting resolutions randomly from thematic clusters of resolutions may not always be feasible due to the low number of restated resolutions belonging to several thematic clusters. Random selection would make the sample statistically not significant. Equally, stratifying the sample by adopting body (plenary or main committee) would not take into consideration the restated character of the vast majority of resolutions. Since the aim of this study is to ascertain how resolutions acquire legal significance through usage by states, the relevant clusters of resolutions have been selected through a combination of three criteria – namely, the number of resolutions forming a cluster, the point in time in which a cluster emerged and the nature, contested or uncontested, of individual clusters.

The selected sample consists of 20 thematic clusters comprising 229 restated resolutions (Table 2.1). Nine clusters consist of 11 or more resolutions while 11 clusters are shorter, comprising a maximum of nine resolutions each. Both types of clusters appear in the selected ones for both the plenary session and individual committees. Likewise, for both the plenary session and the six main committees, the sample includes at least one cluster composed of resolutions adopted by consensus and one characterized by resolutions adopted by majority vote, as well as clusters representing recent developments and older ones.

Table 2.1

PLENARY or COMMITTEE	TITLE OF THE RESOLUTIONS FORMING THE THEMATIC CLUSTER	LENGTH (Number of resolutions)		AGGREGATED VOTING (Individual clusters)		RECENT DEVELOPMENT	
		Long	Short	Contested	Uncontested	Yes	No
C.1	Non-interference with the domestic affairs of states		7	✓			✓
	Declaration on the preparation of societies for life in peace		5	✓			✓
	The illicit trade in small arms and light weapons in all its aspects	18			✓	✓	
C.2	Permanent sovereignty over natural resources		8	✓			✓
	Charter of Economic Rights and Duties		9		✓		✓
	New International Economic Order		7	✓		✓	
	Unilateral economic measures as a means of political and economic coercion	14		✓			✓
C.3	Respect for the principles of national sovereignty and non-interference in the internal affairs of states in their electoral process	12		✓			✓
	Glorification of Nazism: inadmissibility of certain practices that contribute to fuelling contemporary		6	✓		✓	

³⁰ Bryman (n 14) 410.

	forms of racism, racial discrimination, xenophobia and related intolerance						
	Human rights and unilateral coercive measures	23			✓	✓	
C.4	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	15			✓	✓	
	Activities of foreign and economic interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	30		✓			✓
	Comprehensive review of special political missions		7	✓		✓	
C.6	Friendly relations among nations		8		✓		✓
	Good neighbourliness		7	✓			✓
	Legal aspects of the New International Economic Order	12		✓			✓
	The rule of law at the national and international levels	13			✓	✓	
Plenary	Building a peaceful and better world through sport and the Olympic ideal		9		✓	✓	
	New or restored democracies	15			✓		✓
	Coercive economic measures		4	✓			✓

Selected clusters of resolutions by number of resolutions, time of adoption and cluster size.

Several thematic clusters meet the three criteria abovementioned. Accordingly, the selection of the 20 thematic clusters is informed by a further criterion related to the consideration of the same thematic area by two different committees or the Security Council. For example, the Second Committee's cluster of resolutions on unilateral economic measures as a means of political and economic coercion also appears in the work of the plenary session and, with a focus on human rights, the work of the Third Committee. Likewise, the discussion of the legal aspects of the New International Economic Order informs thematic clusters in both the Second and the Sixth Committees. Finally, the First Committee's thematic cluster on small arms and light weapons mirrors a cluster of thematic resolutions adopted by the Security Council since 2013.³¹

2.3.1.4 Hypothesis and variables

Ascertaining the legal significance of resolutions at the adoption stage requires an investigation into the degree of correlation between the use of normative language in the text of resolutions and the intention of states to be bound by the provisions in which such language appears. The related research question reads:

RQ: Are the normative content of resolutions and the intention of states to act on those resolutions related to each other?

The hypothesis to be tested reads:

H_1 : The normative content of a restated resolution affects the level of state commitment to uphold that resolution.

The null hypothesis reads:

H_0 : The normative content of a restated resolution does not affect the level of state commitment to uphold that resolution.

³¹ UNSC res 2117 UN Doc S/RES/2117(2013) (26 September 2013) and following ones.

In the hypothesis above, the dependent variable is the level of state commitment while the normative content of resolutions is the independent variable. However, they are both complex concepts that need to be deconstructed into empirically verifiable components. Schachter's conception of international obligation provides a suitable middle range theory to refine the content of both the dependent and the independent variable, since its component terms are 'empirical and not merely nominal'.³² Accordingly, the component terms of Schachter's theory are taken as proxies to select the individual variables and the related computational methods.

In relation to the independent variable, the theory's requirement of identification of the conduct relevant for the formation of an international obligation³³ and the need to identify the normative content of resolutions present striking similarities. Specifically, since the text of a resolution formulates the actions required of states to achieve its aims, recourse to normative language – that is to say, mentioning principles and rules contained in treaties or customary international law – turns out to be one of the means for detailing the requirements of state conduct. The relationship between state conduct and the use of normative language in the text of resolutions can thus be captured by two variables. With regard to state conduct, for the purposes of this study the relevant types of action consist of a 5-point scale of intensity ranging from high action levels to low action levels (Table 2.2).³⁴ High action levels demand that states change their behaviour in order to comply with the requirements of resolutions. They include unconditional and specific actions, as evidenced by the language used in resolutions. For instance, verbs are indicative of the prescriptive or otherwise nature of the required action (Table 2.3). Low action levels invite states to collaborate with each other and the General Assembly, as well as providing evidence about current and prospective relevant practices. Such discretionary actions include exchanging information and continuing policies conforming to the aim of specific resolutions (Table 2.3). With regard to normative language in the text of resolutions, for the purposes of this study the relevant categories consist of rules and principles. Rules dictate a specific result, in the sense that they either apply or not to given circumstances. Principles are general and abstract norms. They have a core of applicability and a less specific one which determines that a particular situation may be covered by more than one principle.³⁵

Table 2.2

Value	Name	Description
0	No action	The resolution's provision does not require any action on part of states
1	Discretionary and generic	The resolution's provision invites states to implement a generic requirement
2	Discretionary, but specific	The resolution's provision invites states to implement a specific requirement
3	Unconditional and generic	The resolution's provision demands states to implement a generic requirement
4	Unconditional, but specific	The resolution's provision demands states to implement a specific requirement

Action levels

³² Schachter (n 9) 308.

³³ *ibid*

³⁴ The selected typology of action levels is modelled after those appearing in the reporting system of the Universal Periodic Review. See, for instance, B Ahl, 'The Rise of China and International Human Rights Law' 37(3) *Human Rights Quarterly* (2015) 637, 654.

³⁵ See O Schachter, *International Law in Theory and Practice* (Kluwer 1995), 20-21.

Table 2.3

0	1	2	3	4
n/a	The General Assembly solemnly <i>invites</i> member states to take all appropriate measures for the prompt achievement of the aims of the resolution. The General Assembly <i>reiterates its appeal</i> to give tangible effect to the importance of establishing and strengthening a just and durable peace for present and future generations. The General Assembly <i>recommends</i> that all governments should observe the principles contained in resolutions. The General Assembly <i>encourages states</i> to consider the coherent identification of needs, priorities, national plans and programmes that may require international cooperation and assistance.	The General Assembly <i>encourages</i> states to submit, on a voluntary basis, national reports on their implementation of a specific Programme of Action. The General Assembly <i>invites</i> all Governments to incorporate active promotion of the ideas of the preparation of society for life in peace in their programmes. The General Assembly <i>invites</i> member states to submit their views [on a specific issue]. The General Assembly <i>encourages</i> states to make increasing use of their national reports . The General Assembly <i>urges</i> states to submit relevant information with respect to [a specific study to be undertaken by the Secretary-General].	The General Assembly <i>call upon</i> all states to carry out faithfully the obligations of the UN Charter. The General Assembly <i>calls upon</i> states to strengthen cooperation. The General Assembly <i>calls upon</i> Governments to continue their efforts aimed at the complete implementation of the principles and recommendations contained in resolutions. The General Assembly <i>affirms</i> that states should establish the necessary mechanisms and means to guarantee full popular participation in electoral processes.	The General Assembly <i>reiterates</i> that all states shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations. The General Assembly <i>calls upon</i> Governments to inform the Secretary-General of progress made in relation to the implementation of a given resolution. The General Assembly <i>calls upon</i> states to implement a specific Programme of Action. The General Assembly <i>reaffirms</i> that every state has the duty to discourage advocacy of hatred and prejudice against other peoples.

Examples of action level indicators

Based on the classification above, it is possible to determine the degree of correlation between normative provisions and action levels through statistical analysis – namely, a *chi-square* test. The same test can be used to determine whether resolutions adopted without voting are related to lower action levels. Likewise, it can determine whether resolutions adopted with a vote are associated with higher action levels, thus shedding light on an aspect of the legal significance of resolutions at the adoption stage determined by state conduct (both actual and expected).

In relation to the dependent variable, the wording of the text of resolutions (including the use of normative language) can also disclose valuable information about the willingness of states to act on resolutions once adopted.³⁶ It is indeed possible to test the degree of correlation between votes cast on resolutions and the statements made by delegates in explanation of their votes, whenever available in the meeting records. Statements in explanation of a state's vote do not necessarily match the formal votes cast (positive, votes or abstentions). A *Cramér V* test can reveal the strength of the correlation between formal votes and statements matching (or not) the votes cast by individual states in relation to the selected sample of resolutions.³⁷

³⁶ Schachter (n 9) 308.

³⁷ A *Cramér V* test assesses the strength of the relationship between two variables – one containing only two categories (e.g. statements matching votes or not) and the other containing more than two categories (e.g. positive votes, negative votes and abstentions). Bryman (n 14) 690.

Moreover, since some resolutions are more contested than others, states may be more inclined to act (or refrain from acting) on heavily contested resolutions. Binary logistic regression helps determine the likelihood of states keeping a firm commitment on highly contested resolutions by calculating the correlation between the votes cast on individual resolutions (positive votes, negative votes and abstentions – all in numbers) and the statements in explanation of vote made by delegations (classified as matching or not matching the votes cast).³⁸

In relation to this, it is noteworthy that locating statements in explanation of a vote is a complex task. The UN General Assembly website does not provide a link to the text of statements. The UN Official Document System contains full-text documents of the General Assembly, including statements in explanation of a vote. However, retrieving statements in explanation of a vote made in plenary session and those made during the debates in the six main committees require knowledge of the UN official coding system. Information on how to find UN documents is available from the UN website, which also hosts a live chat facility with the librarians at the UN Headquarters in New York.³⁹

Starting from session 34 (1979), delegations are invited to make statements either during the debate in the main committees or in plenary session.⁴⁰ Statements made during the plenary debate are known as the ‘meeting records’ and are available from the UN website in the same page providing the text of the resolution and related votes.⁴¹ Statements made during the debates in the main committees must be retrieved using the UN Official Document System using their own document classification.⁴² This presents a methodological challenge. Specifically, up to the 30th regular session, statements were classified using the following scheme:

A/C.[committee’s number]/SR.[committee’s meeting number] – e.g. A/C.2/SR.1061

From the 31st session onwards, the scheme was modified as follows:

A/C.[committee’s number]/[regular session’s number]/SR.[committee’s meeting number during the same regular session] – e.g. A/C.4/72/SR.9

In addition, the classification of the statements made in the First Committee differs from the others. From the 1st to the 21st regular session, it followed the same classification scheme as the other main committees. From the 22nd session onwards, the classification scheme is as follows:

³⁸ A binary logistic regression examines the strength of the relationship between a variable with only two categories (e.g. statement in explanation of a vote matching the vote cast or not) and a numerical variable with two or more categories (e.g. number of positive votes, negative votes and abstentions cast on a given resolution) in terms of probability. It provides an indication of the likelihood that a statistically relevant relationship exists. AC Acock, *A Gentle Introduction to Stata* (6th ed, Stata Press 2018), 340.

³⁹ UN Documentation: How to Find UN Documents, available at <https://research.un.org/en/docs/find> (accessed 13 September 2021).

⁴⁰ UNGA decision 34/401 (1979) para 7 reads: ‘When the same resolution is considered in a Main Committee and in plenary meeting, a delegation should, as far as possible, explain its vote only once, that is, either in the Committee or in plenary meeting unless that delegation’s vote in plenary meeting is different from its vote in the Committee’.

⁴¹ For the resolutions adopted during the 73rd regular session (2018), see: <http://research.un.org/en/docs/ga/quick/regular/73> (accessed 3 June 2021).

⁴² <https://documents.un.org/prod/ods.nsf/home.xsp> (accessed 3 June 2021).

A/C.1/[regular session's number]/PV.[meeting number during the same regular session] – e.g.
A/C.1/56/PV.22

A committee's meeting number must be retrieved from the information contained in the same committee's report to the plenary session (known as the 'draft'), which is available from the UN website in the same page providing the text of the resolutions, the votes and the meeting records.⁴³

In addition to the willingness of states to act on resolutions, the text of resolutions can also provide valuable information about the capacity of states to act on the requirements of the resolutions adopted.⁴⁴ In this context, the idea of capacity relates to the likelihood that a state will keep the commitments that the implementation of a resolution requires, as described in the text thereof. Such commitments may be economic, political, moral or military.⁴⁵ As Peterson writes, '[t]he full impact of General Assembly resolutions has always depended on the relation between ability to muster votes inside it and control of resources for taking effective action outside'.⁴⁶ A *chi-square* test can determine the correlation between action levels (Table 2.2) and each of the four types of state capacity, as referred to in the text of resolutions (Table 2.4).⁴⁷ Types of state capacity are regarded as complementary to each other, not rank ordered.

Table 2.4

Economic	Political	Moral	Military
The General Assembly <i>encourages</i> states to consider the timely establishment of a voluntary sponsorship fund.	The General Assembly <i>calls upon</i> all states to undertake necessary measures in order to prevent any hostile act or activity taking place within their territory and directed against the sovereignty, territorial integrity and political independence of another state.	The General Assembly <i>calls for</i> increased vigilance on contemporary forms of racism, racial discrimination and xenophobia.	The General Assembly <i>urges</i> states to refrain from military intervention, terrorism or other indirect forms of intervention for the purposes of changing by violence the existing system in another state or interfering in civil strife in another state.
The General Assembly <i>encourages</i> states to provide financial assistance to other states.	The General Assembly <i>solemnly invites</i> states to recognize the importance and necessity of establishing, maintaining and strengthening a just and durable peace for present and future generations.	The General Assembly <i>urges</i> all states to provide moral and material assistance to the peoples of Non-Self-Governing territories.	The General Assembly <i>calls upon</i> the administering Powers to terminate military activities and eliminate military basis in Non-Self-Governing territories.
The General Assembly <i>calls upon</i> states to continue to invest in education.	The General Assembly <i>reiterates</i> that no states may use or encourage the use of economic, political or any other type of measures to coerce another state in	The General Assembly <i>reiterates</i> that states have the duty to take up actions conducive to the furtherance of the ideals of peace, humanism and freedom.	The General Assembly <i>considers</i> it essential that states shall refrain in their international relations from the threat or use of force against the

⁴³ (n 15)

⁴⁴ Schachter (n 9) 308.

⁴⁵ Schachter (n 35) 5.

⁴⁶ MJ Peterson, 'General Assembly' in TG Weiss and S Daws, *The Oxford Handbook om The United Nations* (2nd ed, OUP 2018) 119, 131.

⁴⁷ A *chi-square* test assesses the strength of the relationship between two or more variables containing two or more categories. It allows a generalization of the findings from the selected sample (e.g. action levels and state capacity, as observed in the selected sample of resolutions of the General Assembly) to the population (e.g. e.g. action levels and state capacity in all the resolutions of the General Assembly). Bryman (n 14) 688.

	order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.		territorial integrity or political independence of any state.
--	--	--	---

Examples of state capacity indicators

It is also possible to test whether capacity and willingness of states to act on resolutions are related to each other. States may signal their intention (willingness) to act on resolutions without having the economic capacity to do so, effectively proving unable to keep their commitments. A *t*-test⁴⁸ can shed light on the level of correlation between the intention of states to support resolutions (measured in terms of statements matching the votes cast) and the economic capacity of states to act on resolutions involving the mobilization of economic capital (measured in terms of the contribution of states to the UN regular budget).⁴⁹

2.3.2 Level 2: legal significance within domestic law

The second level of legal significance of resolutions consists of the implementation of resolutions in domestic law. States may choose to incorporate resolutions in domestic law differently, depending on the subject matter of the resolutions, the characteristics of the legal system and the ability of states to mobilize the resources necessary to act on the resolutions' recommendations. In terms of research design, the analysis of the legal significance of resolutions within domestic law presents two challenges. The first challenge refers to the impossibility of locating every single instance in which states have relied on resolutions (verbally or in written form). Since it is not possible to reconstruct the size of the population of references to resolutions, recourse to quantitative analysis is excluded in favour of qualitative content analysis of relevant materials.⁵⁰

Specifically, in order to assess the extent to which, if any, states have internalized resolutions, the focus of the inquiry remains on three main types of legal documents – namely, constitutions, legislation and case law, including the jurisprudence of constitutional courts. These are generally considered forms of state practice capable of contributing to the formation of rules of customary international law or general principles of law.⁵¹ The relevance of each type of document varies from jurisdiction to jurisdiction. For instance, case law plays a central role in common law countries and a secondary one in civil law countries, where courts only apply legislation (often in the light of relevant international obligations).⁵²

⁴⁸ A *t*-test compares the average of a variable (e.g. economic capital) in relation to another variable with two categories (e.g. economic capital in relation to states supporting a resolution and economic capital in relation of states not supporting a resolution). See Acock (n 38) 166-174.

⁴⁹ The contributions of states to the UN regular budget is taken as proxy. The information is available from the UN website from 1946 to present. See <https://www.un.org/about-us/member-states> (accessed 3 June 2021).

⁵⁰ Bryman (n 14) 34.

⁵¹ H Frostestad Kuehl and MA O'Brien, *International Legal Research in a Global Community* (Carolina Academic Press, Durham, North Carolina, 2018), 61-83; M Hoffman and M Rumsey, *International and Foreign Legal Research* (2nd ed, Brill-Nijhoff 2012), 13-16.

⁵² See, for instance, MB Hoffman and RC Berring, *International Legal Research in a Nutshell* (2nd ed, West Academic Publishing 2017), 9-11.

The second challenge refers to the difficulty of locating and retrieving the relevant documents. There exists a variety of approaches to foreign law research, such as thematic search, search by jurisdiction and search by type of document or type of legal system.⁵³ The classification of types of research is not rigid, since overlaps are not only possible but, to an extent, perhaps unavoidable. Therefore, the assessment of the legal significance of resolutions within domestic legal systems proceeds through a combination of approaches comprising two types of searches: by jurisdiction and by type of document in English translation. Following the latest developments in international legal research,⁵⁴ the sources consulted consist of electronic databases and collections.

Three databases have informed the search by jurisdiction (Table 2.5). In the three databases, I entered the keyword terms and connectors “united nations” & “general assembly”. Alternative search terms include “UN” & “general assembly” as well as “U.N.” & “general assembly”. They, however, do not add much to the previous search. Other search terms include “resolution”, “declaration” and “charter”, since resolutions sometimes bear the title of declaration or charter.⁵⁵ I subsequently ran a separate search (for both case law and legislation) substituting the original terms and connectors with the name of the declarations or charters adopted by the UN General Assembly between 1946 and 31 March 2020.

Table 2.5

Database
Westlaw International
Lexis Library International
JustisOne Pro

Search by Jurisdiction: sources consulted

The search for legal materials (constitutions, legislation and case law) in English translation relied on the documents being available through a limited number of sources, both free access and by subscription (Table 2.6). There exists no single source that reprints all state legislation, let alone legislation from various jurisdictions in English translation.⁵⁶ The keyword terms and connectors for legislation and case law are the same as those used for the search by jurisdiction. In relation to legislation, it is noteworthy that the incorporation can take two forms: direct (by way of citing resolutions in the text of legislation) and indirect (by incorporating the content of resolutions). For the purposes of this study, the focus remains on direct incorporation.

Table 2.6

Type of document	Database
Constitutions	Constitute ⁵⁷ World Constitutions Illustrated
Legislation and case law	World Legal Information Institutes ⁵⁸ International Law Reports

⁵³ See, for instance, Juriglobe – available at <<https://nyulawglobal.org/globalex/>> (accessed 3 June 2021) and GlobaLex – Available at <www.juriglobe.ca/eng/> (accessed 3 June 2021).

⁵⁴ As discussed in R Deplano, ‘Is International Legal Research International?’ in R Deplano and N Tsagourias (eds), *Research Methods in International Law: A Handbook* (Elgar 2021), 79.

⁵⁵ Examples include: Universal Declaration of Human Rights, UN Doc A/RES/217A(III); Charter of Economic Rights and Duties of states, UN Doc A/RES/3281(XXIX).

⁵⁶ EH Schaffer and RJ Snyder, *Contemporary Practice of Public International Law* (Oceana 1997), 86.

⁵⁷ www.constituteproject.org (accessed 3 June 2021 – free online access).

⁵⁸ www.worldlii.org (accessed 3 June 2021 – free online access).

	Oxford Reports on International Law Government Gazettes Online Westlaw International Westlaw China Lexis Library International Laws.Africa
--	---

Search by type of document in English translation: sources consulted

In interpreting and problematising the findings, the reliability of the search is subject to a two-fold caveat. Firstly, access to legal information in many jurisdictions presents a challenge for the researcher: the information available is scant and, for non-English speaking countries, English translations are difficult to find⁵⁹ (some also being of dubious reliability).⁶⁰ Most of the information is available through subscription databases, hence subject to the commercial viability of the product in terms of coverage.⁶¹ Secondly, there is the problem of cultural competence in foreign legal research, which requires the researcher to be knowledgeable about the role and place of individual types of documents in foreign jurisdictions.⁶² In order to minimize the problem of cultural competence in interpreting the findings of the search, relevant information about state's backgrounds, including legal system classification and official languages, has been retrieved from the *JuriGlobe*⁶³ and *GlobalLex* databases.⁶⁴

For the purposes of this study, the body of evidence on which the present analysis is grounded consists of 241 observations. They include 51 pieces of legislation, 150 judgments and 40 constitutions (Table 2.7). All documents have been accessed in English translation.⁶⁵ The rationale for selecting the sample consists of an attempt to provide a balanced selection of sources from different legal traditions, taking into account geographical considerations as well. Considering the challenges of accessing legislation and case law from several jurisdictions,⁶⁶ the examples chosen for this chapter reflect the intent to provide an inclusive and comprehensive overview of state practice on resolutions – one which is not limited to a single legal tradition or geographical region.

Table 2.7

Country	Case law	Legislation	Constitution
Afghanistan	-	-	✓
Andorra	-	-	✓
Angola	-	-	✓
Argentina	7	-	✓
Australia	5	1	-
Bahamas	1	-	-

⁵⁹ Hoffman and Rumsey (n 51) 20-21 ('Most foreign-language statutes do not get translated into English. *As a general rule, the more foreign investment money at stake, the more likely a law will be translated into English.* So, for example, it is easier to find commercial laws than criminal laws, and it is easier to find intellectual property laws than family laws. *By the same token, it is easier to find translations from countries with big economies... than from developing countries*'. Emphasis added).

⁶⁰ *ibid* 29-30; Schaffer and Snyder (n 56) 86.

⁶¹ As discussed in Deplano (n 54).

⁶² Kuhel and O'Brien (n 51) xv (pointing out that the problem is often exacerbated by foreign language barriers).

⁶³ *JuriGlobe* (n 53).

⁶⁴ *GlobalLex* (n 53).

⁶⁵ For an account of the challenges posed by the required multi-jurisdictional, multilingual search and the limits thereof, see *ibid*.

⁶⁶ As detailed in Deplano (n 54) 84-87.

Bangladesh	2	-	-
Belgium	2	-	-
Benin	1	-	-
Bosnia and Herzegovina	-	-	✓
Botswana	1	-	-
Brazil	1	-	-
Cambodia	-	-	✓
Cameroon	-	-	✓
Cape Verde	-	-	✓
Canada	10	5	-
Central African Republic	-	-	✓
Chad	-	-	✓
Chile	2	-	-
Colombia	2	-	-
Comoros	-	-	✓
Congo (Democratic Republic of)	-	-	✓
Congo (Republic of)	-	-	✓
Côte d'Ivoire	1	-	-
Croatia	2	-	-
Cyprus	-	-	✓
Djibouti	1	-	✓
Egypt	1	-	-
El Salvador	-	-	✓
Equatorial Guinea	-	-	✓
Ethiopia	4	-	-
Federal Republic of	1	-	-
Germany	-	-	✓
France	1	-	-
Gabon	5	1	-
Gambia	-	-	✓
Germany	-	-	✓
Guinea	-	-	✓
Guinea Bissau	7	-	-
Haiti	1	-	-
Hong Kong	7	-	-
Hungary	2	-	-
India	1	-	-
Israel	5	-	-
Ireland	4	-	-
Italy	3	-	-
Kenya	-	-	✓
Korea	1	-	-
Lebanon	1	-	-
Macao	-	-	✓
Malawi	-	-	✓
Mali	1	-	-
Mauritania	3	-	-
Mauritius	-	-	✓
Mexico	1	-	✓
Moldova	3	-	-
Mozambique	1	2	-
Netherlands	1	-	✓

New Zealand	-	-	✓
Nicaragua	-	1	-
Niger	1	-	✓
Nigeria	-	-	-
Pakistan	2	-	✓
Papua New Guinea	7	-	-
Paraguay	1	2	✓
Peru	1	-	✓
Philippines	2	-	-
Portugal	12	-	-
Romania	-	12	✓
Russian Federation	-	-	✓
Rwanda	-	-	-
Sao Tome and Principe	1	-	-
Senegal	3	-	✓
Slovakia	4	-	-
Slovenia	2	7	-
Spain	-	1	✓
South Africa	-	-	✓
Swaziland	-	-	✓
Tanzania	-	-	-
Timor-Leste	7	-	-
Togo	9	7	-
Uganda	6	12	✓
United Kingdom	-	-	
United States			
Yemen			
Tot.	150*	51	40

Number of observations by country and source consulted.

* The figure does not include instances in which courts simply refer to resolutions adopting international conventions or references to the Universal Declaration of Human Rights by US federal courts (separately discussed in Chapter 5, Section 5.5).

2.3.3 Level 3: legal significance in international practice

The third level of legal significance of resolutions refers to the instances in which states rely on resolutions to make legal claims with a view to settling disputes in contentious cases or intervening in advisory proceedings before international courts and tribunals. As with the second level of legal significance, reconstructing the size of the population of references to resolutions (verbal and written) by 193 states is, for all practical purposes, impossible. Hence, the analysis consists of the qualitative content analysis of relevant materials – namely, statements made by states before international courts and tribunals referring to resolutions. Similar to the method adopted in the second level (legal significance within domestic law), the search for relevant documents consists of online archival research.⁶⁷ Table 2.8 lists the sources consulted to search the submissions of

⁶⁷ J Church and M McCaffrey, 'International organizations: Available Information and Documentation' in Reinalda (n 28) 27, 39-40 (outlining the complexities of doing research on international organizations, although now facilitated by the advent of online databases).

states before international courts and tribunals. The keywords used are the same as those used for the search of references to resolutions in domestic law.⁶⁸

Table 2.8

Databases
Official websites of the International Courts of Justice
Official websites of the International Tribunal for the Law of the Sea
Official websites of the European Court of Human Rights
Official websites of the Inter-American Court of Human Rights
Official websites of the African Court of Human and Peoples Rights
Jus Mundi

Search by document: sources consulted

The majority of written submissions are available in English and Spanish. French also remains a largely used working language in international law. Occasionally, documents in Portuguese feature in the repositories of regional courts. The selected documents are freely available from the official websites of the selected courts and arbitral tribunals, often in multilingual version.

For the purposes of this study, the notion of international practice remains restricted to the use that states make of resolutions before selected international courts and tribunals. The choice of such a restrictive notion rests on two considerations. First, the manifestations of state practice in international law are manifold. In the absence of a global repository, it is impracticable to gather a representative sample of state practice covering all jurisdictions. Conversely, the full set of state submissions before international courts and tribunals is available for consultation. Secondly, international litigation is a means for settling disputes through legal, as opposed to diplomatic or political, means. State submissions before international courts and tribunals are documents detailing perceived rights and obligations of states under international law. Hence, they are an appropriate means for understanding the degree to which states attach legal significance to the General Assembly resolutions referred to in those documents.

The selection adopted includes international courts and tribunals with global reach in terms of the number of potential state parties subject to them – namely, the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the Permanent Court of Arbitration (PCA) and the International Centre for Settlement of Investment Disputes (ICSID) tribunals. The choice is conducive to an examination of state submissions which are highly representative of the international community. The ICJ and ITLOS also exercise advisory functions. In order to enrich the analysis on state submissions in advisory proceedings, the selection of courts includes three regional courts – namely, the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the African Court of Human and Peoples Rights (ACHPR). In total, the sample consists of 257 state submissions, covering both contentious cases (Table 2.9) and advisory proceedings (Table 2.10).

Table 2.9

ICJ	70
ITLOS	13
PCA	20

⁶⁸ See *supra* Section 2.3.2.

ICSID	7
Tot.	110

Number of references to resolutions in contentious jurisdiction.

Table 2.10

ICJ	127
ECtHR	0
ACHPR	0
IACtHR	11
ITLOS	9
Tot.	147

Number of references to resolutions in advisory jurisdiction

2.4 Conclusion

Grounded on a specific theoretical basis originating in international legal thought, the research design for the empirical component of the present study provides the rationale (accompanied by details about the sources consulted) for conducting quantitative and qualitative content analysis of the selected sample of resolutions and relevant legal sources, both domestic and international. Compared to the research design of previous studies on General Assembly resolutions, it possesses two distinctive features. One is the division of the inquiry into three levels of analysis – namely, the legal significance of resolutions at the adoption stage, within domestic law and in international practice. The other feature is the clustering of resolutions into thematic areas as the basis of the process of sampling.

CHAPTER 3

UNPACKING THE PRACTICE OF THE GENERAL ASSEMBLY

3.1 Introduction

The General Assembly is an institution with unique features. Designed to give representation to each member of the United Nations,¹ effectively it acts as the representative body of the international community of states. This distinctive character stems from the universal mandate and quasi-universal membership of the United Nations.² At the same time, the institutional role of the General Assembly as the plenary organ of the United Nations makes it an institution able to give genuine expression to world opinion, in particular through its decision-making process.

Descriptions of the General Assembly abound. Scholars, delegates and journalists alike have variously referred to it as ‘the world meeting place,’³ ‘the world’s leading forum for political discussion’⁴ and ‘the main deliberative, policymaking, and representative organ of the United Nations.’⁵ Others see it as a world parliament⁶ or, at least, as an institution with similar features.⁷ For instance, some scholars argue that the General Assembly is the repository of the peoples’ entitlement to decide on issues of global concern that may affect them directly.⁸ The World Summit Outcome document also commends the General Assembly for its central role ‘in the process of standard-setting and codification of international law.’⁹

Praise for the work of the General Assembly exists in parallel with fierce criticism about its working methods and functioning. International relations scholars have described the United Nations, and especially the General Assembly, as a dangerous institution.¹⁰ They argue that states have largely abused the broad scope of the General Assembly’s mandate and related powers of discussion to achieve their own goals rather than those of the international community. Specifically, by using the General Assembly as a forum for denouncing the actions of individual countries as contrary to their own understanding of what is acceptable behaviour under the UN Charter, states have created an environment where suspicion and distrust, rather than collaborative efforts, thrive. That is the opposite of an institution aimed at promoting a culture of peace.¹¹

¹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI Art 9 para 1 (‘The General Assembly shall consist of all the Members of the United Nations’).

² The membership of the General Assembly consists of the 193 UN member states. Data available at: www.un.org/en/sections/member-states/about-un-membership/index.html (accessed 31 May 2021).

³ J Kaufmann, *United Nations Decision Making* (Sijthoff & Nordhoof International Publishers 1980) 25.

⁴ R Higgins et al (eds), *Oppenheim’s International Law: United Nations*, vol I (OUP 2017) 14.

⁵ www.un.org/en/ga/revitalization/ (accessed 31 May 2021) (referring to the General Assembly as ‘a true, universal parliament of Nations’).

⁶ UNGA res 60/1 UN Doc A/RES/60/1 (24 October 2015) para 149.

⁷ Kaufmann (n 3) 25.

⁸ T Franck, *Fairness in International Law and Institutions* (OUP 1995) 484 (suggesting that the creation of a second chamber representative of peoples rather than states would help maximize the General Assembly’s potential to develop into a fully democratic institution).

⁹ UNGA res 60/1 (n 6) para 149.

¹⁰ A Yeselson and A Gaglione, *A Dangerous Place: The United Nations as a Weapon in World Politics* (Grossman 1974) 3.

¹¹ *ibid* (describing the United Nations as ‘an arena for combat’).

How is it possible to reach such contrasting conclusions about the same institution? What is the role and function of the General Assembly in international society today? What method of international cooperation does it represent? These are complex questions and the formulation of any answer must take into consideration the fact that the General Assembly is not an organic body. Like its predecessor, the Assembly of the League of Nations, it is a body full of contradictions resembling a permanent diplomatic conference.¹² This has led some commentators to warn against descriptions of the General Assembly as a democratic institution, since the United Nations 'is a club of inter-State cooperation that represents only indirectly the peoples'.¹³ Most importantly, it is not a legislator, as it possesses only recommendatory powers.¹⁴ At the same time, its quasi-universal membership and general mandate make it the organ of the United Nations that can express the conscience of the world, an idea sometimes referred to as world opinion. As Kolb writes,

the United Nations is the only place where, following discussions and debates, an opinion that represents the common will of international society can possibly crystallise, be formulated and eventually be put into practice in certain concrete cases.¹⁵

Despite its functional limitations, the General Assembly is an institution both based on tradition and intimately connected with the idea of an international rule of law – that is to say, international cooperation based on legal principles.¹⁶ It is therefore essential to understand how it routinely operates in its political and institutional environment, thus contributing to the ecosystem of international cooperation under the UN Charter. This chapter evaluates the nuances of the decision making process at the General Assembly, which culminates in the adoption of resolutions. Section 3.2 briefly outlines the procedure of convening the General Assembly. While focusing on procedural aspects for the ease of exposition, it provides insights on how the rules of procedure have shaped the General Assembly's functioning and the extent to which states have used and abused the procedural rules to pursue their own political agenda.

Section 3.3 outlines the General Assembly's decision making powers and related functions. It distinguishes between lawmaking power, which the UN Charter neither attributes to the General Assembly nor explicitly excludes,¹⁷ and the power of recommendation. The former consists of the power of international organizations to adopt binding law. The latter entails the capacity of the international organization to adopt non-binding decisions. The UN Charter describes resolutions of the General Assembly as recommendations. However, the letter of the UN Charter does not exclude the possibility that resolutions may acquire legal significance. This thesis argues that the latter is a matter of empirical assessment.

¹² A Zimmern, *The League of Nations and the Rule of Law 1918-1935* (MacMillan 1945), 459 (describing the League Assembly as full of contradictions, as containing 'a variety and indeed confusions of ideas and projects contributed to its making') and 469 (referring to the Assembly as 'a standing Conference of the majority of States of the world, great and small alike').

¹³ R Kolb, *An Introduction to the Law of the United Nations* (Hart 2010), 121.

¹⁴ *ibid* 124.

¹⁵ *ibid* 176.

¹⁶ MJ Peterson, 'General Assembly' in TG Weiss and S Daws, *The Oxford Handbook on the United Nations* (2nd ed, OUP 2018) 119, 120.

¹⁷ Except for resolutions dealing with internal matters, such as the apportionment of the UN budget. Charter of the United Nations (n 1) Arts 10 and 17.

Section 3.4 thus reconstructs seven decades of General Assembly practice. Based on an original dataset,¹⁸ it sheds light on the working methods and practices informing the functioning of the General Assembly in plenary session as well as its six main committees. For each of them, it provides information about the number of resolutions adopted, their subject matter and voting patterns. This empirical analysis is useful to shed light on the degree of autonomy of the General Assembly from its member states through the analysis of the body of practice developed by both the plenary session and its six main committees. As Gazzini writes,

The degree of autonomy an international organization enjoys is defined principally by the voting procedures of its organs composed of the members' representatives.¹⁹

Building on the empirical findings, Section 3.5 elaborates on the concept of autonomy of the General Assembly and its connection with the process through which resolutions acquire legal significance. Section 3.6 concludes by pointing out that it is not possible to generalize about the functioning of the General Assembly and, consequently, the legal significance of resolutions.

3.2 Convening the General Assembly

The General Assembly adopts resolutions when it convenes in regular and special sessions.²⁰ Regular sessions take place annually and begin with the general debate. Special sessions are *ad hoc* meetings to discuss specific matters of special relevance for member states. The following subsections provide a brief outline of the rules governing the convening of the General Assembly in regular and special sessions. The analysis of procedural rules represents the backdrop for evaluating the nuances of the General Assembly's decision making process in section 3.3.

3.2.1 General debate

The general debate is usually the first debate of the General Assembly's session as well as one of the highlights of the United Nations' year.²¹ With the exception of the high-level meetings,²² it is also the only meeting in which Heads of State and Government regularly participate.²³

The General Assembly's Rules of Procedure establish that the general debate spans across nine consecutive days.²⁴ In practice, it protracts for no more than seven days²⁵ with each meeting lasting

¹⁸ The research methodology is described in Chapter 2, Section 2.3.

¹⁹ T Gazzini, 'The relationship between international legal personality and the autonomy of international organizations' in R Collins and N White, *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 196, 201.

²⁰ Emergency special sessions may also take place under the Uniting for Peace resolution, UN Doc A/RES/377A(V) (1950). They may be convened within 24 hours when the Security Council is unable or unwilling to take action. They address collective security issues and fall outside the scope of this study.

²¹ S Frankel and M Regan (eds), *The PGA Handbook: A Practical Guide to the United Nations General Assembly* (Permanent Mission of Switzerland to the United Nations, 2011) [hereinafter referred to as the PGA Handbook], 78 and 80-81.

²² *ibid* 77.

²³ *ibid* 46.

²⁴ Rules of Procedure of the General Assembly, UN Doc A/520/Rev.18 (21 February 2017) Annex IX, 95.

²⁵ PGA Handbook (n 21) 78.

until all scheduled speakers have spoken.²⁶ According to an established practice, a Protocol or Conference Officer escorts the speakers from their delegation seat to the podium of the General Assembly Hall at the appropriate time. After delivering the speech, the Heads of State usually shake hands with the President of the General Assembly and the Secretary-General on the podium. They are then escorted back to their seat.²⁷

The largely ceremonial character of the general debate dates back to the first General Assembly, which met in London in January 1946 in a solemn atmosphere largely dominated by idealism. In his welcome speech, King George VI affirmed that ‘the rights of both nations and individuals cannot exist and stand secure unless nations and individuals alike are members of an ordered society.’²⁸ That society is the one that gathered in the General Assembly, aptly described by its acting President as ‘the town meeting of the world.’²⁹ Under the circumstances, the general debate served the function of enabling the 32 participating members to ‘state their policy and point of view upon world problems.’³⁰ Unavoidably, without any past practice to build on, the substance of every speech largely consisted of generalities.³¹ For example, the US Secretary of State opened the debate by referring to ‘the common interests which should unite free nations in maintaining a friendly, peaceful world.’³² He accompanied his remarks with a warning against ‘casting excessive burdens’ upon the United Nations.³³ Similarly, the Foreign Secretary of Great Britain stated that it is not possible to ‘change the world in a moment’ and that the UN machinery alone is not a panacea.³⁴ His plea for nurturing a collective sense of belonging to the United Nations as the only way forward to realize the goals of the UN Charter found approval from other delegations, including France³⁵ and China.³⁶ The Soviet Union also condemned any suggestion of reverting to the methods of the League of Nations by amending the UN Charter.³⁷

By the time the second Assembly met in New York in 1947, the idealism surrounding the general debate was largely gone. With the prelude of the Cold War already looming on the horizon, states used the general debate mostly to accuse each other of violating the spirit of the UN Charter rather than facilitating collaborative efforts. In this sense, commentators point out that ‘the Second Assembly [opened] with almost complete lack of ceremony.’³⁸ The radical shift to a more pragmatic approach to the work of the United Nations also transpires from the words of the President of the second General Assembly, who acknowledged that ‘political forces alone will not decide the future of the world. Other factors – economic, social and cultural – will eventually

²⁶ *ibid* 79.

²⁷ *ibid* 80.

²⁸ Rt Hon The Earl of Lytton, *First Assembly: The Birth of the United Nations Organization* (Hutchinson 1946) 19.

²⁹ *ibid* 23 (statement by Dr Zuleta Angel of Colombia). See also F White, *United Nations First Assembly: London 1946* (Stanhope 1946) 13 (attributing the origins of the expression to US Senator Vandenberg).

³⁰ White (n 29) 19.

³¹ *ibid*.

³² *ibid*.

³³ *ibid*.

³⁴ Earl of Lytton (n 28) 44.

³⁵ *ibid* 53.

³⁶ *ibid* 40.

³⁷ *ibid* 50; White (n 29) 21.

³⁸ B Moore, *United Nations Second Assembly: New York* (Stanhope Press 1947) 11.

predominate. The world we want to preserve is one based on persuasion.³⁹ Persuasion, indeed, became the ultimate goal of the regular session's opening meeting.

As a result, for decades the general debate lacked focus, resembling 'a series of monologues in which each head of delegation... undertakes a *tour d'horizon* of the current state of the world's problems as seen in the light of his government's policy.'⁴⁰ This attitude is reminiscent of the practice of states in the League of Nations, where the general debate featured as

a unique occasion, such as was nowhere available under the pre-war system, for the expression of the opinions and conscience of the people represented there. During that week in September Geneva is the best sounding-board in the world. [...] The cumulative effect of the speeches in such a debate is to provide a sort of bird's-eye view of the condition of the world, both political and psychological, at that particular moment.⁴¹

Arguably, the politicization of the general debate has imparted a largely self-serving quality to individual speeches, thus reducing the opening meeting of the General Assembly to a procedural formalism. As a result, attendance at the general debate by delegates has always been rather poor, except for the speeches made by the Heads of the major powers, which often carry with them an element of spectacularization. The images of Khrushchev repeatedly banging his shoe on the delegates' desk,⁴² Castro's address against the United States foreign policy interrupted by 19 rounds of applause,⁴³ Chávez accusing the US President of being the devil⁴⁴ and, more recently, the US President dubbing the leader of North Korea 'little rocket man' while threatening to 'totally destroy' his country⁴⁵ have entered the collective and institutional memory of both the General Assembly and the United Nations.

Yet the general debate remains a widely broadcasted event and the competition to deliver a speech on a strategic day is fierce. Kaufmann reports that '[s]ome diplomats have themselves locked in the [UN Headquarters] building the previous evening, in order to be number one or two the next morning at 9 a.m. when inscription [registration] starts.'⁴⁶ This trend towards strategic self-positioning to deliver this speech appears to persist. In 2017, the President of the General Assembly raised the issue of 'the standards of decorum during the general debate,' referring in particular to the high levels of noise and low levels of attendance when national leaders speak from the podium.⁴⁷

³⁹ *ibid* 13.

⁴⁰ Kaufmann (n 3) 27.

⁴¹ Zimmern (n 12) 477-478.

⁴² Yeselson and Gaglione (n 10) 26.

⁴³ The text of the speech is available at: www.lanic.utexas.edu/project/castro/db/1979/19791012.html (accessed 31 May 2021).

⁴⁴ Excerpts of the speech are available at: www.nytimes.com/2006/09/20/world/americas/20cnd-chavez.html (accessed 31 May 2021).

⁴⁵ The text of the speech is available at: www.whitehouse.gov/briefings-statements/remarks-president-trump-72nd-session-united-nations-general-assembly/ (accessed 31 May 2021).

⁴⁶ Kaufmann (n 3) 27.

⁴⁷ UN Doc A/71/1007 para 9, p 3.

Attempts at modernizing and standardizing the general debate have included a voluntary 15-minute time limit for statements⁴⁸ (which states often disregard⁴⁹) and the duty of delegations to provide 350 copies of their statement in advance to the designated receiving area of the General Assembly Hall if they wish to distribute it.⁵⁰ During the general debate, the right of reply to the statements made by any speaker usually takes place at the end of each day of debate.⁵¹ Alternatively, states can reply by addressing a letter to the Secretary-General, who will then circulate it to all members.⁵² It is also noteworthy that in 2003 the General Assembly decided to organize the general debate around a theme of global concern, as suggested by the President after consulting with member states and the Secretary-General.⁵³ The President usually announces the chosen theme for the general debate in August, well in advance of the opening of the regular session.⁵⁴

3.2.2 Regular sessions

The General Assembly meets on an annual basis. Following a tradition dating back to the League of Nations,⁵⁵ the regular session starts on the Tuesday of the third week of September.⁵⁶ On the recommendation of the General Committee, at the beginning of each session the General Assembly agrees on a closing date for the session.⁵⁷ However, for all practical purposes, it distributes its work throughout the entire year,⁵⁸ effectively remaining in permanent session.⁵⁹ Two distinct parts of a session are thus clearly discernible.

From the opening to Christmas break in December, the activities taking place include the general debate and the work in the six main committees.⁶⁰ This largely replicates the organization of work of the Assembly of the League of Nations, which used to meet in September, albeit only for three weeks.⁶¹ From January to September, the activities taking place include most thematic debates, consultation processes and working group meetings.⁶² The rationale for having an extended part of the session is traceable to the Rules of Procedure, which establish that the General Assembly ‘may decide at any session to adjourn temporarily and resume its meetings at a later date.’⁶³

⁴⁸ PGA Handbook (n 21) 79.

⁴⁹ A/71/1007 (n 47) para 9, p 3.

⁵⁰ PGA Handbook (n 21) 79.

⁵¹ *ibid*

⁵² *ibid*

⁵³ UN Doc A/RES/58/126 (19 December 2003). See also PGA Handbook (n 21) 78.

⁵⁴ PGA Handbook (n 21) 78.

⁵⁵ League of Nations, *Ten Years of World Co-operation* (Hazell 1930), 11.

⁵⁶ Rules of Procedure (n 24) Rule 1.

⁵⁷ *ibid* Rule 2.

⁵⁸ PGA Handbook (n 21) 14 (recognizing that the phenomenon of extended sessions received the General Assembly’s formal endorsement during the 44th session, in 1989-1990). Cf. Higgins (n 4) 19 (reporting that the phenomenon of annual regular sessions started in 1997).

⁵⁹ Higgins (n 4) 19.

⁶⁰ PGA Handbook (n 21) 14.

⁶¹ Zimmermann (n 12) 471 (writing that the first week dealt with the opening formalities and the general debate while the second one hosted the work in Committees, whose reports were the object of thorough scrutiny by the plenary session during the third week).

⁶² PGA Handbook (n 21) 14.

⁶³ Rules of Procedure (n 24), Rule 6.

Regular sessions usually take place at the UN Headquarters in New York.⁶⁴ However, the General Assembly may convene a session elsewhere upon request of a member with the majority of UN members concurring in the request.⁶⁵ The third session, for example, convened in Paris.⁶⁶

3.2.3 Special sessions

Like the Assembly of the League of Nations,⁶⁷ the General Assembly may meet in special session as occasion may require.⁶⁸ A special session is a high-level event whose distinctive characteristic is the participation of Heads of States or Governments and Government Ministers.⁶⁹ Each special session deals with only one issue and its agenda is very short. Some sessions have addressed country-specific issues, such as the situation of Palestine, Tunisia, the Congo, West Africa and Lebanon.⁷⁰ Others have focused on thematic issues, such as the establishment of a new international economic order, development and international economic cooperation, disarmament and narcotic drugs.⁷¹ The outcome of a special session usually consists of a resolution containing a political declaration or an action plan.⁷²

3.3 Decision making powers and related functions

The powers of the General Assembly closely resemble those of the Assembly of the League of Nations.⁷³ The most prominent one is the power to discuss any issue within the scope of the UN Charter, including matters relating to the powers and functions of the primary organs of the UN.⁷⁴ As in the League of Nations, questions relating to the maintenance of international peace and security may be discussed by both the General Assembly and the Security Council.⁷⁵ UN members, non-member states and the Security Council may bring such questions before the General Assembly for consideration.⁷⁶ Likewise, the General Assembly may bring a situation to the attention of the Security Council for consideration.⁷⁷ However, no provision of the UN Charter

⁶⁴ *ibid*, Rule 3.

⁶⁵ *ibid* Rule 4.

⁶⁶ RC Lawson, 'The United Nations Third Assembly at Work', *Current History*, 1 December 1948, 329.

⁶⁷ *Ten Years of World Co-operation* (n 55) 11 (mentioning the special session summoned in March 1926, when Germany applied for admission to the League).

⁶⁸ UN Charter (n 1) Art 20; Rules of Procedure (n 24) Rule 7.

⁶⁹ PGA Handbook (n 21) 14-15.

⁷⁰ See 1st-5th, 8th-9th and 14th special sessions, respectively.

⁷¹ See, for instance, 6th-7th, 10th-11th, 15th and 30th special sessions.

⁷² PGA Handbook (n 21) 14. See, for example UN Doc A/RES/S-30/1 (4 May 2016) adopting a declaration ('joint commitment') to effectively addressing and countering the world drug problem; UN Doc A/RES/S-26/2 (27 June 2001) containing a Declaration of commitment on addressing the global HIV/AIDS epidemic. There have also been instances in which the special session did not adopt any final document, as in the case of the 27th (World Summit for Children), 28th (Commemoration of the 60th anniversary of the liberation of the Nazi concentration camps) and 29th (Follow-up to the Programme of Action of the International Conference on Population and Development beyond 2014) special sessions.

⁷³ Kolb (n 13) 10-11.

⁷⁴ UN Charter (n 1) Art 10; PGA Handbook (n 21) 13. *Ten Years of World Co-operation* (n 55) 11.

⁷⁵ *Ten Years of World Co-operation* (n 55) 11 (stating that the Assembly 'may deal with any matter within the action of the League or affecting the peace of the world').

⁷⁶ UN Charter (n 1) Art 11 para 2.

⁷⁷ *ibid*, Art 11 para 3.

replicates the content of Article XV of the League Covenant, which allowed member states to bring a dispute from the Council to the Assembly.⁷⁸

The General Assembly also has the power to discuss any matter within the scope of the UN Charter and may make recommendations to both member states and the Security Council on any matter considered.⁷⁹ In addition to the attributed powers, some scholars identify the power of the General Assembly to make international legislation,⁸⁰ which entails that the consent of states may be on occasion overruled for the sake of preserving ‘the interest of mankind’.⁸¹ This scholarly position is controversial, as it aims to give legal force to nonbinding instruments like resolutions by invoking an implied lawmaking power of the General Assembly – that is to say, a power that the UN Charter neither authorizes nor excludes.⁸² In particular, there appear to be two main problems with this scholarly position.

First, it is difficult to reconcile the concept of international legislation with the power of recommendation. By definition, recommendations are not deemed to be binding. Secondly, the concept of international legislation is not supported by practice. The only instances of binding instruments adopted against the wishes of member states feature in the constitutive treaties of the UN specialized agencies and a handful of other organizations, although they do not entirely circumvent state consent. For example, Article 21 of the World Health Organization establishes that certain regulations (known as the International Health Regulations) become binding on member states unless individual members opt-out within a fixed period of time.⁸³

It is reasonable to infer from the above that the General Assembly lacks genuine lawmaking powers, since making recommendations is not intended to produce binding law. At the same time, there are limits to the attributed power of recommendation. Thus, Article 12, paragraph 1, of the UN Charter establishes that the General Assembly cannot consider questions relating to the maintenance of international peace and security that are under discussion at the Security Council, unless the Security Council so requests.⁸⁴ This implies that the General Assembly can make a recommendation to the parties concerned on situations not inscribed on the Security Council’s agenda.⁸⁵ However, if action is needed, it must refer the situation to the Security Council.⁸⁶ It is also widely accepted that such limits do not apply to the power of the General Assembly to make recommendations with regard to the general principles of cooperation in the maintenance of

⁷⁸ Covenant of the League of Nations (28 April 1919) Art XV para 9, available at: www.refworld.org/docid/3dd8b9854.html (accessed 31 May 2021). Such provision has been used by the Chinese government in 1932 against Japan and again in the dispute between Bolivia and Paraguay in 1934. In both cases, it led to the convening of an Extraordinary Assembly. See Zimmern (n 12) 479.

⁷⁹ UN Charter (n 1) Art 10.

⁸⁰ See, for instance TO Elias, ‘Modern Sources of International Law’ in W Friedmann, L Henkin and O Lissitzyn (eds), *Transnational Law in a Changing Society* (Columbia University Press 1972) 34, 51 (envisioning the General Assembly as a world parliament).

⁸¹ J Klabbbers, *An Introduction to International Organizations Law* (3rd ed, CUP 2015), 161.

⁸² *ibid*

⁸³ Constitution of the World Health Organization (adopted 22 July 1946, entered into force 23 May 1967) 221 UNTS 1975, Annex A, 360, Art 21.

⁸⁴ UN Charter (n 1) Art 12 para 1.

⁸⁵ *ibid*, Art 11 para 2.

⁸⁶ *ibid*

international peace and security, including the principles governing disarmament and the regulation of armaments.⁸⁷

Beyond the international peace and security area, Article 13 of the UN Charter establishes the power of the General Assembly to initiate studies and make recommendations aimed at promoting international cooperation in both the political field, including encouraging the progressive development and codification of international law,⁸⁸ and the economic and social field, including assisting in the realization of human rights.⁸⁹ The wording of Article 13 of the UN Charter vaguely recalls the power of the Assembly of the League of Nations to advise the reconsideration by member states of treaties which had become inapplicable or the consideration of international conditions whose continuance might have endangered the peace of the world.⁹⁰ By the terms of the UN Charter, the General Assembly may also recommend measures for the peaceful adjustment of any situation that is likely to impair the general welfare or friendly relations among nations, provided that the situation is not being considered by the Security Council.⁹¹

Finally, the General Assembly exercises several functions variously related to its decision making powers, as detailed in the Rules of Procedure.⁹² They include receiving and considering reports issued by primary organs and subsidiary bodies⁹³ as well as electing and appointing its officers⁹⁴ and those of the primary organs.⁹⁵ Like the Assembly of the League of Nations,⁹⁶ it may also appoint the members of the UN judicial organ⁹⁷ and the Secretary-General⁹⁸ based on the recommendation of the Security Council. Likewise, it decides on a state's admission to membership in the United Nations, suspension of membership rights or accession to the ICJ Statute upon the recommendation of the Security Council.⁹⁹ Article 6 of the UN Charter states that the General Assembly may also expel a member for persistent violations of the UN Charter's principles. To date, no member has ever been expelled.¹⁰⁰

In relation to the internal law of the United Nations, as the representative body, the General Assembly considers and approves the budget of the United Nations. On the advice of the Committee on Contributions, it decides on the apportionment of UN expenses to member

⁸⁷ *ibid*, Art 11 para 1. See also Higgins (n 4) 55.

⁸⁸ UN Charter (n 1) Art 13 para 1(a). See also Higgins (n 4) 56.

⁸⁹ UN Charter (n 1) Art 13 para 1(b).

⁹⁰ Covenant of the League of Nations (n 78) art XIX. See also *Ten Years of World Co-operation* (n 55) 11.

⁹¹ UN Charter (n 1) Art 14. See also Higgins (n 4) 56.

⁹² UN Charter (n 1) Art 21; Rules of Procedure (n 24) Rule 163 (establishing that the rules of procedure may be amended by a decision of the majority of members present and voting, after a committee has reported on the proposed amendment).

⁹³ UN Charter (n 1) Art 15.

⁹⁴ *ibid*, Art 21 (referring to the election of the President of the General Assembly); PGA Handbook (n 21) 13.

⁹⁵ UN Charter (n 1) Arts 23 and 61; Rules of Procedure (n 24) Rules 142-146. Rule 92 also establishes that all elections take place by secret ballot without nominations.

⁹⁶ *Ten Years of World Co-operation* (n 55) 11.

⁹⁷ UN Charter (n 1) Arts 93 and Rules of Procedure (n 24) Rules 150-151.

⁹⁸ UN Charter (n 1) Arts 97 and Rules of Procedure (n 24) Rule 141 (prescribing a vote by secret ballot in private meeting).

⁹⁹ By a two thirds majority of the members present and voting. See UN Charter (n 1) Art 4 para 2; Rules of Procedure (n 24) Rule 136. See also Higgins (n 4) 49 and *Ten Years of World Co-operation* (n 55) 11.

¹⁰⁰ Higgins (n 4) 50.

states.¹⁰¹ This aspect of the budgetary function dates back to the First Assembly of the League of Nations.¹⁰² Moreover, on the advice of the Committee on Administrative and Budgetary Questions, it also examines the budget of the specialized agencies with a view to making recommendations to them.¹⁰³ In relation to this aspect, it departs from the practice of the League of Nations, where the technical organizations were immediately responsible to the Council.¹⁰⁴ The budgetary control also extends to the General Assembly's decision-making process, in the sense that all resolutions involving expenditure must receive the approval of the Fifth Committee. The latter consists of both an estimate of expenditures prepared by the Secretary-General and an estimate of the effect on the UN budget prepared by the Fifth Committee.¹⁰⁵

Taken together, the considerations above show that the General Assembly is empowered to adopt only soft law instruments. Looking at the working methods and informal practices of the General Assembly in its various configurations – the plenary session and the six main committees – provides a broad indication of whether states effectively consider the General Assembly as an organ endowed with a will of its own. For example, resolutions adopted by majority vote may signal a genuine expression of the autonomous will of the General Assembly. As such, they may engender the expectation that states will abide by their provisions, thus starting a process of transition from soft law to potentially hard law.

3.4 Unpacking seven decades of practice

The General Assembly in plenary session and the six main committees have the same composition, each committee consisting of all the members of the General Assembly.¹⁰⁶ Like in the Assembly of the League of Nations,¹⁰⁷ committees have developed their own working methods, traditions and practices.¹⁰⁸ As a general rule, the six main committees meet during the main part of the regular session within a time frame for their work decided by the General Assembly at the beginning of each session. By established practice, the First and Fourth Committees do not meet simultaneously. They may nonetheless reconvene during the resumed part of the session, if needed.¹⁰⁹

Unless a state explicitly requests a vote, resolutions are adopted without a vote, thus denoting consensus among states.¹¹⁰ The practice of the General Assembly, however, is not uniform (Figure 3.1). The reconstruction of the resolutions' voting patterns shows that, out of 17,924 resolutions adopted between 1946 and 2018, 11,269 resolutions have been adopted without voting and 6,646 with a vote (Figure 3.2). The data also reveals that from 1946 to 1973, the majority of resolutions

¹⁰¹ UN Charter (n 1) Art 17 para 2; Rules of Procedure (n 24) Rule 160.

¹⁰² UN Charter (n 1) Art 17 para 1. See also ME Burton, *The Assembly of the League of Nations* (University of Chicago Press 1941), 73 and *Ten Years of World Co-operation* (n 55) 2.

¹⁰³ UN Charter (n 1) Art 17 para 3; Rules of Procedure (n 24) Rule 157.

¹⁰⁴ Burton (n 102) 85.

¹⁰⁵ Rules of Procedure (n 24) Rules 152-154.

¹⁰⁶ *ibid* Rule 98; PGA Handbook (n 21) 18 and 62.

¹⁰⁷ Zimmermann (n 12) 473.

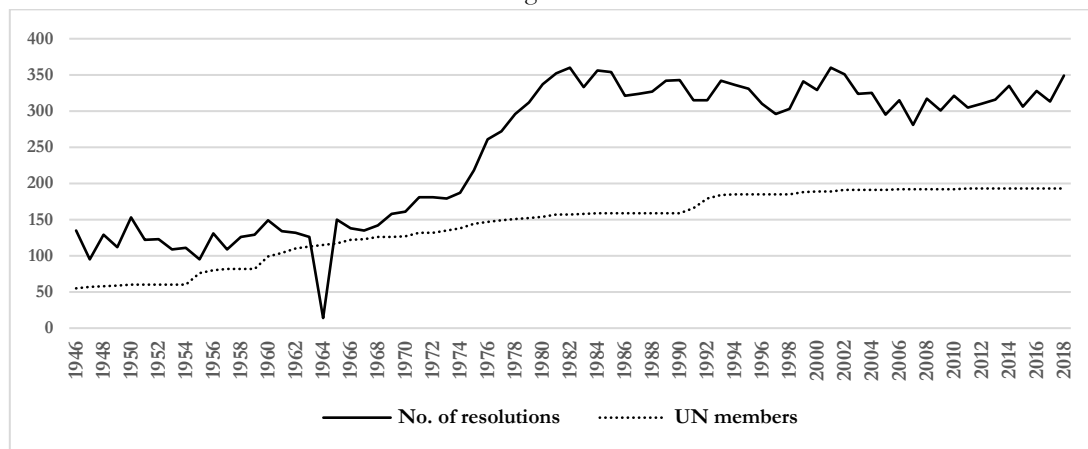
¹⁰⁸ A/71/1007 (n 49) para 32, p 10; PGA Handbook (n 21) 62.

¹⁰⁹ *ibid* 62.

¹¹⁰ *ibid* 55.

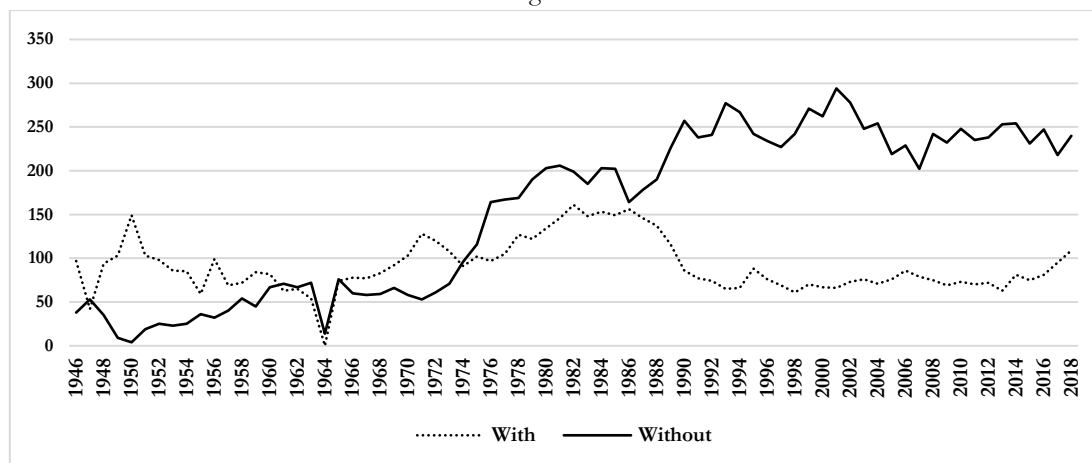
have been put to vote while from 1974 onwards, most of the resolutions have been adopted without voting, notably since 1986 (Figure 3.2).¹¹¹

Figure 3.1



Total number of resolutions adopted (1946-2018) assessed against the increase in UN membership

Figure 3.2



Total number of resolutions adopted with or without a vote (1946-2018)

The graphs' downward spike in 1964 relates to the application of Article 19 of the UN Charter, which states that a member in arrears of payment equalling or exceeding the amount of the contributions due from it for the preceding two years has no right to vote. Following the establishment of a peacekeeping operation in the Congo in 1960, a group of eight states – namely, the Soviet Union, Byelorussia, Czechoslovakia, Hungary, Poland, Romania, Ukraine and France – refused to contribute to the costs of the peacekeeping operation lamenting the illegality of the

¹¹¹ See also N White, 'Decision-making' in J Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Elgar 2011) 225, 228 (noting the shift to consensus since the late 1980s); J Wouters and P De Man, 'International organizations as law-makers' in ibid 190, 195; K Zemanek, 'Majority Rule and Consensus Technique in Law-Making Diplomacy' in RSJ MacDonald and M Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Nijhoff 1989) 857, 862-863. More broadly, Schermers and Blokker point out that the move to consensus decision making has been discernible in a number of international organizations since the 1960s. HG Schermers and NM Blokker, *International Institutional Law* (6th rev ed, Brill/Nijhoff 2018), 561, para 772.

General Assembly's apportionment.¹¹² This caused a constitutional crisis, which almost paralyzed the functioning of the General Assembly. In order to deal with such an extraordinary situation and circumvent the application of Article 19 of the UN Charter, member states agreed to adopt 'draft proposals by consensus'.¹¹³ As a result, that year the General Assembly adopted only 14 resolutions without a vote. In 1965, it resumed its regular functioning.

Apart from the 1964 incident, there appears to be no single cause or factor that could explain the move of the General Assembly towards consensus decision making. Article 18 of the UN Charter does not expressly recognize consensus. It only mentions majority voting based on the principle of one-country one-vote.¹¹⁴ A possible explanation is that the expansion in membership following the creation of new independent states as part of the process of decolonization has made majority voting in many respects impractical.¹¹⁵ However, adopting resolutions without voting – that is to say, by consensus – is not synonymous with unanimity. Consensus is the making of decisions, including adopting resolutions, without a vote or formal objection.¹¹⁶ This means that it is a procedure that allows states casting reservations not to block the resolution, for whatever reason. According to the UN Office for Legal Affairs:

in United Nations practice, consensus is generally understood to mean adoption of a decision without formal objections and vote; this being possible only when no delegation formally objects to a consensus being recorded, though some delegations may have reservations to the substantive matter at issue or a part of it.¹¹⁷

Scholars point out that recourse to consensus presents disadvantages. One is that it is time consuming, as it allows states to debate options until a general agreement is reached.¹¹⁸ Another disadvantage is that protracted discussion facilitates political compromise. As a result, the content of resolutions may be diluted and become very abstract.¹¹⁹ More significant from an international institutional law perspective is the fact that the shift from majority voting to consensus appears to suggest a gradual shift from high to lower levels of autonomy of the General Assembly from its member states.¹²⁰ It is widely accepted that majority voting enables the international organization (and organs thereof) to take action even against a minority of dissenting member states. In this sense, decisions taken by majority are a manifestation of the separate will of the international

¹¹² C Tomuschat, 'Article 19' in B Simma et al (ed), *The Charter of the United Nations: A Commentary* vol I (3rd ed, OUP 2012) 637, 640-642; RO Keohane, 'Political Influence in the General Assembly' 557 (1966) *Int'l Conciliation* 49-52.

¹¹³ Higgins (n 4) 43. See also Schermers and Blokker (n 111) 563-564, para 774.

¹¹⁴ UN Charter (n 1) Article 18, para 1, reads: 'Each member of the General Assembly shall have one vote'. Schermers and Blokker refer to the one-state one-vote principle as the principle of equality of voting power of all member states. Schermers and Blokker (n 111) 577, para 791.

¹¹⁵ Wouters and De Man (n 111) 197; Schermers and Blokker (n 111) 574, para 784 and 576, para 789 (noting that the requirement of majority voting is more common in small international organizations, such as Benelux, EFTA or OPEC).

¹¹⁶ Wouters and De Man (n 111) 194. Cf Klabbbers (n 81) 178 (noting that there is very little practical difference between unanimity and consensus).

¹¹⁷ UN Office of Legal Affairs, 'Meaning of consensus in the practice of the United Nations' (1987) *United Nations Juridical Yearbook*, 174.

¹¹⁸ Schermers and Blokker (n 111) 562, para 772.

¹¹⁹ White (n 111) 229.

¹²⁰ As described in Chapter 1, Section 1.4.3.

organization.¹²¹ Conversely, the more inclusive nature of consensus supports the view of the international organization as a genuine forum for discussion (*agora*).¹²² There are, however, no neat and clean lines between the implications stemming from the reliance on one decision making technique or the other.

As Figure 3.2 shows, most resolutions of the General Assembly are now adopted by consensus. Equally, influential resolutions have been adopted by majority vote. They include the Declaration on the Granting of Independence to Colonial Countries and Peoples (adopted with nine abstentions)¹²³ and the resolutions on Permanent Sovereignty over Natural Resources (adopted with 2 negative votes and 12 abstentions).¹²⁴

Another caveat is that the considerations above are based on a generalization of the practice of the General Assembly, in the sense that they refer to the total number of resolutions adopted. However, the working methods and informal practices of the General Assembly impart a distinctive character to the ways in which the plenary session and each of the six main committees function. The recommendations of the main committees influence the course of action of the General Assembly in plenary session, where all the resolutions are eventually adopted: each main committee debates and votes on drafts resolutions; it then produces a report providing information about the official documents considered, the speakers invited to make statements besides member states as well as recommendations to the plenary session.¹²⁵ This is a largely overlooked stage of the decision making process. The following sub-sections examine the practice of both the plenary session and the main committees with a view to providing a more nuanced picture of the practical functioning of the General Assembly – hence, its degree of autonomy from member states.

3.4.1 Plenary session

According to established practice, the General Assembly in plenary session usually adopts the resolutions recommended by the main committees. Resolutions adopted by consensus in a committee are usually adopted by consensus in plenary session as well. Likewise, resolutions put to vote in a committee are usually put to vote in plenary session as well.¹²⁶ This points to the existence of informal practices that supplement the General Assembly's Rules of Procedure. Furthermore, an overview of the work of the plenary session since 1946 reveals that resolutions falling short of consensus in the main committees also fail to achieve consensus in plenary session. Such resolutions have effectively become frozen items in the General Assembly's agenda featuring

¹²¹ Wouters and De Man (n 111) 196; White (n 111) 225 and 231. Conversely, decisions by unanimity do not fit well functionalism, since unanimity gives a *de facto* veto to every member, potentially leading to paralysis. J Charney, 'Universal International Law' 87 (1993) AJIL 529. Schermers and Blokker remain ambiguous on this point; see Schermers and Blokker (n 111) 60, para 59 (arguing that binding decisions require unanimous approval) and 62, para 62 ('Binding decisions are taken by majority vote in most organizations').

¹²² White (n 111) 226 (elaborating on voting methods as crucial to the functionalist/constitutionalist debate).

¹²³ UN Doc A/RES/1514(XV) (14 December 1960). Voting data available at <http://research.un.org/en/docs/ga/quick/regular/15> (accessed 31 May 2021).

¹²⁴ UN Doc A/RES/1803(XVII) (14 December 1962). Voting data available at <http://research.un.org/en/docs/ga/quick/regular/17> (accessed 31 May 2021). Cf White (n 111) 232 (reporting 14 abstentions and a negative vote).

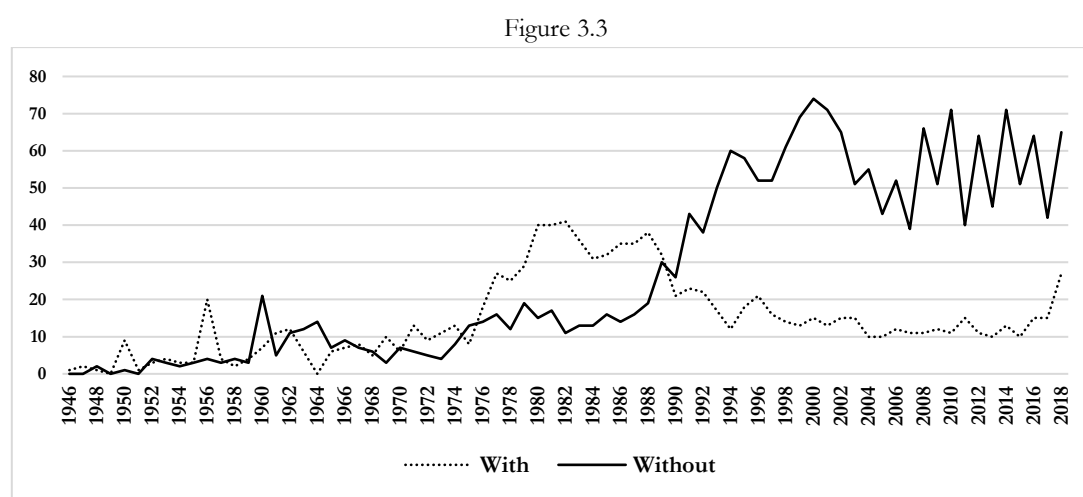
¹²⁵ PGA Handbook (n 21) 62.

¹²⁶ *ibid*

regularly in the debates of the plenary session. Examples include the resolutions on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples¹²⁷ and those on the dissemination of information on decolonization,¹²⁸ both initially discussed by the Fourth Committee, as well as the resolutions on coercive economic measures¹²⁹ coming from the work of the Second Committee.

The General Assembly in plenary session can also discuss matters not included in a committee's agenda. They address mainly country-specific situations, some of which have become a perennial issue on the plenary's agenda. The foremost example is the cluster of resolutions on the Cuban embargo: condemned year after year by the overwhelming majority of UN member states, it is still in place, thus denoting the essentially political nature of General Assembly resolutions and their inability to prompt change in state behaviour simply by virtue of their adoption.¹³⁰ In general, in terms of subject matter, the attention of the plenary session appears to have gradually switched from the regulation of armament to socio-economic aspects of international cooperation, including promoting a fair economic globalization.

An examination of voting patterns also shows that from 1946 to 2018, the General Assembly in plenary session has adopted 3,058 resolutions, of which 1,076 were with a vote and 1,981 without voting (Figure 3.3).¹³¹ Among the resolutions put to vote, 21 have been adopted with no negative votes cast by the members present and voting. The voting pattern closely resembles that of the total number of resolutions adopted by the General Assembly since 1946 (Figure 3.2), except for the fact that the resolutions adopted from 1976 to 1989 have been put to vote rather than adopted by consensus.



Total number of resolutions adopted with or without a vote in plenary session (1946-2018)

The longest cluster of restated resolutions, comprising 58 resolutions, is the one on the report of the International Atomic Energy Agency (Table 3.1)¹³² while the resolutions on the

¹²⁷ UN Doc A/RES/2878(XXVI) (20 December 1971) and following ones.

¹²⁸ UN Doc A/RES/2879(XXVI) (20 December 1971) and following ones.

¹²⁹ UN Doc A/RES/51/22 (27 November 1996) and following ones.

¹³⁰ UN Doc A/RES/47/19 (24 November 1992) and following ones.

¹³¹ No voting pattern in available for a resolution adopted in 1994.

¹³² UN Doc A/RES/1242(XIII) (30 October 1958) and following ones.

implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples¹³³ are those adopted with the narrowest majority (Table 3.2). Among them, the most contested resolution is resolution 2642(XXV) on the representation of China in the United Nations¹³⁴ while the resolution with the highest number of abstentions is resolution 51/22 on the elimination of coercive economic measures as a means of political and economic compulsion.¹³⁵

Table 3.1

1.	Report of the International Atomic Energy Agency (58 resolutions)
2.	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (34 resolutions)
3.	Dissemination of information on decolonization (32 resolutions)
4.	Strengthening of the coordination of humanitarian emergency assistance (29 resolutions)
5.	Oceans and the law of the sea (24 resolutions)

List of the five longest clusters of restated resolutions adopted in plenary session (1946-2018)

Table 3.2

1.	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples
2.	Elimination of coercive measures as a means of political and economic compulsion
3.	Return of cultural property to the countries of origin
4.	Judgment of the ICJ concerning military and paramilitary activities in and against Nicaragua (1986)
5.	Sovereign debt restructuring

List of the five most contested clusters of restated resolutions adopted in plenary session (1946-2018)

This broad overview of the type of resolutions adopted in plenary session reveals a connection between voting patterns and subject matter of resolutions. Specifically, it appears that the resolutions dealing with issues related to the regulation of armaments are mostly associated with majority voting while those dealing with socio-economic aspects of international cooperation are closely related to decision making by consensus. As stated above, the international institutional law literature describes majority voting as a manifestation of the autonomy of the international organization to act as a decision maker in its own right, taking decisions even against the will of some of its member states.¹³⁶ Conversely, consensus decisions resemble an agreement without opposition among the member states. They are therefore associated with the idea of the international organization as an *agora* (a forum for discussion).¹³⁷

Taken together, the considerations above reveal an aspect of the degree of autonomy of the General Assembly. According to one interpretation, the General Assembly turns out to be an autonomous decision maker in relation to the regulation of armaments and a standard setting institution for issues related to socio-economic cooperation. However, the contrary interpretation is equally plausible, since states may adopt resolutions by majority voting in order to protect their national interest. The fact that some of the resolutions adopted with the greatest levels of opposition address issues of international cooperation (Table 3.2) also shows that there is no perfect match between voting patterns and subject matter. As Österdahl observes, 'In practice, the

¹³³ UN Doc A/RES/1514(XV) (14 December 1960) and following ones.

¹³⁴ UN Doc A/RES/2642(XXV) (19 November 1970), adopted with 66 votes in favour, 52 against and 7 abstentions.

¹³⁵ UN Doc A/RES/51/22 (27 November 1996), adopted with 56 votes in favour, 4 against and 76 abstentions.

¹³⁶ White (n 111) 231 ('majority decision-making underpins a functionalist approach'); Wouters and De Man (n 111) 196 ('The practice of majority voting fits better the functionalist approach').

¹³⁷ *ibid* 197 ('Both unanimity and consensus support a more constitutionalist approach').

structure of the organizations tends to be the result of a mixture between the managerial perspective and the perspective of the *agora*.¹³⁸

It is therefore advisable to keep the empirical findings in perspective and consider them as only indicative of broad trends, and degrees of autonomy and related expectations on the possibility of resolutions acquiring legal significance.

3.4.2 First Committee

The First Committee is the Disarmament and International Security Committee. In terms of composition, it hosts several delegates who are also members of the Conference on Disarmament in Geneva.¹³⁹ Each meeting opens with a general debate followed by a discussion of the agenda items. The committee's practice is to hold thematic debates about clusters of agenda items. There are currently seven such clusters: nuclear weapons, other weapons of mass destruction, outer space, conventional weapons, regional disarmament and security, international security and the disarmament machinery.¹⁴⁰ The last meeting of each thematic discussion usually includes informal interactions with civil society organizations.¹⁴¹ Two subsidiary bodies – namely, the Conference on Disarmament and the Disarmament Commission – also report through the First Committee.¹⁴²

Most of the First Committee's work revolves around two broad themes – namely, disarmament and weapons of mass destruction. It is however possible to single out three different phases in the work of the committee. The first phase covers the period of time from 1946 to the end of the 1970s. Resolutions adopted during this period aim at promoting peaceful coexistence of states by regulating aspects of the reduction of armaments,¹⁴³ nuclear and biological weapons,¹⁴⁴ peaceful uses of both the ocean¹⁴⁵ and outer space¹⁴⁶ as well as peace and friendship among states,¹⁴⁷ including good neighbourliness,¹⁴⁸ non-intervention in the domestic affairs of states¹⁴⁹ and the essentials of peace.¹⁵⁰ The second phase covers the 1980s. In terms of subject matter, the resolutions adopted reflect some of the main concerns of the international community during the Cold War, as evidenced by the introduction of three new thematic clusters. They are: scientific and technological advancements for peaceful purposes,¹⁵¹ the concept of collective security¹⁵² and the question of Antarctica.¹⁵³

¹³⁸ I Österdahl 'International organizations – institutions and organs' in Klabbers and Wallendahl (n 111) 156, 157.

¹³⁹ PGA Handbook (n 21) 63.

¹⁴⁰ *ibid*

¹⁴¹ *ibid*

¹⁴² *ibid*

¹⁴³ UN Doc A/RES/41(I) (14 December 1946) and following ones.

¹⁴⁴ UN Doc A/RES/2603(XXIV) (16 December 1969) and following ones.

¹⁴⁵ UN Doc A/RES/2340(XXII) (18 December 1967) and following ones.

¹⁴⁶ UN Doc A/RES/1348(XIII) (13 December 1958) and following ones.

¹⁴⁷ UN Doc A/RES/504(VI) (19 January 1952) and following ones.

¹⁴⁸ UN Doc A/RES/1236(XII) (14 December 1957).

¹⁴⁹ UN Doc A/RES/2131(XX) (21 December 1965) and following ones.

¹⁵⁰ UN Doc A/RES/290(IV) (1 December 1949) and following ones.

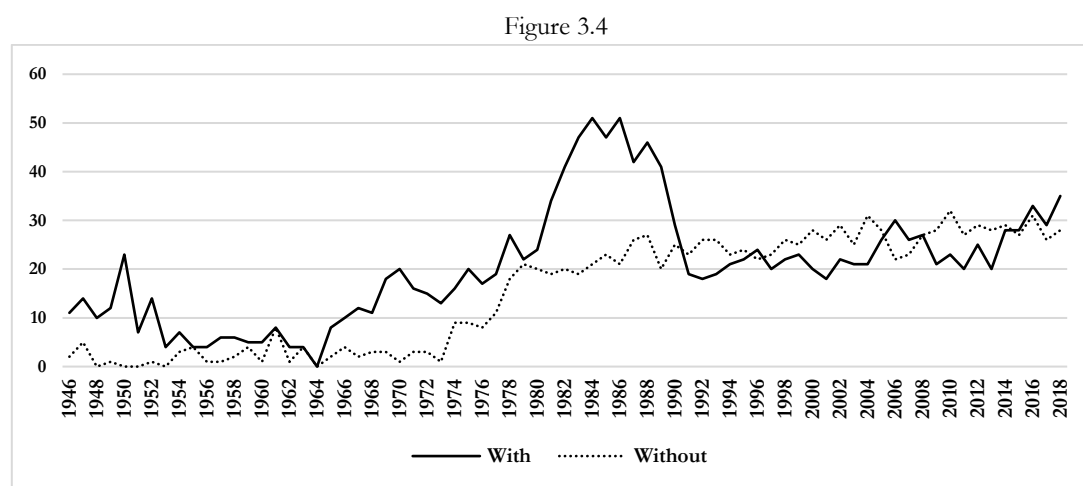
¹⁵¹ UN Doc A/RES/37/77B (9 December 1982) and following ones.

¹⁵² UN Doc A/RES/37/119 (16 December 1982) and following ones.

¹⁵³ UN Doc A/RES/38/77 (15 December 1983) and following ones.

The third phase coincides with the end of the Cold War and extends to the present. While continuing to devote much attention to issues of disarmament and weapons of mass destruction, the work of the committee now addresses issues affecting the interests of civilian populations rather than states. This is in line with the development of the Security Council's practice, which includes thematic, as opposed to country-specific, clusters of resolutions on civilians, women and children in armed conflict.¹⁵⁴ Newly introduced clusters of resolutions include the relationship between development and disarmament,¹⁵⁵ control of conventional arms¹⁵⁶ and landmines,¹⁵⁷ the observance of environmental norms in the drafting and implementation of disarmament and arms control agreements¹⁵⁸ as well as the role of women in disarmament, non-proliferation and arms control.¹⁵⁹ Another distinctive feature of the post-Cold War resolutions is the attempt by the First Committee to ensure state compliance with previous commitments on non-proliferation and disarmament.¹⁶⁰

The information contained in the *Practical Guide to the United Nations General Assembly* (known as the *PGA Handbook*) also reveals that the resolutions adopted by the First Committee are negotiated under the facilitation of the sponsor and tabled only when the draft text is ready for adoption.¹⁶¹ As a result, the analysis of voting patterns shows that, of the 2,628 resolutions adopted between 1946 and 2018, 1,506 were adopted with a vote and 1,119 without voting (Figure 3.4).¹⁶² Among those put to vote, 22 have been adopted with no negative votes cast by the members present and voting.



Total number of resolutions adopted with or without a vote by the First Committee (1946-2018)

¹⁵⁴ R Deplano, *The Strategic Use of International Law by the United Nations Security Council: An Empirical Study* (Springer 2015) 37-45.

¹⁵⁵ UN Doc A/RES/46/36C (6 December 1991) and following ones.

¹⁵⁶ UN Doc A/RES/48/75J (16 December 1993) and following ones.

¹⁵⁷ UN Doc A/RES/51/45S (10 December 1996) and following ones.

¹⁵⁸ UN Doc A/RES/50/70M (12 December 1995) and following ones.

¹⁵⁹ UN Doc A/RES/65/69 (8 December 2010) and following ones.

¹⁶⁰ See, for instance, UN Doc A/RES/63/59 (2 December 2008); UN Doc A/RES/59/75 (3 December 2004); UN Doc A/RES/42/38J (30 November 1987).

¹⁶¹ PGA Handbook (n 21) 63.

¹⁶² See also *ibid.*

The longest cluster of restated resolutions, comprising 55 resolutions, is the one on general and complete disarmament¹⁶³ (Table 3.3) while the resolutions adopted with the narrowest majority are those on the Convention on the prohibition of the use of nuclear weapons¹⁶⁴ (Table 3.4). The resolution adopted with the narrowest majority is resolution 58/43 on confidence-building measures and conflict prevention¹⁶⁵ while the two resolutions with the highest number of abstentions are resolution 55/33A on missiles¹⁶⁶ and resolution 40/152H on the prohibition of the nuclear neutron weapon.¹⁶⁷

Table 3.3

1.	General and complete disarmament (55 resolutions)
2.	Chemical and bacteriological (biological) weapons (42 resolutions)
3.	Suspension of nuclear and thermo-nuclear tests (34 resolutions)
4.	Regional disarmament (30 resolutions)
5.	Prevention of an arms race in outer space (28 resolutions) Bilateral nuclear arms negotiations (28 resolutions)

List of the five longest clusters of restated resolutions adopted by the First Committee (1946-2018)

Table 3.4

1.	Convention on the Prohibition of the Use of Nuclear Weapons
2.	Nuclear disarmament
3.	Prohibition of the use of nuclear neutron weapons
4.	Advisory Opinion of the ICJ on the legality of the threat or use of nuclear weapons
5.	The role of science and technology in the context of international security, disarmament and other related fields

List of the five most contested clusters of restated resolutions adopted by the First Committee (1946-2018)

The patterns of practice of the First Committee to an extent resemble the ones of the plenary session.¹⁶⁸ Like in the plenary session, there appears to be a direct link between methods of decision making and subject matter of resolutions. On the one hand, the first two phases of the work of the First Committee display a marked tendency to rely on majority voting. Coupled with the observation that the majority of resolutions adopted during this period concern matters closely related to the protection of state sovereignty against armed attacks, this can be seen as symptomatic of a high degree of autonomy of the General Assembly.

On the other hand, the fact that resolutions are usually tabled only when they are ready to be adopted points to the opposite direction. In relation to resolutions concerning friendly relations among states and the maintenance of international peace and security, the First Committee appears to be a diplomatic platform with no real separate identity from its member states. Conversely, the majority of resolutions adopted in the third phase are consensus resolutions dealing with issues related to the rights of civilians caught in armed conflict rather than the interest of states. Like in

¹⁶³ UN Doc A/RES/1378(XIV) (20 November 1959) and following ones.

¹⁶⁴ UN Doc A/RES/1801(XVII) (14 December 1962) and following ones.

¹⁶⁵ UN Doc A/RES/58/43 (8 December 2003), adopted with 73 votes in favour, 48 against and 46 abstentions.

¹⁶⁶ UN Doc 55/33A (20 November 2000), adopted with 97 votes in favour, zero against and 65 abstentions.

¹⁶⁷ UN Doc A/RES/40/152H (16 December 1985), adopted with 70 votes in favour, 11 against and 65 abstentions.

¹⁶⁸ See Section 3.4.1 above.

the plenary session, the post-Cold War the First Committee resembles an *agora* and a standard-setting institution. This engenders opposing expectations as to the legal significance of resolutions.

3.4.3 Second Committee

The Second Committee is the Economic and Financial Committee. Delegates working in the Second Committee often cover the work of ECOSOC as well due to the largely overlapping mandate of the two bodies.¹⁶⁹ Like in the First Committee, a brief general debate opens the committee's meetings. Debates of individual, rather than thematic, items follow. A peculiarity of the Second Committee is that it hosts ongoing negotiations throughout the duration of its work. However, there are no subsidiary bodies reporting through it.¹⁷⁰

The Second Committee mainly deals with economic and financial issues affecting developing countries. Two features characterize its work. The first is the presence of four major themes – namely, international trade, the protection of the environment, global financial integration and human settlements. The second consists of the presence of several small size thematic clusters of resolutions, each contributing to the development of the four major themes. They include those on the resources of the sea,¹⁷¹ the protection of global climate,¹⁷² desertification,¹⁷³ the development of energy resources of developing countries¹⁷⁴ and the Convention on Biological Diversity.¹⁷⁵ However, certain clusters appear to contradict each other. For instance, it is difficult to harmonize the principles contained in the cluster of resolutions calling for the establishment of a New International Economic Order¹⁷⁶ with those calling for the strengthening of the Bretton Woods Institutions.¹⁷⁷ This suggests that ideological conflict at the General Assembly did not cease with the end of the Cold War. As Voeten writes, the attenuated East-West conflict now appears to unfold in parallel with the North-South ideological conflict.¹⁷⁸

An internal practice has evolved according to which the resolutions adopted by the Second Committee are usually tabled by the Chair of the G-77 and China before they are negotiated.¹⁷⁹ They are also mostly adopted by consensus at every stage of its work.¹⁸⁰ An examination of the voting patterns shows that out of a total of 2,616 resolutions adopted between 1946 and 2018, 569 have been adopted with a vote and 2,046 without voting (Figure 3.5). From 1973 onwards, the resolutions adopted without voting regularly outnumber those put to vote. Among those put to vote, 44 have been adopted with no negative votes cast by the members present and voting.

¹⁶⁹ PGA Handbook (n 21) 64 (providing a list of broad agenda items allocated to the Second Committee. They include globalization and interdependence, elimination of poverty and sustainable development).

¹⁷⁰ *ibid*

¹⁷¹ Doc A/RES/2172(XXI) (6 December 1966).

¹⁷² UN Doc A/RES/43/53 (6 December 1988) and following ones.

¹⁷³ UN Doc A/RES/3337(XXIX) (17 December 1974) and following ones.

¹⁷⁴ UN Doc A/RES/37/251 (21 December 1982) and following ones.

¹⁷⁵ UN Doc A/RES/49/117 (19 December 1994) and following ones.

¹⁷⁶ UN Doc A/RES/63/224 (19 December 2008) and following ones.

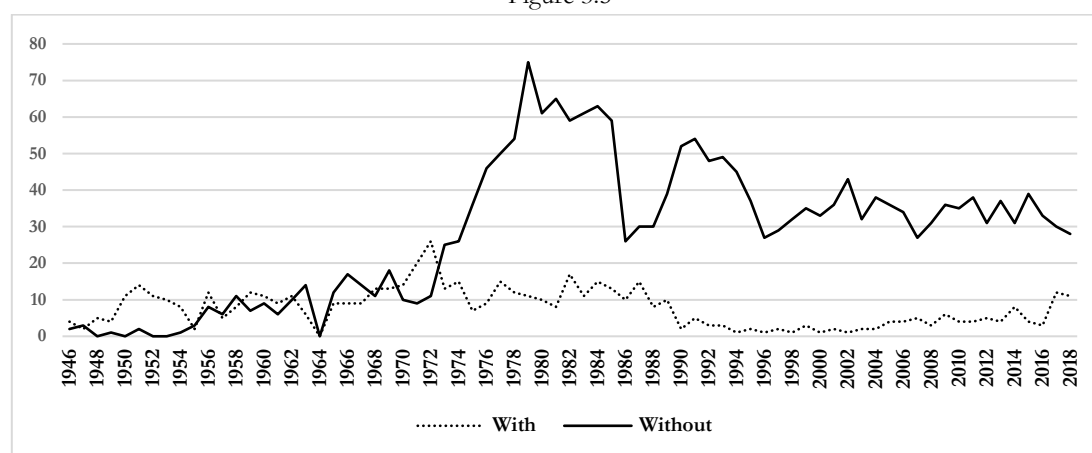
¹⁷⁷ UN Doc A/RES/51/166 (16 December 1996).

¹⁷⁸ E Voeten, 'Data and Analyses of Voting in the United Nations General Assembly' in B Reinalda (ed), *Routledge Handbook of International Organization* (Routledge 2013), 54-66.

¹⁷⁹ PGA Handbook (n 21) 64; Kaufmann (n 3) 35.

¹⁸⁰ PGA Handbook (n 21) 64; A/71/1007 (n 49) para 35, p 11.

Figure 3.5



Total number of resolutions adopted with or without a vote by the Second Committee (1946-2018)

The longest cluster of restated resolutions, comprising 38 resolutions, is the one on the UN Institute for Training and Research¹⁸¹ (Table 3.5) while the resolutions on economic measures as a means of political and economic coercion against developing countries¹⁸² are those adopted with the narrowest majority (Table 3.6). The resolution adopted with the highest number of negative votes is resolution 71/236¹⁸³ while the resolution with the highest number of abstentions is resolution 63/224,¹⁸⁴ both on the New International Economic Order.

Table 3.5

1. UN Institute for Training and Research (38 resolutions)
2. International trade and development (25 resolutions)
3. Convention on biological diversity (24 resolutions)
4. International convention to combat desertification (21 resolutions)
5. Financing of economic development of underdeveloped countries (19 resolutions)

List of the five longest clusters of restated resolutions adopted by the Second Committee (1946-2018)

Table 3.6

1. Economic measures as a means of coercion against developing countries
2. Towards a New International Economic Order
3. Agricultural technology for development
4. International trade and development
5. International economic security

List of the five most contested clusters of restated resolutions adopted by the Second Committee (1946-2018)

The pattern of practice of the Second Committee differs from the patterns observed in both the plenary session¹⁸⁵ and the First Committee.¹⁸⁶ In the Second Committee, the subject matter of resolutions mostly revolves around selected aspects of economic cooperation rather than collective security issues which may pose a threat to state sovereignty. The fact that a selected number of

¹⁸¹ UN Doc A/RES/1827(XVII) (18 December 1962) and following ones.

¹⁸² UN Doc A/RES/38/197 (20 December 1983) and following ones.

¹⁸³ UN Doc A/RES/71/236 (21 December 2016), adopted with 131 votes in favour, 49 against and 4 abstentions.

¹⁸⁴ UN Doc A/RES/63/224 (19 December 2008), adopted with 123 votes in favour, 1 against and 52 abstentions.

¹⁸⁵ See supra Section 3.4.1.

¹⁸⁶ See supra Section 3.4.2.

individual countries has taken the role of sponsor to secure the adoption of consensus resolutions suggests that the Second Committee is mainly a forum for discussion and a standard setting platform. It thus fits neatly with the image of the General Assembly as an *agora* rather than that of a world parliament or global legislator.¹⁸⁷ In theory, this should enhance the chances of voluntary compliance with resolutions, thus increasing expectations for progressively higher levels of legal significance attached to resolutions.

3.4.4 Third Committee

The Third Committee is the Social, Humanitarian and Cultural Committee. It is also known as ‘the ladies committees’, since historically more women have acted as delegates in this committee than in any other.¹⁸⁸ The composition of the Third Committee is symptomatic of the wider, and persistent, problem of gender representation in the General Assembly and the United Nations. For example, of the 75 Presidents of the General Assembly so far elected, only four have been women. Likewise, women are severely underrepresented in the main committees.¹⁸⁹ Up to 2018, only four women have been Chair in the Fourth Committee¹⁹⁰ while in the Fifth Committee the gender stereotype spreads to cover its administrative support as well. Tellingly, in the history of the Fifth Committee, only two women have been Chair while the composition of its Secretariat features only women.¹⁹¹

The Third Committee’s longest clusters of resolutions, spanning across decades, equally address the three areas of its remit. Social issues include the fight against narcotic drugs,¹⁹² policies on youth¹⁹³ and freedom of information.¹⁹⁴ Humanitarian issues include the problem of refugees,¹⁹⁵ the right to self-determination of peoples,¹⁹⁶ the protection of human rights in general and a number of specific rights in particular, such as ageing,¹⁹⁷ torture¹⁹⁸ and the rights of women and children.¹⁹⁹ Cultural issues include racial discrimination,²⁰⁰ apartheid²⁰¹ and religious intolerance.²⁰² However, it is difficult, and perhaps not useful, to draw a neat and clean line between thematic areas, since social, humanitarian and cultural considerations largely overlap. Likewise, there are instances in which the work of the Third Committee overlaps with the work of other main committees. For example, issues related to globalization and unilateral coercive measures also

¹⁸⁷ J Klabbers, ‘Two Concepts of International Organization’ 2 Int’l Org L Rev (2005) 277, 282.

¹⁸⁸ Kaufmann (n 3) 37; AM Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2002) 136-137.

¹⁸⁹ A/71/1007 (n 49) para 13, p 45.

¹⁹⁰ *ibid* para 34, p 11.

¹⁹¹ *ibid* para 37, p 12 (also pointing out that the Committee’s Bureau is predominantly made of women).

¹⁹² See, for instance, UN Doc A/RES/1774(XVII) (7 December 1962).

¹⁹³ UN Doc A/RES/1572(XV) (18 December 1960) and following ones.

¹⁹⁴ UN Doc A/RES/59(I) (14 December 1946) and following ones.

¹⁹⁵ UN Doc A/RES/8(I) (12 February 1946) and following ones.

¹⁹⁶ UN Doc A/RES/637(VII)A (16 December 1952) and following ones.

¹⁹⁷ UN Doc A/RES/213(III) (4 December 1948).

¹⁹⁸ UN Doc A/RES/3059(XXVIII) (2 November 1973) and following ones.

¹⁹⁹ UN Doc A/RES/56(I) (11 December 1946) and following ones.

²⁰⁰ UN Doc A/RES/1780(XVII) (7 December 1962) and following ones.

²⁰¹ UN Doc A/RES/2144(XXI)A (26 October 1966) and following ones.

²⁰² UN Doc A/RES/1684(XVI) (18 December 1961) and following ones.

feature in the Second Committee's agenda while the rule of law features in the Sixth Committee's agenda.

It is nonetheless possible to identify three different stages in the work of the Third Committee. The first one comprises the resolutions adopted from 1946 until the 1970s. It is in this period of time that the longest clusters of restated resolutions emerged (Table 3.7). They still feature regularly on the Third Committee agenda. The second stage includes the 1980s and 1990s. Somehow anticipating, and possibly facilitating, the end of the Cold War, resolutions adopted in this period aim at delineating a view of world order based on democratic principles. Of particular relevance are the clusters of resolutions on popular participation,²⁰³ periodic and genuine elections²⁰⁴ and the monitoring of the electoral process in countries transitioning to democracy.²⁰⁵ Finally, the clusters of resolutions of the twenty-first century extend the democratic principles elaborated in the second stage to the international order. Prominent examples include the resolutions addressing the effects of globalization on the enjoyment of human rights²⁰⁶ and a democratic and equitable international order.²⁰⁷ Recently introduced on the Committee's agenda, the rights of indigenous peoples²⁰⁸ and the right to privacy in the digital age²⁰⁹ appear to be consolidating into new thematic clusters.

Delegates to the Third Committee often include delegates to the UN Human Rights Council, which is a subsidiary organ of the General Assembly. The distinctive feature of the working methods of the Third Committee is that they remain flexible and rather unstructured. For instance, no general debate takes place at the beginning of a meeting and no subsidiary body reports through it.²¹⁰ As a general rule, the resolutions of the Third Committee are tabled by states without seeking previous agreement on the draft text.²¹¹

The analysis of voting patterns shows that, between 1946 and 2018, the Third Committee has adopted 3,193 resolutions, about 30 percent of which (1,005) are by vote²¹² and the remaining 70 per cent (2,186) without voting (Figure 3.6). Similar to the resolutions of the Second Committee (Figure 3.5), starting from 1976, the majority of resolutions have been adopted by consensus. Among those put to vote, 37 have been adopted with no negative votes cast by the members present and voting.

²⁰³ UN Doc A/RES/37/55 (3 December 19) and following ones.

²⁰⁴ UN Doc A/RES/43/157 (8 December 1988) and following ones.

²⁰⁵ UN Doc A/RES/44/147 (15 November 1989) and following ones.

²⁰⁶ UN Doc A/RES/54/165 (17 December 1999) and following ones.

²⁰⁷ UN Doc A/RES/55/107 (4 December 2000) and following ones.

²⁰⁸ UN Doc A/RES/66/142 (19 December 2011) and following ones.

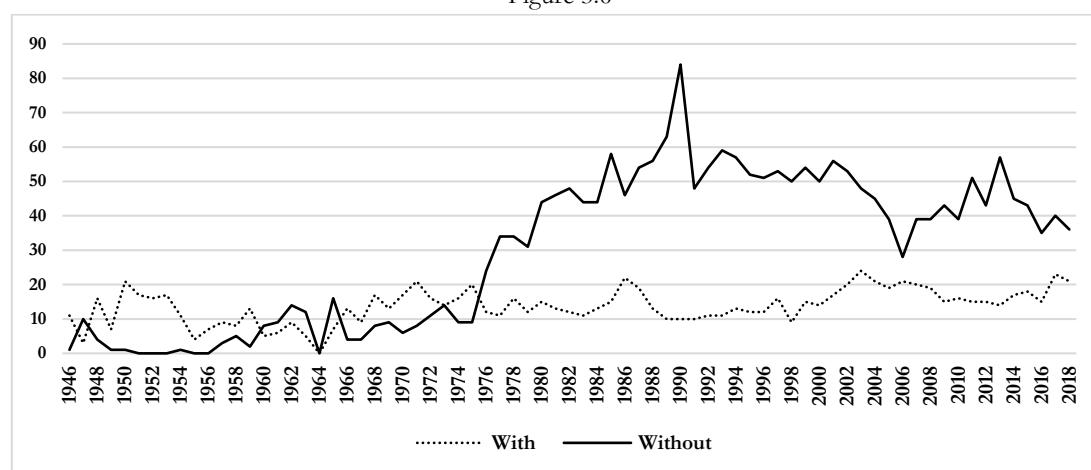
²⁰⁹ UN Doc A/RES/68/167 (18 December 2013) and following ones.

²¹⁰ PGA Handbook (n 21) 65.

²¹¹ *ibid*

²¹² *ibid*

Figure 3.6



Total number of resolutions adopted with or without a vote by the Third Committee (1946-2018)

The longest cluster of restated resolutions, comprising 39 resolutions, is the one on human rights and scientific and technological developments²¹³ (Table 3.7). The three clusters of restated resolutions adopted with the narrowest majority are those on non-interference in the internal affairs of states, promotion of a democratic and equitable international order and human rights and unilateral coercive measures (Table 3.8). The resolution adopted with the narrowest margin of support is resolution 68/144 on the report of the Human Rights Council²¹⁴ while the resolution with the highest number of abstentions is resolution 67/139 on the rights and dignity of older persons.²¹⁵

Table 3.7

1.	Human rights and scientific and technological developments (39 resolutions)
2.	Universal realization of the rights of peoples to self-determination (37 resolutions)
3.	Office of the High Commissioner for Refugees (34 resolutions)
4.	Right to development (32 resolutions)
5.	Report of the UN High Commissioner for Refugees (30 resolutions)

List of the five longest clusters of restated resolutions adopted by the Third Committee (1946-2018)

Table 3.8

1.	Respect for the principles of national sovereignty and non-interference in the internal affairs of states in relation to their electoral processes
2.	Promotion of a democratic and equitable international order
3.	Human rights and unilateral coercive measures

²¹³ UN Doc A/RES/38/197 (20 December 1983) and following ones.

²¹⁴ UN Doc A/RES/2450(XXIII) (19 December 1968), adopted with 94 votes in favour, 71 against and 23 abstentions. Arguably, this is also the most contested resolutions adopted by the General Assembly to date. It concerned the division of labour between the Third Committee and the Human Rights Council. In particular, the resolution prevented the General Assembly to reopen for consideration an issue discussed by the Human Rights Council – namely, the issue of reprisals against human rights defenders – when the relevant Human Rights Council resolution does not contain any specific recommendation for the General Assembly or the Security Council. According to some delegations, this would set a dangerous precedent and undermine the credibility of the Human Rights Council. For others the General Assembly has the right to revisit decisions of the Human Rights Council, which remains a subsidiary body. Moreover, there appears to be past practice in other areas covered by the Human Rights Council supporting this interpretation. See, for instance, UN Doc A/68/PV.70 (18 December 2013), p. 6 (statement by the United States) and 8-9 (statement by the Cameroon).

²¹⁵ UN Doc A/RES/63/224 (19 December 2008), adopted with 123 votes in favour, 1 against and 52 abstentions.

4.	Promotion of peace as a vital requirement for the enjoyment of human rights by all
5.	Globalization and its impact on the full enjoyment of human rights

List of the five most contested clusters of restated resolutions adopted by the Third Committee (1946-2018)

In terms of voting patterns, the body of practice developed by the Third Committee mirrors the one of the Second Committee. Since the mid-1970s, the vast majority of resolutions has been adopted by consensus, thus denoting the character of both committees as an *agora*. At the same time, it appears that the Third Committee has consistently relied upon majority voting to adopt resolutions condemning economic and political practices, such as recourse to unilateral coercive measures, that impinge upon the enjoyment of human rights recognized by both the Third Committee and the General Assembly in plenary session. The foremost example is the right to self-determination, which is also mentioned in the two Covenants on Human Rights (1966).²¹⁶ In doing so, the Third Committee acts as an authoritative body attempting to impose the will of the General Assembly over the will of its member states.

This is a manifestation of functionalism at the General Assembly in its full extent, despite the fact that resolutions are not as such binding on member states. Under these circumstances, the related expectation of legal significance of resolutions finds its justification in the General Assembly relying upon and reiterating norms already shared by the international community, thus contributing to their consolidation and development. Here lies the main difference between the resolutions adopted by majority in the Third Committee and groups of restated resolutions adopted by majority in the Second Committee, such as those on the New International Economic Order: the latter do not support norms widely accepted by the international community. As Peterson also notes, '[c]ontroversial norms and rules, no matter how often restated in the assembly, will not elicit much compliance'.²¹⁷

In conclusion, it appears that the resolutions adopted by consensus in the Third Committee are a genuine attempt to streamline rules and principles widely shared by the international community while those adopted by majority attempt to enforce them on recalcitrant states. This aligns with White's broader view that 'international organizations do not simply carry out functions as delegated to them by states, but using their separate will, they create laws and enforce those laws'.²¹⁸ The caveat, though, is that the General Assembly possesses only recommendatory, as opposed to proper lawmaking, powers.

3.4.5 Fourth Committee

The Fourth Committee is the Special Political and Decolonization Committee. It deals with a range of items mainly pertaining to decolonization issues and the situation in the Middle East. In 1994, the General Assembly decided to merge the former Special Political Committee with the Fourth Committee.²¹⁹ As a result, most of the delegates to this committee are Middle East experts and

²¹⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

²¹⁷ MJ Peterson, *The UN General Assembly* (Routledge 2006) 101.

²¹⁸ White (n 111) 232.

²¹⁹ UN Doc A/RES/47/233 (17 August 1993) para 4. See also Kaufmann (n 3) 34.

military advisers.²²⁰ A peculiarity of the Fourth Committee's working methods is that the agenda items on decolonization are always debated jointly.²²¹ In addition, various subsidiary bodies report through it, including the Special Committee on Decolonization and the Special Committee on Peacekeeping Operations.²²²

In dealing with decolonization issues, the Fourth Committee is completely autonomous from the Security Council. This marks a major point of departure from its predecessor, the Sixth Committee of the Assembly of the League of Nations. While charged with dealing with such questions as mandates and minorities,²²³ the latter effectively exercised a supervisory function over issues falling within the mandate of the Council.²²⁴

In many respects, the Fourth Committee is also different from the other main committees of the General Assembly. Not only are the number of resolutions adopted by it significantly lower than the number adopted by the other committees, but the range of issues covered is remarkably narrow. As a result, the practice of the Fourth Committee consists for the most part of clusters of restated resolutions spanning across decades. They concentrate on two main areas. One is the process of decolonization, with emphasis on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples by both the UN member states²²⁵ and UN specialized agencies.²²⁶ The other area deals with the monitoring of information from the Non-Self-Governing Territories.²²⁷ Following the independence of the last Non-Self-Governing Territory, Palau, and the subsequent termination of the Trusteeship Council's mandate, the Fourth Committee decided to introduce agenda items on new subject areas. It is noteworthy that, in contrast with most of its practice, the clusters of resolutions on the peaceful use of outer space²²⁸ and peacekeeping operations²²⁹ have both been entirely adopted by consensus.

According to established practice, the resolutions passed by the Fourth Committee are usually negotiated in advance.²³⁰ In addition, the resolutions addressing issues taking place in the Middle East are usually adopted with a vote while the others by consensus.²³¹ As a result, it turns out that out of a total of 1,552 resolutions adopted between 1946 and 2018, 925 resolutions have been adopted with a vote and 626 without voting (Figure 3.7). Among those put to vote, 13 have been adopted with no negative votes cast by the members present and voting.

²²⁰ PGA Handbook (n 21) 66.

²²¹ *ibid*

²²² *ibid*

²²³ Zimmermann (n 12) 473.

²²⁴ *ibid* 473-474.

²²⁵ UN Doc A/RES/59/136 (10 December 2004) and following ones

²²⁶ UN Doc A/RES/2311(XXII) (14 December 1967) and following ones.

²²⁷ UN Doc A/RES/551(VI) (7 December 1951) and following ones.

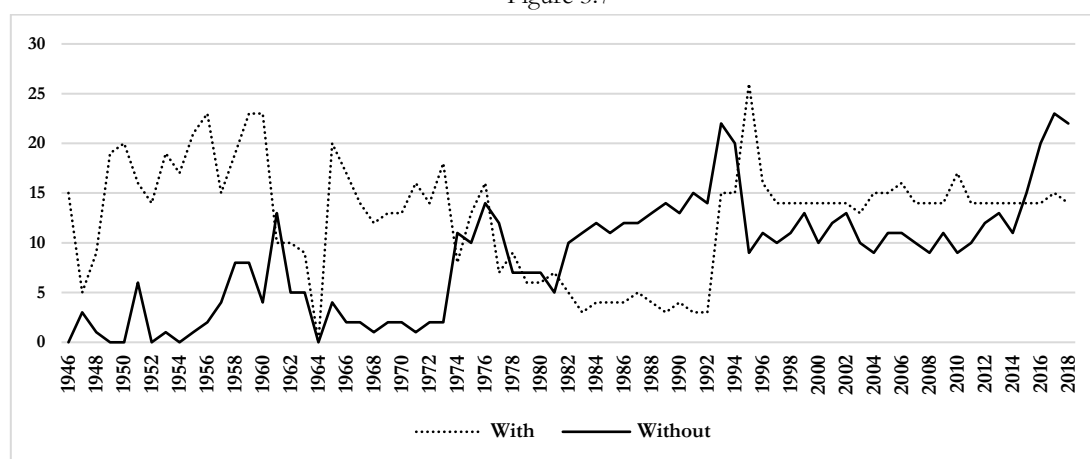
²²⁸ UN Doc A/RES/48/39 (10 December 1993) and following ones.

²²⁹ UN Doc A/RES/48/42 (10 December 1993) and following ones.

²³⁰ PGA Handbook (n 21) 66.

²³¹ *ibid*

Figure 3.7



Total number of resolutions adopted with or without a vote by the Fourth Committee (1946-2018)

The longest cluster of restated resolutions – and, indeed, the longest of all the General Assembly’s thematic clusters, comprising 65 resolutions – is the cluster on offers by member states of study and training facilities for inhabitants of Non-Self-Governing territories (Table 3.9) while the cluster of restated resolutions adopted with the lowest level of support is the one dealing with economic activities deemed to impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples²³² (Table 3.10). The resolution adopted with the narrowest majority is resolution 50/33²³³ while the resolution with the highest number of abstentions is resolution 33/40.²³⁴ Both resolutions deal with the activities of foreign economic interests which are deemed to impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

Table 3.9

1. Offers by member states of study and training facilities for inhabitants of Non-Self-Governing territories (65 resolutions)
2. Questions relating to information (45 resolutions)
3. Information from Non-Self-Governing territories (35 resolutions)
4. Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the UN specialized agencies (30 resolutions)
5. Effects of atomic radiation (25 resolutions) Peacekeeping cooperation (25 resolutions)

List of the five longest clusters of restated resolutions adopted by the Fourth Committee (1946-2018)

Table 3.10

1. Activities of foreign economic and other interests in the territory of developing countries
2. Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples
3. Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the UN specialized agencies
4. Attainment by the Trust Territories of the objective of self-determination
5. Cessation of the transmission of information under Article 73(e) UN Charter

List of the five most contested clusters of restated resolutions adopted by the Fourth Committee (1946-2018)

²³² UN Doc A/RES/2288(XXII) (7 December 1967) and following ones.

²³³ UN Doc A/RES/50/33 (6 December 1995), adopted with 93 votes in favour, 51 against and 3 abstentions.

²³⁴ UN Doc A/RES/33/40 (13 December 1978), adopted with 83 votes in favour, 14 against and 84 abstentions.

Unlike the other main committees, the Fourth Committee's working methods determine in advance when recourse to majority voting applies. Such a systematic approach cannot be considered a genuine manifestation of the autonomous will of the General Assembly. Given its composition, featuring military advisers and the fact that resolutions are usually negotiated in advance, it seems that states utilise the Fourth Committee as a platform for diplomatic exchanges on issues related to decolonization and intractable conflict situations in the Middle East. In this respect, the will of states effectively prevails over the will of the General Assembly, although the resolutions adopted are formally attributed to the General Assembly. It is reasonable to infer from this that the related expectation of legal significance of resolutions remains fairly low.

3.4.6 Fifth Committee

The Fifth Committee is the Administrative and Budgetary Committee. It is responsible for the UN biennial programme budget, the annual peacekeeping budget, human resources and oversight issues. It also examines all the resolutions with budgetary implications before they are adopted in plenary session.²³⁵ Most of the delegates in the Fifth Committee are experienced diplomats.²³⁶ Several subsidiary bodies – such as the Joint Inspection Unit, the Board of Auditors and the Advisory Committee on Administrative and Budgetary Questions – also report through it.²³⁷

The committee's working methods are meticulously structured. The consideration of agenda items starts with the introduction of a report for individual items. A general discussion follows. After a round of informal consultations, the committee's secretariat prepares a draft resolution, which is presented to states. If consensus is reached, the proposal gets tabled and formally adopted by the committee.²³⁸ As a result, the overwhelming majority of resolutions are adopted by consensus: out of 3,162 resolutions adopted between 1946 and 2018, only 738 have been adopted with a vote while 2,424 without voting (Figure 3.8). Unlike the other main committees and the plenary session, the practice of the Fifth Committee is not amenable to classification into thematic clusters of resolutions. Nonetheless, it appears that the most contested resolution is resolution 60/260 on the strengthening of the United Nations²³⁹ while the resolution with the highest number of abstentions is resolution 66/283 on the status of internally displaced persons in Georgia.²⁴⁰

Figure 3.8

²³⁵ PGA Handbook (n 21) 67.

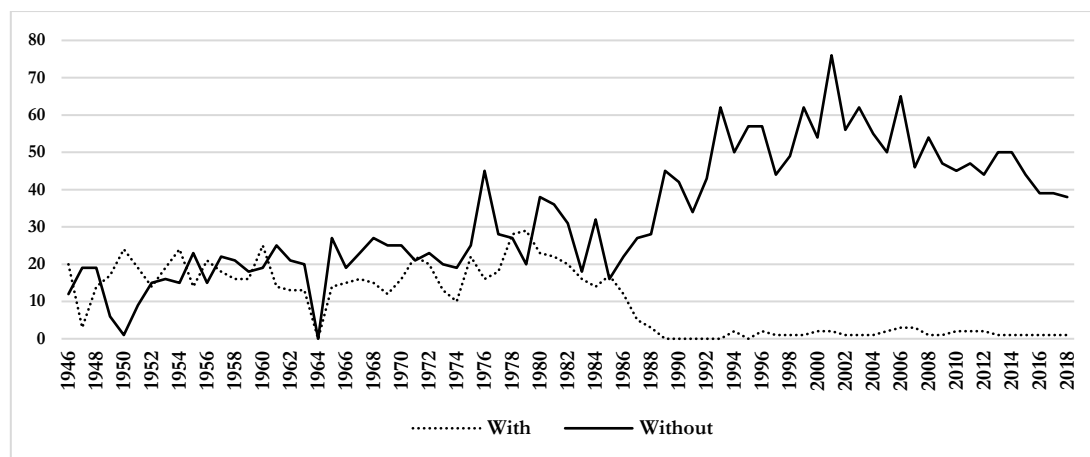
²³⁶ *ibid*

²³⁷ *ibid*

²³⁸ *ibid*. The consensus-based procedure for the United Nations budget was introduced by resolution 41/213; UN Doc A/RES/41/213 (19 December 1986).

²³⁹ UN Doc A/RES/60/260 (8 May 2006), adopted with 121 votes in favour, 50 against and 2 abstentions.

²⁴⁰ UN Doc A/RES/66/283 (3 July 2012), adopted with 60 votes in favour, 15 against and 82 abstentions.



Total number of resolutions adopted with or without a vote by the Fifth Committee (1946-2018)

The legal nature of the resolutions adopted by the Fifth Committee is different from the other resolutions adopted by the General Assembly. By virtue of article 17 of the UN Charter, they are binding on member states. Given its structured working methods, the resolutions of the Fifth Committee adopted by consensus, especially after the end of the Cold War, are essentially the equivalent of resolutions adopted by unanimity.²⁴¹ As a result, both resolutions adopted by majority and resolutions by consensus are an expression of the autonomous will of the General Assembly – hence, a manifestation of ‘managerial’ functionalism.²⁴²

3.4.7 Sixth Committee

The Sixth Committee is the Legal Committee. It deals with all aspects of international law and other legal matters concerning the UN. Accordingly, most of the delegates to the Sixth Committee are legal advisors or diplomats.²⁴³ A number of subsidiary bodies, including the International Law Commission and the UN Commission on International Trade Law, also report through it.²⁴⁴

The work of the Sixth Committee mainly complements the work of the other main committees. Therefore, all agenda items are debated individually.²⁴⁵ However, compared to the work of the other main committees, the Sixth Committee’s clusters of restated resolutions tend to be relatively few. They include: reservations to multilateral conventions,²⁴⁶ the concept of international criminal jurisdiction,²⁴⁷ the question of defining aggression²⁴⁸ and the principles of international law concerning friendly relations among states.²⁴⁹ The discussion of many such issues often consists of a review of reports commissioned by the General Assembly to the International Law Commission. Clusters of restated resolutions generated only by the work of the Sixth Committee

²⁴¹ A different issue is whether states are capable or willing to meet their financial obligations. For an overview of the debate, see Klabbbers (n 81) 113-129.

²⁴² In the international institutional law literature, functionalism is sometimes identified as managerialism as opposed to constitutionalism, which resembles an inclusive, deliberative process. See Klabbbers (n 187) 280.

²⁴³ PGA Handbook (n 21) 68.

²⁴⁴ *ibid*

²⁴⁵ *ibid*

²⁴⁶ UN Doc A/RES/478(V) (16 November 1950) and following ones.

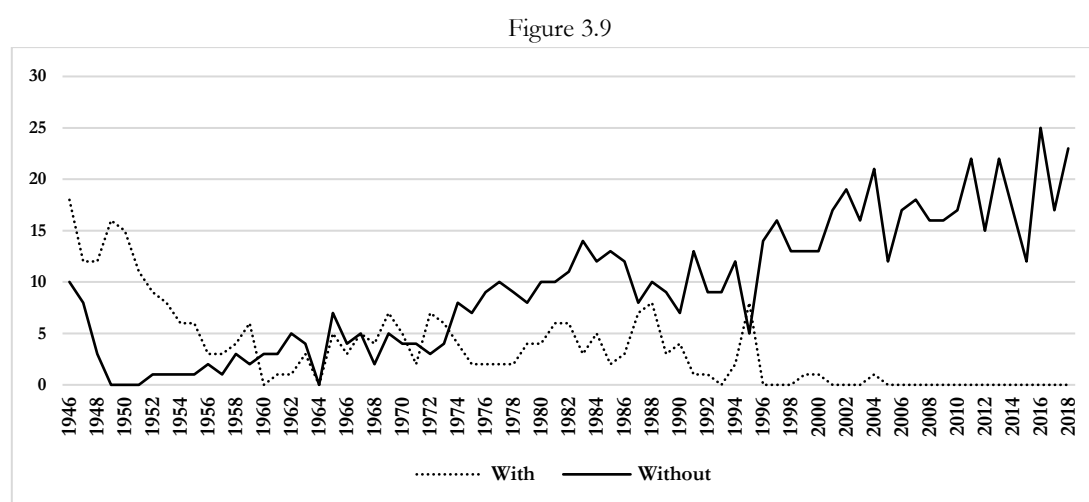
²⁴⁷ UN Doc A/RES/489(V) (12 December 1950) and following ones.

²⁴⁸ UN Doc A/RES/599(VI) (31 January 1952) and following ones.

²⁴⁹ UN Doc A/RES/1815(XVII) (18 December 1962) and following ones.

include the consolidation and progressive development of the legal aspects of the New International Economic Order²⁵⁰ and, more recently, the rule of law at the national and international levels.²⁵¹ A notable change in the Sixth Committee's practice of the post-Cold War era is the attention dedicated to various aspects of private international law, mostly in collaboration with the UN Commission on International Trade Law.

Given its peculiar composition, the resolutions of the Sixth Committee are usually tabled only after they have been negotiated and adopted by consensus.²⁵² The total number of resolutions adopted between 1946 and 2018 amounts to 952. Among them, 260 resolutions have been adopted with a vote and 692 without voting (Figure 3.9). Among the resolutions put to vote, 46 have been adopted with no negative votes cast by the members present and voting.



Total number of resolutions adopted with or without a vote by the Sixth Committee (1946-2018)

The longest clusters of restated resolutions, comprising 62 resolutions, is the one on the report of the work of the International Law Commission²⁵³ (Table 3.11) while the cluster of restated resolutions adopted with the narrowest majority is the one on the observer status of national liberation movements²⁵⁴ (Table 3.12). The resolution adopted with the lowest level of support is resolution 59/280 on the United Nations Declaration on Human Cloning²⁵⁵ while the resolution with the highest number of abstentions is resolution 43/171A on the development and strengthening of good-neighbourliness between states.²⁵⁶

Table 3.11

1.	Report of the International Law Commission on its work (62 resolutions)
2.	Report of the Committee on Relations with the Host Country (48 resolutions) Report of UNCITRAL (48 resolutions)
3.	Report of the Special Committee on the Strengthening of the Role of the Organization (43 resolutions)
4.	Measures to prevent international terrorism (34 resolutions)

²⁵⁰ UN Doc A/RES/34/150 (17 December 1979) and following ones.

²⁵¹ UN Doc A/RES/61/39 (4 December 2006) and following ones.

²⁵² PGA Handbook (n 21) 68.

²⁵³ UN Doc A/RES/373(IV) (6 December 1949) and following ones.

²⁵⁴ UN Doc A/RES/33/96 (16 December 1978) and following ones.

²⁵⁵ UN Doc A/RES/59/280 (8 March 2005), adopted with 84 votes in favour, 34 against and 37 abstentions.

²⁵⁶ UN Doc A/RES/43/171A (9 December 1988), adopted with 123 votes in favour, 1 against and 52 abstentions.

5. Technical assistance to promote the teaching of international law (27 resolutions)

List of the five longest clusters of restated resolutions adopted by the Sixth Committee (1946-2018)

Table 3.12

1. Report of the Special Committee on enhancing the effectiveness of the principle of non-use of force in international relations
2. Question of aggression
3. Consolidation of the principles and norms of the New International Economic Order
4. Observer status of national liberation movements recognized by the Organization of African Unity and the League of Arab States
5. Draft Code of Offences against the Peace and Security of Mankind

List of the five most contested clusters of restated resolutions adopted by the Sixth Committee (1946-2018)

The trends in the practice of the Sixth Committee present similarities with those in the First and the Fourth Committees in that most resolutions are negotiated in advance. At the same time, it shares with the Second and Third Committees the feature that, since the 1970s, the overwhelming majority of resolutions has been adopted by consensus. What this suggests is that, in the light of the subject matter of resolutions and their levels of state support (Table 3.12), states genuinely use the Sixth Committee as an *agora* to discuss issues mainly pertaining to the private international law area. The situation is more ambiguous in relation to issues related to the preservation of national sovereignty, such as the use of force or aggression. In relation to them, states may simply be using the Sixth Committee as a forum for restating – rather than discussing and negotiating – preconceived state positions. As a result, the image of the separate will of the General Assembly does not neatly emerge from the overview of the practice of the Sixth Committee. On the one hand, the expectation of legal significance of the private international law resolutions is significantly high. On the other hand, it appears that the debates at the General Assembly, rather than the text *per se* of resolutions on sensitive political issues, have the potential to affect governments' choices over time, thus contributing to the evolution of the international context.²⁵⁷

3.5 Conceptualising the autonomy of the General Assembly

The preceding analysis suggests that the mainstream approach to the study of the law of international organizations – that is to say, functionalism – does not provide any solid guidance to determine the degree of autonomy of the General Assembly from its members and the related expectations as to the legal significance of resolutions. It appears that, by looking at the voting patterns in plenary session and the six main committees, functionalism lacks explanatory power.²⁵⁸ Alternatively, the practice of the General Assembly both in plenary session and within the six main committees is exceptional and, as such, it does not fit functionalism's theoretical premises. Either way, there must be an explanation for the mismatch.

One possible explanation is that functionalism, as envisioned in the literature,²⁵⁹ is mostly associated with the presence of lawmaking powers – that is to say, the capability of international

²⁵⁷ Peterson (n 217) 38.

²⁵⁸ See also Wouters and P De Man (n 111) 207 (arguing that 'the functionalist approach does not suffice to explain the dynamics of law-making by international organizations').

²⁵⁹ J Klabbbers, 'Theorizing International Organizations' in A Orford and F Hoffmann, *The Oxford Handbook of the Theory of International Law* (OUP 2016), 618; id, 'The Transformation of International Organizations Law' 26 EJIL

organizations to adopt binding decisions. In the case of the General Assembly, the UN Charter contemplates the power of recommendation, which consists of the power to adopt decisions aimed at influencing state conduct without creating new law.²⁶⁰ Be that as it may, the power of recommendation is nonetheless a form of decision making of the international organization. As a conferred power, it is intimately related to the concept of international legal personality of the organization and the related idea of autonomy.²⁶¹ Indeed, broadly speaking, functionalism aims at elucidating the relationships between the international organization and its member states. It therefore appears that, by excluding the power of recommendation from its remit, functionalism downplays the role of states as both the constituent members of the international organization and their counterparts (that is to say, sovereign entities in their own right).²⁶² In this respect, functionalism turns out to be an incomplete theory.

A more likely reason for the apparent mismatch between the theory of functionalism and the empirical evidence on the body of practice developed by the General Assembly lies in the fact that simply looking at voting patterns cannot reveal any reliable – or, at least, not entirely reliable – information about the degree of autonomy of the General Assembly from its member states. Voting patterns are a static indicator of the outcome of the decision making process. They do not provide any insight into the exchanges leading to the final outcome. As Engström writes, ‘[a]lthough a decision of an organization may seem unitary, it is arrived at only through a deliberation, sometimes even between competing views’.²⁶³

It follows that evaluating the working methods and informal practices of both the plenary session and the six main committees provides a better indicator of the degree of the General Assembly from its member states. Indeed, the empirical findings show that the trends in practice of the General Assembly depart from the theoretical underpinnings of functionalism in at least two respects.

First, the distinction between majority and consensus resolutions is not *per se* indicative of either the separate will of the General Assembly or its character of *agora*. At best, the connection between subject matter of resolutions and the observation of voting patterns over time (as opposed to individual votes) suggests that, when it comes to adopting resolutions on issues closely related to state sovereignty, states use the General Assembly as a gathering of states where the individual positions of states count at face-value and are not amenable to compromise. An alternative, and perhaps more convincing, explanation is that the working methods and practices of certain committees are deliberately designed to preserve state interests in certain areas. The analysis of the body of practice in the First, the Fourth and the Sixth Committees appears to confirm this.²⁶⁴

(2016) 9; id, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’ 25 EJIL (2014) 645.

²⁶⁰ Klabbers (n 81) 163-168.

²⁶¹ *ibid*

²⁶² C Brölmann, ‘A Flat Earth? International Organizations in the System of International Law’ 70(2001) Nordic J Int’l L 319, 320-322 (describing international organizations as layered entities); Österdahl (n 138) 163 (referring to the notion of *dédoublement fonctionnel*).

²⁶³ V Engström, ‘Powers of organizations and the many faces of autonomy’ in Collins and White (n 19) 213, 224.

²⁶⁴ As discussed in Sections 3.4.2, 3.4.5 and 3.4.6 above.

Secondly, looking at trends in practice at the General Assembly does not reveal the patterns of alliances that form between delegations and how they impact the decision by individual states to support or oppose resolutions, or to abstain. International organizations, and especially their plenary organs, are political institutions.²⁶⁵ It follows that voting patterns are the tip of the iceberg of the decision making process, which also includes deliberation and negotiation (both formal and informal). As Peterson observes, '[w]hen delegates in the General Assembly adopt resolutions and decisions, they are asking others to conduct themselves in particular ways'.²⁶⁶ This shows that voting patterns possess very little explanatory force in relation to the concept of autonomy. Indeed, as discussed above, the practice of the Third Committee to an extent appears to defeat the *agora* logic despite relying heavily on consensus decision making. The empirical findings thus suggest that functionalism lacks normative power as well, since it does not provide any solid guidance to determine the legal significance of resolutions or, at least, expectations thereof. This observation aligns with the international institutional law literature.²⁶⁷

The considerations above suggest that the issue of autonomy of the General Assembly is intimately related to the issue of legal significance of resolutions, which the UN Charter describes as recommendations. In the absence of an explicit decision making power and uncertainty as to the level of autonomy of the General Assembly from its members, the conclusion that can be drawn at this stage of the inquiry is that the extent to which resolutions acquire legal significance is a matter of empirical assessment – as suggested by the New Legal Realist approach to international law²⁶⁸ – rather than preconceived legal theory.

3.6 Conclusion

Created and regulated by law, the General Assembly is an organ specifically designed to facilitate dialogue among the United Nations members without imposing any decision on them. In this sense, it is an instrument of international cooperation rather than a global parliament. At the same time, the findings of the empirical investigation show that member states have developed a variety of working methods and informal practices, which influence how the General Assembly performs its mandate, both in plenary session and the six main committees. For instance, it appears that states use the First Committee as a standing diplomatic conference to discuss and negotiate issues of international peace and security while they use the Second and Third Committees as standard setting platforms. This is evidence that the General Assembly possesses a will of its own, although it remains mostly confined to the discussion and regulation of issues falling within certain thematic areas, such as human rights. The analysis performed thus shows that functionalism cannot explain the presence of different degrees of autonomy of the General Assembly or address the related challenge of discerning expectations as to the legal significance of resolutions.

²⁶⁵ Klabbers (n 259) 50-55; Peterson (n 217) 9 ('Political institutions are sites of interaction that develop and change over time in reaction to shifts in the broader social context and in actors' beliefs, expectations and behaviour').

²⁶⁶ Peterson (n 217) 90.

²⁶⁷ J Klabbers, 'Contending Approaches to International Organizations: between Functionalism and Constitutionalism' in Klabbers and Wallendahl (n 111) 1, 9 ('functionalism does not impose any real limits to international organisations').

²⁶⁸ As discussed in Chapter 1, Section 1.4.2.

Specifically, the analysis in this chapter shows that attempts at ascertaining the autonomy the General Assembly through the prism of the resolutions adopted reveals an image of the institution that only partly reflects its internal dynamics – that is to say, the actual relationships between the General Assembly and its member states. The empirical reconstruction of voting patterns appears to confirm this, as it fails to provide any reliable indication of the legal significance of resolutions.

Taken together, the considerations above warrant against drawing generalizations about the patterns of practice of the General Assembly and, consequently, the legal significance of resolutions. The degree of autonomy of the General Assembly is not uniform. This generates a related level of uncertainty as to the legal significance of resolutions or expectations thereof. It is therefore submitted that the extent to which the resolutions adopted are able to influence state conduct depends on the degree of state commitment to observe them and their subsequent use in practice. The next chapter examines the circumstances under which states lend support to the adoption of resolutions with a view to understanding the level of legal significance they attach to them at the time of adoption.

CHAPTER 4

THE LEGAL SIGNIFICANCE OF RESOLUTIONS AT THE ADOPTION STAGE

4.1 Introduction

Chapter 3 showed that the General Assembly is not a unitary actor. The working methods of the plenary session and those of the six main committees differ from each other and are supplemented by informal practices. This affects the way in which states attach legal significance to resolutions at the time of adoption. This chapter evaluates the socially constructed meaning of the legal significance of resolutions when they are adopted by states at the General Assembly – that is to say at the adoption stage. It provides an empirical analysis, both quantitative and qualitative, of the relationship between the content of selected resolutions and the level of state support for those resolutions with a view to facilitating the discovery of emergent analytics – that is to say, key concepts shedding light on the scope, limits and intensity of the perceived binding character of resolutions at the adoption stage.¹

The contention is that the text of resolutions cannot be taken at face-value, hence it is not determinative of the legal significance of resolutions. It is indeed acknowledged that states use the General Assembly as a convenient forum to shape their international agenda and influence the behaviour of other states through bargaining commitments.² This exposes the dual nature of states as members of the General Assembly (an organ expressing the will of the United Nations) and as sovereign entities endowed with their own will. In other words, states are subjects of international law operating within the representative organ of an entity possessing its own international legal personality. As a result, the General Assembly turns out to be an institution at the same time distinct from and entirely dependent upon states.

When states act as members of the General Assembly, their actions are governed by the institutional law of the United Nations, not international law. Yet they do not act in secrecy. Their actions remain visible on the international plane, as if they were covered by a transparent institutional veil.³ The latter effectively creates two normative spaces: the institutional law of the General Assembly (under the veil) and international law (above the veil). This naturally generates a tension between the autonomy of the General Assembly and the autonomy of states operating within the General Assembly.⁴ Building on this, the analysis aims to clarify how states pursue their goals by adopting resolutions whose text often contains propositions written in normative or

¹ As discussed in Chapter 1, Section 1.4.3.

² K Jacobsen, *The General Assembly of the United Nations: A Quantitative Analysis of Conflict, Inequality and Relevance* (Universitetsforlaget 1978), 38 (referring to ‘the manner in which the various nations use the organization’) and 40 (pointing out that ‘at no place in the global system is the articulation of interests and their subsequent aggregation more visible than at the UN’); D Tingley and M Tomz, ‘How Does the UN Security Council Influence Public Opinion?’ Working paper (2012), available at <https://web.stanford.edu/~tomz/working/TingleyTomz-UNSC-2012-11-04.pdf> (accessed 19 January 2021), 2 (describing resolutions as public commitments); A Lall, ‘Some Thoughts on the UN General Assembly as a Forum for Mediation and Negotiation’ 9(1) (1975) J Int’l Affairs 63, 64.

³ C Brölmann, ‘A Flat Earth? International Organizations in the System of International Law’ 70(2001) Nordic JIL 319, 320-322 (referring to the corporate veil as the institutional veil or international organizations); id, *The Institutional Veil in Public International Law* (Hart 2007) 2 (referring to the ‘layered nature’ of international organizations).

⁴ As discussed in Chapter 1, Section 1.3.

prescriptive language. In doing so, it discerns the degree of state support for those resolutions by evaluating the political nuances of the process of resolution adoption.

The chapter is divided into two main sections. Section 2.2 examines the empirical evidence of the process of negotiation of the text of resolutions with a view to gaining insights into what impact the resolutions' requirements are likely to have on state conduct once adopted. By focusing on the content of resolutions, it provides an original angle of inquiry, since existent scholarly works focus exclusively on voting patterns, regional group alliances and the thematic composition of the General Assembly agenda.⁵ Section 2.3 evaluates the empirical findings with a view to assessing the emergent analytics on the legal significance of resolutions. It conceptualises the legal and political factors that lead states to attach different degrees of significance to resolutions endowed with different types of support at the adoption stage. In particular, it shows that the formally democratic character of the General Assembly coupled with the presence of a majority voting system leads to its characterization as an international polyarchy while the use states make of international law in the text of resolutions determines its character as a quasi-supranational institution. Building on this, it then articulates a technique for determining a reasonable approximation of the degree of legal significance accompanying the adoption of resolutions.

Section 2.4 concludes by pointing out that the concept of legal significance of resolutions at the adoption stage is determined by the characteristics of the General Assembly as a self-contained political system. It is therefore likely to differ from the concept of legal significance at the implementation stage.

4.2 Adopting resolutions: the empirics of text formulation

A resolution is the outcome of the decision-making process at the General Assembly. Analysing the texts of resolutions is important, but it does not as such disclose the level of state support for their content. Yet delegations devote a considerable amount of time to reaching agreement on the wording of resolutions. It is indeed a known fact that every word in the text of a resolution undergoes close scrutiny by delegations, since resolutions contain recommendations to which the international community of states is expected to give consideration.⁶ The circumstances surrounding the adoption of resolutions thus become all important in assessing the significance that states assign to certain types of resolutions or characteristics thereof. For the purposes of this section, the relevant circumstances consist of the formal votes cast on resolutions as well as the statements made by delegates in explanation of their vote.⁷

⁵ For an overview of the mainstream literature, see E Voeten, 'Data Analysis of Voting in the United Nations General Assembly', in B Reinalda (ed), *Routledge Handbook of International Organization* (Routledge 2013), 54-66.

⁶ Y Wu and J Sauma, 'A Practical Guide to Outcome Documents' reprinted in RE Webber Gaudiosi, J Leiva Roesch and Y Wu, *Negotiating at the United Nations: A Practitioner's Guide* (Routledge 2019), 45-51. See also CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd ed, CUP 2005) 177-178 (referring to a duty to consider resolutions in good faith).

⁷ MJ Peterson, *The General Assembly in World Politics* (Unwin Hyman 1990), 147 (emphasising the need to examine the delegates' statements in explanation of vote. Conversely, the debate preceding the vote is not considered as particularly relevant, since delegations tend to read official statements entrenched in rhetoric rather than engage in a genuine debate).

The analysis is divided into four parts. Sub-section 4.2.1 provides summary and descriptive statistics about the type of resolutions in which normative language appears in the text of resolutions with a view to understanding whether there are significant differences between resolutions adopted with or without a vote as well as those adopted in plenary session and by the main committees. Sub-section 4.2.2 evaluates what the content of resolutions reveals about the nature, prescriptive or descriptive, of resolutions. Specifically, it examines the conditions under which states perceive the text of resolutions as containing prescriptive provisions. Sub-section 4.2.3 examines whether the text of resolutions can be taken at face-value by reconstructing the degree of intensity of the support (or lack thereof) provided by delegations through formal votes and statements in explanation of vote. Finally, sub-section 4.2.4 evaluates how demanding the resolutions' provisions are to implement by reconstructing the underlying relationship between the degree of prescriptiveness of provisions and the capacity of states to mobilize the necessary economic and political resources.

4.2.1 When is normative language used in resolutions?

The selected sample of 229 resolutions⁸ contains 617 references to normative provisions – namely, 135 to rules and 482 to principles.⁹ Rules dictate a specific result, in the sense that they either apply or not to given circumstances. Principles are general and abstract norms. They have a core of applicability and a less specific one which determines that a particular situation may be covered by more than one principle. Overall, the majority of normative provisions (58 percent) appear in the preamble – that is to say, the portion of the text describing the recent history and some elements of the topic under consideration¹⁰ – rather than the operative part, which contains the recommendations to address the issue at hand¹¹ (Figure 4.1). Equally, the majority of references (67 percent) appears in resolutions adopted with a vote rather than consensus (Figure 4.2). In spite of this, significant differences emerge in the distribution of references to normative provisions by the adopting body. Perhaps unsurprisingly, the Sixth (Legal) Committee contains the highest cumulative percentage of normative provisions (34 percent), followed by the Third (Social, Humanitarian and Cultural) Committee (29 percent) whereas the resolutions adopted by the First (Disarmament and International Security) Committee have the lowest percentage (5 percent) (Figure 4.3).

Figure 4.1

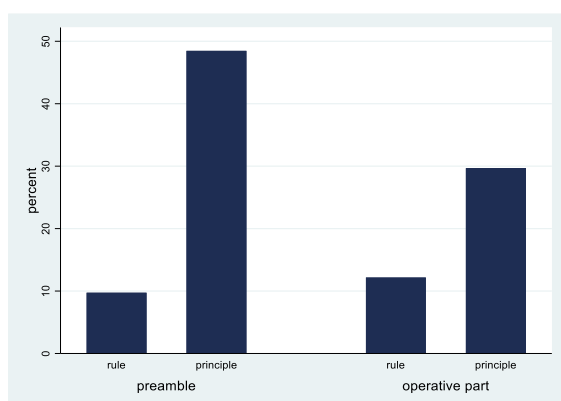
Figure 4.2

⁸ As detailed in Chapter 2, Section 2.3.1.3.

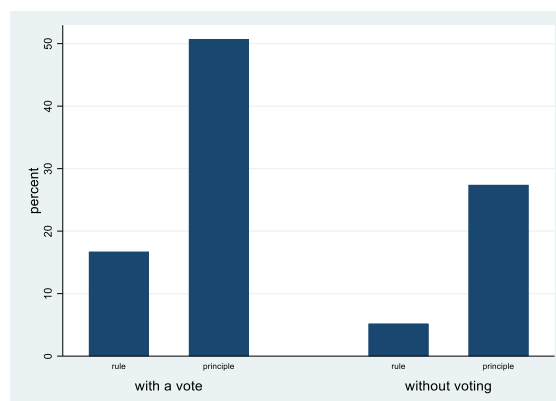
⁹ See O Schachter, *International Law in Theory and Practice* (Kluwer 1995), 20-21.

¹⁰ Y Wu and J Sauma (n 6) 46.

¹¹ *ibid* 47.

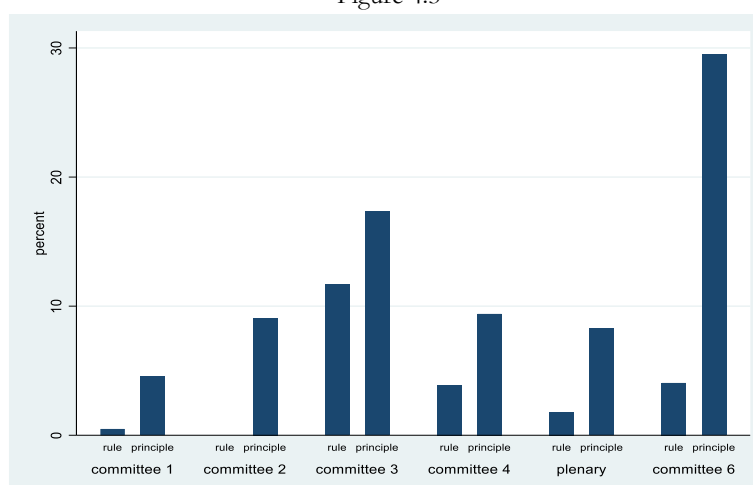


Number of references (in percentages) to normative provisions in the text of resolutions (preamble and operative part).



Number of references (in percentages) to normative provisions in the text of resolutions adopted with or without voting (aggregated data).

Figure 4.3



Number of references (in percentages) to normative provisions in the text of resolutions by adopting body (plenary or main committee).

However, taken individually, the distribution of references to rules and principles seems to follow a different pattern. On the one hand, the majority of principles (62 percent) appear to be mentioned in the preamble of resolutions while the majority of rules (56 percent) appear in the operative part (Table 4.1). On the other hand, the vast majority of both rules and principles (76 and 65 percent, respectively) appear in resolutions adopted with a vote (Table 4.2). This finding in itself is not particularly relevant. It acquires significance when read in conjunction with the working methods and practices of individual committees.¹² As Figure 2.3 shows, the overwhelming majority of all the normative provisions contained in resolutions adopted by the First, Second and Sixth Committees (90 percent, 100 percent and 88 percent, respectively) are principles. What these committees have in common is that, as part of their working methods and procedures,¹³ the text of the resolutions is usually negotiated before it gets tabled. Conversely, the majority of all the

¹² As discussed in Chapter 3, Section 3.4.

¹³ As discussed *ibid*, Sections 3.4.2, 3.4.3 and 3.4.7.

references to rules (53 percent in total) appears in the resolutions adopted by the Third Committee, whose resolutions are not usually negotiated in advance.¹⁴

Table 4.1

Text of resolution	Normative provision rule principle		Total
preamble	60	299	359
	16.71	83.29	100.00
	44.44	62.03	58.18
operative part	75	183	258
	29.07	70.93	100.00
	55.56	37.97	41.82
Total	135	482	617
	21.88	78.12	100.00
	100.00	100.00	100.00

Number of references (in percentages) to normative provisions in the text of resolutions (preamble and operative part).

Table 4.2

Method of adoption	Normative provision rule principle		Total
with a vote	103	313	416
	24.76	75.24	100.00
	76.30	64.94	67.42
without voting	32	169	201
	15.92	84.08	100.00
	23.70	35.06	32.58
Total	135	482	617
	21.88	78.12	100.00
	100.00	100.00	100.00

Number of references (in percentages) to normative provisions in the text of resolutions and method of adoption (with or without voting).

What this suggests about the legal significance of resolutions is that carefully negotiated texts of resolutions, which are also those usually put to vote, mostly contain references to principles whereas reference to specific treaty rules often appears in the text of resolutions adopted without voting (that is to say, by consensus). Under these circumstances, discerning what exactly states are committing to when adopting resolutions is extremely difficult, if possible at all. As Gaudiosi, Roesch and Wu write, it is common practice among delegates at the General Assembly to rely heavily on previously agreed¹⁵ or vague¹⁶ language to close a deal on the text of a resolution, thus leaving scope for accommodating its subsequent implementation. Two observations about the data come to the fore.

On the one hand, the findings suggest that states appear able to openly agree only on broad principles, which do not impose any specific course of action. On the other hand, states do not generally oppose the passage of resolutions referring to specific rules. Yet whether non-opposition amounts to an endorsement of the content of resolutions is doubtful.¹⁷ As Jacobsen writes, states channel a variety of claims and demands into the General Assembly. Such claims and demands ‘have mainly a *national* basis and not a *functional* one’.¹⁸ Coupled with the empirical findings above, this indicates that states treat resolutions as political, rather than legal, instruments aimed at facilitating forms of international cooperation in the fields covered by resolutions.

As Gaudiosi, Roesch and Wu also point out, adopting a resolution is the outcome of a wider process of negotiation.¹⁹ This, in turn, conforms with the widespread understanding among

¹⁴ As discussed *ibid*, Section 3.4.4.

¹⁵ Gaudiosi, Roesch and Wu (n 6) 49 (arguing that agreed language ‘involves recycling language on a subject from a previous resolution’).

¹⁶ *ibid* 50 (arguing that the use of vague language ‘makes everyone happy (or really equally upset) due to its ambiguity’).

¹⁷ As discussed in Chapter 1, Section 1.4. See also P Sands and P Klein, *Bowett’s Law of International Institutions* (6th ed, Sweet & Maxwell 2009), 271 (arguing that consensus does not mean that the act concerned benefits from unanimous approval).

¹⁸ Jacobsen (n 2) 40 (emphasis original). Similarly, according to the UN Office of Legal Affairs, states ‘do not consider themselves associated with the adopted text.’ See United Nations Juridical Yearbook (1987), 174.

¹⁹ Gaudiosi, Roesch and Wu (n 6) 4 and 45. See also Peterson (n 7) 92 (arguing that negotiation patterns in the General Assembly are based on continual bargaining).

political scientists that the General Assembly is ‘a realistic representation of the world’,²⁰ where states affiliate differently for different purposes,²¹ thus engendering ‘political practices’ within the General Assembly.²² As Alker and Russett write, ‘the UN was, after all, designed as an arena for discussing the major issues dividing nations’.²³ It follows that reliance on normative language in resolutions (inclusive of both rules and principles) is not *per se* indicative of any degree of legal significance of resolutions.

4.2.2 Is the text of resolutions prescriptive?

The text of resolutions contains provisions articulating recommendations. The latter mostly consist of expectations of conduct on part of member states to fulfil the resolution’s goals.²⁴ Gaudiosi, Roesch and Wu write that:

A resolution conveys messages through its language. [...] The nuances in the language at the beginning of each paragraph reflect the different degrees of preoccupation, importance or urgency regarding the subject at hand. For example, “endorses” is one of the strongest verbs that can be used. This is followed by “welcomes”.²⁵

The statement above shows that the provisions of a resolution may have different gradations of intensity, ranging from no action requirement on part of states to discretionary or unconditional action (hereinafter referred to as action levels).²⁶ Accordingly, verbs are typically indicators of the nature, descriptive or prescriptive, of those provisions. An example of a discretionary action level requirement is: ‘[The General Assembly] *Encourages* all States to promote and strengthen regional and subregional initiatives to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its forms’.²⁷ An example of an unconditional action level requirement is: ‘[The General Assembly] *Calls upon* all States to implement the Programme of Action [To Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Forms]’.²⁸

It follows from the preceding that reference to rules and principles in the text of resolutions may appear in provisions with any gradation of intensity in terms of action requirements. Such references are always accompanied by an expectation, implicit or explicit, that states will give some

²⁰ HR Alker and BM Russett, *World Politics in the General Assembly* (Yale University Press 1965), 2 (citing Secretary-General U Thant).

²¹ SD Bailey, *The General Assembly of the United Nations: A Study of Procedure and Practice* (rev ed, Greenwood Press 1978), 21-40. See also Alker and Russett (n 20) 218 (arguing that ‘[i]t is clear that *policies* taken [at the General Assembly] to a large extent reflect broader national foreign policies’. Emphasis added).

²² Alker and Russett (n 20) 3.

²³ *ibid* 216.

²⁴ The addressees of resolutions (or specific provisions thereof) may be states or other actors, such as the UN Secretary-General or the UN specialized agencies. See Gaudiosi, Roesch and Wu (n 6) 47. For the purposes of this study, the focus remains on provisions addressing states. See also Peterson (n 7) 140 (referring to stable expectations regarding state behaviour).

²⁵ Gaudiosi, Roesch and Wu (n 6) 48.

²⁶ Discretionary and unconditional actions are further divided into generic and specific actions, as discussed in Chapter 2, Section 2.3.1.4.

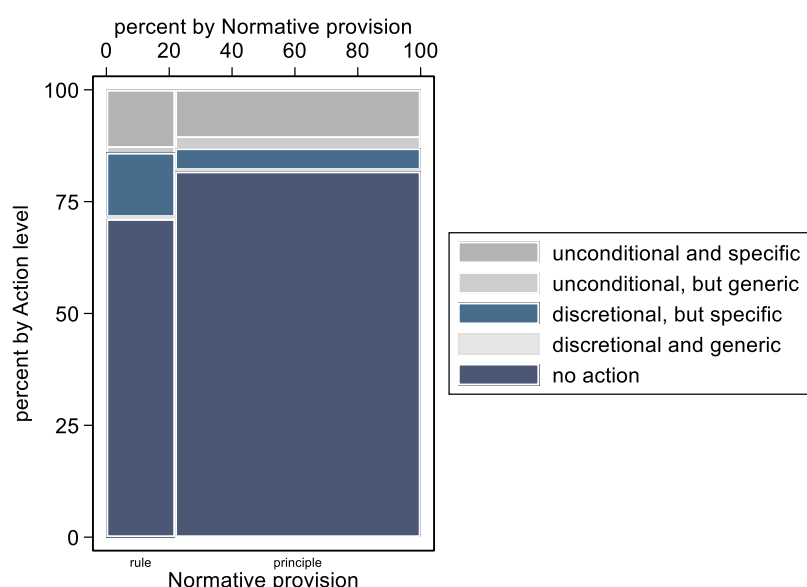
²⁷ UN Doc A/RES/56/24V (24 December 2001) para 6 (emphasis original).

²⁸ *ibid* para 3 (emphasis original).

form of consideration to the content of resolutions,²⁹ thus revealing an aspect of the concept of legal significance of resolutions at the time of adoption. It is indeed possible to determine the degree of association between references to normative provisions and action levels. My contention is that rules are mainly associated with higher (that is to say, unconditional) action levels while principles are mostly associated with lower (hence, discretionary) action levels.

Figure 4.4 below shows that normative provisions and action levels are significantly related. Specifically, it turns out that both rules and principles are strongly correlated with no action requirements, meaning that most of the provisions of resolutions are intended to be aspirational in nature rather than prescriptive. This appears to strengthen the previous finding about the political (rather than legal) nature of resolutions.³⁰

Figure 4.4



Correlation between normative provisions and action levels. With a *chi-square* of 17 with 4 degrees of freedom and a *p* value of 0.002, the relationship between normative provisions and action levels is statistically significant at 99%.

A possible explanation is that, since the General Assembly has no formal legislative powers,³¹ states use it as a forum for discussion with a view to reaching broad political agreements on how to tackle problems affecting the international community.³² Indeed, such ‘welfare internationalism’ constitutes one of the philosophical foundations of the United Nations.³³ Yet, as Jacobsen writes, the United Nations is ‘a very complex organization serving different purposes for different

²⁹ Gaudiosi, Roesch and Wu (n 6) 47 (‘It is understood that, although not binding, General Assembly resolutions have to be followed’); Amerasinghe (n 6).

³⁰ As discussed in Section 4.2.1 above. See also Gaudiosi, Roesch and Wu (n 6) 51 (‘General Assembly resolutions help guide UN policies. They also send a signal to the world on that particular subject’).

³¹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI arts 10-14 (referring to decisions of the General Assembly as recommendations). See also the discussion in Chapter 3, Section 3.3.

³² Peterson (n 7) 226.

³³ HG Nicholas, *The UN as a Political Institution* (OUP 1965), 21.

countries'.³⁴ Similarly, Alker and Russett describe the UN as 'a forum for promoting debate and the international exchange of ideas'³⁵ while Hovet argues that states pursue 'policy objectives' at the General Assembly.³⁶ Looking at this study's sample of resolutions, several statements made by delegates in explanation of votes concur with this stream of scholarly literature in at least two ways.

Firstly, it is not infrequent for states to cast identical votes on a resolution while contesting it on different grounds. For example, in relation to Resolution 3171(XXVIII) on permanent sovereignty over natural resources,³⁷ the Soviet Union, Algeria and Turkey all cast a positive vote. However, the Soviet Union declared that the key provisions of the resolutions, especially those on national jurisdiction, should be interpreted according to international law.³⁸ Algeria proposed a distinction between Euro-centric and progressive international law, which was eventually rejected, while Turkey categorically excluded the applicability of international law in the case of a dispute over nationalization.³⁹ This shows how agreed language in the text of resolutions remains open to interpretation, thus affecting the clarity and the perception of legal significance of the resolutions.⁴⁰ A more recent example relates to the adoption of Resolution 40/52 on activities of foreign economic interests in developing countries,⁴¹ where Chile, Mongolia and Afghanistan all cast a positive vote. However, Chile objected to naming and shaming individual countries in the text of the resolution as a matter of principle, Mongolia disagreed with the selective naming of countries, while Afghanistan complained that more countries should have been named.⁴² This shows that sometimes the agreement on a resolution rests on the lowest denominator rather than the entire text of the resolution,⁴³ thus undermining the possibility of generalizing about the legal significance of resolutions.

Secondly, states often cast different votes on a resolution while providing the same justification for doing so. For instance, in relation to Resolution 36/51 on activities of foreign economic interests in developing countries,⁴⁴ Fiji voted in favour, the United States voted against and Liberia abstained.⁴⁵ They all complained that the resolution was grounded on generalizations about foreign investments being harmful for developing countries. Another example is the adoption of Resolution 70/231 on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁴⁶ where Canada voted in favour, the United States against and France abstained.⁴⁷ However, they all raised serious concerns about the budget implications of the resolution. Such and similar examples suggest that states' positions in relation to supporting (or

³⁴ Jacobsen (n 2) 25.

³⁵ Alker and Russett (n 20) 149.

³⁶ T Hovet, *Bloc Politics in the United Nations* (Harvard University Press 1960), 12. See also Alker and Russett (n 20) 218 (referring to 'Assembly policies').

³⁷ UN Doc A/RES/3171(XXVIII) (17 December 1973).

³⁸ A/PV.2203, p. 15 para 156.

³⁹ *ibid*, p. 8 para 90 (Algeria) and p. 16 para 164 (Turkey).

⁴⁰ Gaudiosi, Roesch and Wu (n 6) 45 (referring to 'constructive ambiguities' as the use of language 'that can be interpreted differently to meet the various parties' bottom-lines').

⁴¹ UN Doc A/RES/40/52 (2 December 1985).

⁴² A/C.4/40/SR.10, p. 17 para 82 (Chile), p. 19 para 98 (Mongolia) and p. 20 para 101 (Afghanistan).

⁴³ Gaudiosi, Roesch and Wu (n 6) 132.

⁴⁴ UN Doc A/RES/36/51 (24 November 1981).

⁴⁵ A/C.4/36/SR.22 p. 9 para 50 (United States), p. 12 para 75 (Liberia) and p. 15 para 93 (Fiji).

⁴⁶ UN Doc A/RES/70/231 (23 December 2015).

⁴⁷ A/C.4/70/SR.7 p. 18 para 117 (France), pp. 18-19 para 119 (United States) and p. 19 para 120 (Canada).

not) a resolution do not necessarily coincide with their real or most immediate interests.⁴⁸ This, in turn, supports the findings about the aspirational (rather than prescriptive) nature of resolutions.

An alternative explanation for the findings (Figure 4.4) is that the adoption of a resolution may be perceived as establishing a precedent in international relations possibly amounting to customary practice if accepted or acquiesced, effectively creating expectations of state conduct for the future.⁴⁹ Reisman, for example, writes that:

Nonauthoritative practices that endure may become prescriptive. Since the function of prescription is that the target audience come to expect that certain practices and procedures should be followed, *demands that were initially not prescriptive may become prescriptive*.⁵⁰

In the selected sample, there are several instances of delegations opposing the interpretation that adopting resolutions automatically establishes a precedent in international practice. For example, the adoption in the First Committee of a series of resolutions on the issue of non-interference in the domestic affairs of states has sparked a debate among delegations as to the significance of re-citation of previous General Assembly resolutions. On the one hand, several delegations pointed out that voting in favour of a resolution does not amount to an endorsement of previous resolutions cited therein. Hence, resolutions do not establish a precedent. For instance, France clarified that voting in favour of Resolution 2131(XX) did not change its position on Resolution 1514(XV) containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, which it did not support at the time of adoption.⁵¹ Likewise, Morocco pointed out that the same resolution contains reference to documents, including previous General Assembly resolutions, which it did not support and that voting in favour of Resolution 2131(XX) could not change its previous position on them.⁵² Contrary positions have also been put forward. For example, Bolivia qualified Resolution 2158(XXI) on permanent sovereignty over natural resources as ‘a legal precedent’.⁵³ This appears to contradict the findings of Bleicher’s seminal study on the legal meaning of re-citation in the text of General Assembly resolutions. Grounded on an alleged analogy between re-citation in resolutions and the common law doctrine of *stare decisis*, Bleicher’s study maintains that the most cited resolutions have a significant legal content.⁵⁴ This, however, proves to be a largely formalistic type of inquiry not supported by qualitative evidence, such as statements by delegates in plenary session or committee meetings.

On the other hand, it may be argued that while it is not possible to draw simple generalizations about the significance of re-citation of resolutions, the fact that a significant number of delegations rely on it is evidence that resolutions are able to mould state conduct in international relations.⁵⁵

⁴⁸ Gaudiosi, Roesch and Wu (n 6) 26.

⁴⁹ Schachter (n 9) 23; Peterson (n 7) 140.

⁵⁰ WM Reisman, ‘International Lawmaking: A Process of Communication’ 75 (1981) Am Soc’y Int’l L 101, 112 (emphasis added).

⁵¹ A/C.1/SR.1422 p. 432 para 35.

⁵² *ibid* para 38.

⁵³ A/PV.1478 p. 5 para 38.

⁵⁴ SA Bleicher, ‘The Legal Significance of Re-Citation of General Assembly Resolutions’ (1969) 63 AJIL 444, 458.

⁵⁵ As Madagascar pointed out in relation to the adoption of Resolution 3486(XXX) on the Charter of Economic Rights and Duties of States, ‘the resolutions of the United Nations are having increasing influence on the conduct of states and their basic principles should be strengthened and brought together as a coherent whole’. A/PV.2439 p 1303

This, in turn, forces states to take a firm stance about the extent to which they endorse re-citations contained in individual resolutions. For instance, in relation to the adoption of Resolution 72/111 on activities of foreign economic actors in developing countries, the United States clarified that '[a]ny reaffirmation of prior documents contained in the resolution [applies] only to those states that ha[ve] affirmed them initially'.⁵⁶ Effectively, while denying that adopting resolutions establishes a precedent *per se*, the delegates' statements in explanation of votes create political precedents engendering future expectations of state conduct in international relations. It follows from the preceding that while voting on a resolution does not disclose much about state commitment to uphold its provisions once adopted, states remain cautious in framing the text of resolutions in a way that could engender unequivocal expectations of future behaviour.⁵⁷ Hence, the high correlation between normative provisions and low action levels (Figure 4.4).

Overall, what the analysis above suggests about the legal significance of resolutions is that resolutions prescribing uniform standards of conduct or containing sweeping generalizations do not suit all states equally well. As Jacobsen writes, the United Nations, including the General Assembly, is 'a forum for conflict manifestation and a forum for negotiation'.⁵⁸ Unavoidably, the majority of resolutions contain no specific action requirements, thus denoting either a lack of state commitment to uphold the normative provisions of resolutions or a lack of legal significance attached to resolutions. This appears to conform with Peterson's observation that 'governments find it easiest to comply when little or no action is required'.⁵⁹ The findings also suggest that, while some states adopt resolutions in an attempt to influence the development of specific areas of international law by qualifying resolutions as binding commitments, especially in the area of trade relations, other states see resolutions as political, nonbinding agreements allowing them to address difficulties and problems of the international community on a case-by-case basis, as they emerge.⁶⁰ Under these circumstances, the best or only way to achieve consensus, or at least a majority, in support of a resolution is not to require any specific course of action – that is to say, deny any prescriptive character of the resolution.⁶¹ Alternatively, the risk is that states will end up adopting what Jacobsen termed 'paper resolutions with limited consequences for the situation in the "real" world'.⁶²

This, however, does not mean that voting for resolutions is devoid of any significance. Quite the contrary, determining the degree of similarity between the content of resolutions adopted with or without voting (in terms of requirements of state conduct) may well shed light on their level of prescriptiveness, hence on an aspect of the degree of legal significance states attach to them.

para 144. See also Peterson (n 7) 183 ('All deliberative bodies use words to influence conduct. Words explain what outcome is desired. Words also help motivate action by appealing to addressees' sense of moral right or wrong').

⁵⁶ A/C.4/72/SR.9 p. 10 para 68.

⁵⁷ Peterson (n 7) 141-142 ('Most governments remain wary of attributing any general legislative authority to the Assembly').

⁵⁸ Jacobsen (n 2) 43.

⁵⁹ Peterson (n 7) 64.

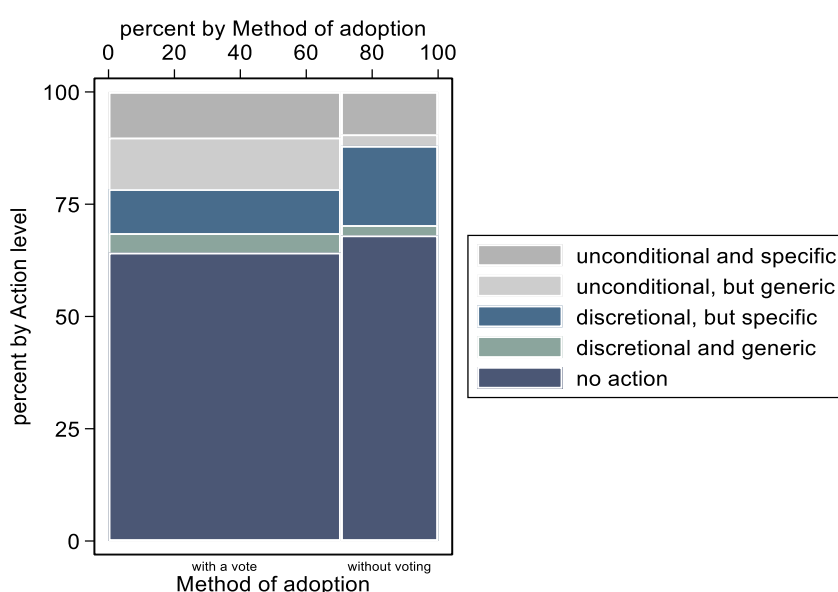
⁶⁰ Gaudiosi, Roesch and Wu (n 6) 2 (referring to the UN meetings as 'a crucial platform for global dialogue and cooperation').

⁶¹ Peterson (n 7) 200 ('the likelihood of an Assembly decision being implemented depends in part on the action requested').

⁶² Jacobsen (n 2) 170.

As Figure 4.5 shows, the method of adoption of resolutions (with or without voting) and action levels are significantly related. Specifically, it turns out that both resolutions put to vote and resolutions adopted without voting are strongly related to no action requirements, thus denoting no substantive difference in the resolutions' requirements. This seems to confirm that in adopting resolutions states tend to agree on broad political directives rather than specific, uniform standards of conduct.⁶³ It also appears to strengthen the finding that states mostly perceive resolutions as political means for shaping state conduct at the General Assembly without creating a binding precedent.

Figure 4.5



Relationship between method of adoption and action level. With a *chi-square* of 114.13 with 4 degrees of freedom and a *p* value of <0.001, the variables (method of adoption and action level) are related. The results are statistically significant at 99%.

Indeed, attempts to use resolutions to affect existent rights and duties under international law typically face strenuous resistance by a conspicuous number of states. For example, in relation to Resolution 36/103 containing the Declaration on Non-Intervention in the Internal Affairs of States, the United States lamented that the text of the resolution creates new rights and duties that are not contained in the UN Charter and seeks to expand principles in ways not called for by the UN Charter.⁶⁴ Likewise, Sweden and Austria pointed out that they could not agree on any proposal which could be interpreted as restricting the work of mass media or limit freedom of expression and information.⁶⁵ Even more significant is the statement by Malta denouncing that most of the new rights and duties formulated in the Declaration had never been discussed in depth in previous resolutions: they had simply been declared while accompanied by no request for action.⁶⁶ The adoption of the Declaration on the Right of Societies to Life in Peace sparked a similar debate, as

⁶³ See Figure 4.4.

⁶⁴ A/C.1/36/PV.51 p. 56.

⁶⁵ A/C.1/34/PV.55 p. 46 (Sweden) and 51 (Austria) – both commenting on Resolution 34/101, the background resolution preceding the adoption of the Declaration.

⁶⁶ A/PV.1408 p. 9 para 88.

several delegations firmly opposed any attempt to frame the concept of ‘crime against peace’ as well as a number of ‘duties of states’ which had not been adequately examined by the UN.⁶⁷

Similar considerations have accompanied the adoption of resolutions prescribing a course of action deemed to be in violation of international law, including the UN Charter. Once again, the adoption of Resolution 36/103 on the Declaration on Non-Interference in the Internal Affairs of States provides a good example, since it has been severely criticized by states for both providing ‘a distorted presentation of the principle of non-intervention’ in relation to the proposed new international information order⁶⁸ and being at variance with the right to self-defence under Article 51 of the UN Charter⁶⁹ by containing an explicit endorsement of armed struggle against former and neo-colonial powers.⁷⁰ The statement in explanation of vote by Uruguay contains a concise overview of all the concerns of the international community:

The text of this Declaration contains some statements which... are alien to the nature of the principle of non-interference in the internal affairs of states, and also contrary to the purposes and principles of the Charter. We refer in particular to Section III(b) of paragraph 2 of the Declaration. We cannot accept or subscribe to a paragraph which would attempt to institutionalize recourse to armed force for the attainment of any objective, however noble it may appear to be.⁷¹

There have also been delegations providing support to the resolution. The Soviet Union, for example, described the provision authorizing the use of military force as ‘completely correct’.⁷² Much more ambiguous has been its endorsement of the provision referring to the new international information order,⁷³ a concern shared by Fiji and Uruguay despite them voting in favour of the resolution.⁷⁴

Taken together, the considerations above show that resolutions trying to alter the existent international law framework generally fail to gather consensus around the text of the resolution. What this suggests about the legal significance of resolutions is that states tend to commit themselves to achieve the overarching goals of resolutions without necessarily endorsing any specific course of action to do so. This conforms with Peterson’s observation that the text of resolutions only indicates desired outcomes.⁷⁵ It follows that the text of resolutions associated with higher action levels – that is to say, those written in prescriptive language – or relying heavily on the re-citation of resolutions is not as such indicative of any legal character of the resolutions, at least at the adoption stage.

⁶⁷ A/C.1/33/PV.67 p. 16 (Federal Republic of Germany), 22 (Japan) and 25 (Australia).

⁶⁸ A/C.1/34/PV.55 p. 39 (Ireland). See also A/36/PV.51 p. 56 (United States – arguing that the paragraph on the new international information order contradicts the principles of Article 19 of the Universal Declaration of Human Rights).

⁶⁹ A/C.1/36/PV.51 p. 47 (France); A/36/PV.51 p. 56 (United States).

⁷⁰ A/36/PV.51 p. 61 (Ireland) and 62 (Fiji).

⁷¹ A/36/PV.91 p. 1631 para 276. See also A/36/PV.51 p. 57 (Greece), 58 (Finland) and 59 (Austria).

⁷² A/C.1/36/PV.51 p. 5.

⁷³ Alker and Russett (n 20) 65 (arguing that ‘neither Soviets nor most Old Europeans were happy with resolutions sponsored by a variety of states... urging codification of an irrevocable convention on the freedom of correcting false information’).

⁷⁴ A/36/PV.51 p. 62 (Fiji); A/36/PV.91 p. 1631 para 276 (Uruguay).

⁷⁵ Peterson (n 7) 183.

4.2.3 Can the text of resolutions be taken at face-value?

Votes cast on resolutions are often accompanied by statements made by delegates in explanation of their votes. A statement is a delegation's formal message on the item under discussion. However, as Gaudiosi, Roesch and Wu write, 'what is said at the microphone... is not necessarily what the delegation really seeks in the negotiation'.⁷⁶ It follows that a statement may either support the vote cast on a resolution or qualify it, thus raising questions about the genuine value of formal votes. If the content of statements contradicts the face-value of the votes cast, the formal support for resolutions may lack genuine state support irrespective of the content of the resolutions. This begs the question: do states really 'mean' what they have voted for? What does this tell us about the legal significance of resolutions?

One way of addressing the questions above is to ascertain whether states cast strategic votes on resolutions by comparing formal votes (positive, negative or abstentions) with the content of statements made by delegates in explanation of their votes (including statements on abstentions). The expectation is that a statement matching a vote signals the intention of states (or lack thereof) to try to achieve the objectives of a resolution while a statement not matching a vote suggests that states vote on resolutions based on considerations other than the content of resolutions.⁷⁷

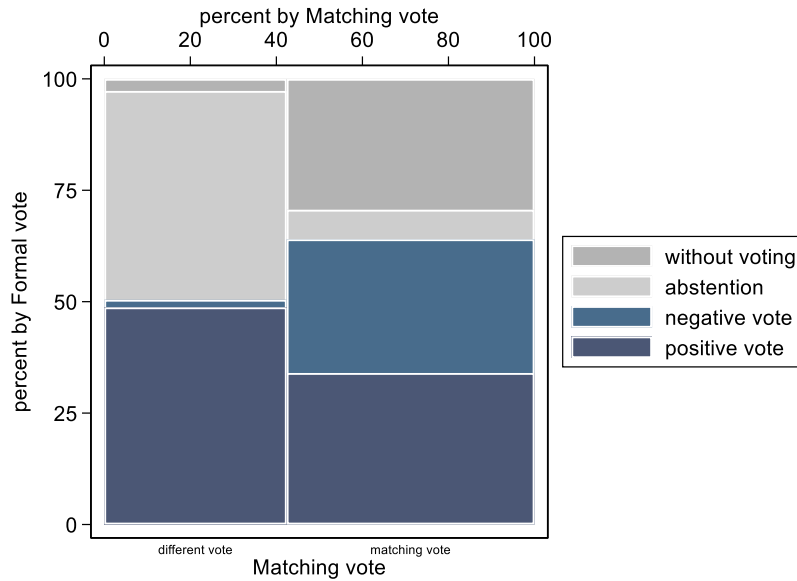
Figure 4.6 shows that the two variables are strongly related. Specifically, it turns out that 58 percent of the statements made align with the votes cast while 42 percent contradict them. Roughly half of the statements made in explanation of positive votes match each other. The split is more prominent in relation to negative votes, where the overwhelming majority of statements matches the votes cast. The same pattern emerges in relation to resolutions adopted by consensus (without voting).⁷⁸ Conversely, in relation to abstentions, the majority of statements signals the intention of states not to support a resolution rather than remaining neutral.

Figure 4.6

⁷⁶ Gaudiosi, Roesch and Wu (n 6) 75.

⁷⁷ *ibid* 57 (arguing that discussions at the General Assembly are often accompanied by 'programmed prejudice when tabling a proposal', meaning that some developing countries view ideas from developed countries with suspicion and vice versa).

⁷⁸ Even in relation to resolutions adopted without voting, states often clarify whether they support (or not) a resolution.



Relationship between votes cast and statements in explanation of vote. The results show that, with a *Cramér V* coefficient of 0.62, there is a high strength relation between formal votes and matching votes. The *chi-square* of 534.52 with 3 degrees of freedom and a *p* value of <0.001 also shows that the variables are related. The results are statistically significant at 99%.

What this suggests is that the text of resolutions adopted by majority does not necessarily benefit from full support by all states who have voted in favour of them. For example, in the resolutions on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Argentina and Spain have consistently voted in favour of the resolutions. Equally, they have consistently objected to sending visiting missions to territories where there is a sovereignty dispute like the Falkland Islands⁷⁹ and Gibraltar.⁸⁰ As a consequence, the legal significance of those resolutions does not fully transpire from their text irrespective of their content, whether framed in prescriptive language or not. Jacobsen reaches similar conclusions in relation to resolutions tabled by a high number of sponsors. He argues that such resolutions cannot be taken as an indication of a high degree of consensus, especially ‘if backing comes from one limited group only’.⁸¹

Conversely, heavily contested resolutions suggest a firm lack of support by several states, unambiguously signalling the intention of states not to treat those resolutions as legally binding. For instance, the resolutions on human rights and unilateral coercive measures adopted by the Third Committee stand out for the virtual absence of statements in explanation of the vote. The few statements provided all match the votes cast. A similar scenario accompanies the adoption of the resolutions on non-interference in the electoral process of states adopted by the same

⁷⁹ UN Docs A/C.4/62/SR.6 p. 11 para 69; A/C.4/65/SR.7 p. 13 para 72; A/C.4/66/SR.7 p. 6 para 23; A/C.4/67/SR.7 p. 7 para 45; A/C.4/68/SR.8 p. 9 para 52; A/C.4/69/SR.7 p. 10 para 53; A/C.4/70/SR.7 p. 19 para 122; A/C.4/71/SR.8 p. 2 para 8; A/C.4/72/SR.9 p. 10 para 62 (statements in explanation of vote by Argentina).

⁸⁰ UN Docs A/C.4/68/SR.8 p. 9 para 50; A/C.4/69/SR.7 p. 10 para 54; A/C.4/70/SR.7 p. 19 para 121; A/C.4/71/SR.8 pp. 2-3 para 6; A/C.4/72/SR.9 pp. 9-10 para 61 (statements in explanation of vote by Spain).

⁸¹ Jacobsen (n 2) 63-64.

committee: with the exception of a handful of positive votes⁸² and abstentions,⁸³ all statements match the votes cast.

Likewise, resolutions adopted with a large number of abstentions are not widely supported by states, effectively amounting to a mild form of negative voting. This aligns with Peterson's observation that abstention can mean mild doubt.⁸⁴ For example, since 2007, the EU member states have abstained from voting for resolutions on unilateral economic measures as a means of political and economic coercion adopted by the Second Committee.⁸⁵ Yet they have consistently provided an explanation of their vote that closely aligns with the United States, which regularly votes against the resolutions on this issue.⁸⁶ For instance, in relation to the adoption of Resolution 62/187, Portugal made a statement on behalf of the EU member states arguing that unilateral economic measures are:

admissible in certain circumstances, in particular when necessary in order to fight terrorism and the proliferation of weapons of mass destruction, or to uphold respect for human rights, democracy, the rule of law and good governance.⁸⁷

The considerations above are in line with Jacobsen's observation that abstentions '[do] not necessarily mean the same thing to various actors'.⁸⁸ Only statements in explanation of vote can clarify the precise meaning of abstentions.⁸⁹ This, in turn, suggests that the text of resolutions adopted with large numbers of abstentions is accompanied by a low presumption of legal significance.

Finally, resolutions adopted by consensus appear well suited to develop into established state practice, thus suggesting that their text is indicative of high levels of legal significance. For example, the resolutions on the illicit trade of small arms and light weapons have been annually adopted by the First Committee since 2001.⁹⁰ However, as the Mexican delegation pointed out, 'the agreements reached thus far continue to be diluted and... instruments adopted on the basis of the lowest common denominator'.⁹¹ Similarly, the resolutions on special political missions have been yearly adopted by the Fourth Committee since 2012 on the understanding that special political missions are distinct from peacekeeping operations and do not alter the balance of power between the General Assembly and the Security Council in the field of international peace and security.⁹² Such and similar remarks indicate that resolutions adopted by consensus tend to strengthen the

⁸² A/44/PV.82 p. 26 (Guatemala); A/C.3/46/SR.55 p. 15 para 89 (Guatemala); and A/50/PV.99 pp. 8-9 (Mexico).

⁸³ A/C.3/46/SR.55 p. 15 para 87 (Chile); A/C.3/48/SR.52 p. 13 paras 61 (Costa Rica) and 62 (Chile); A/C.3/49/SR.63 p. 7 para 31 (Chile); A/C.3/50/SR.55 p. 4 para 14 (Chile) and p. 5 para 17 (Costa Rica).

⁸⁴ Peterson (n 7) 65.

⁸⁵ UN Doc A/RES/62/183 and following ones.

⁸⁶ See, for instance, A/62/PV.78 p. 12 (arguing that 'In some instances, sanctions are designed to pressure a state to return to generally accepted international norms such as democracy and the rule of law. In other cases, sanctions... play a critical role in denying states the tools they need to engage in harmful acts that threaten international peace and security').

⁸⁷ A/C.2/62/SR.28 p. 5.

⁸⁸ Jacobsen (n 2) 61.

⁸⁹ Peterson (n 7) 65.

⁹⁰ UN Doc A/RES/56/24 and following ones.

⁹¹ A/60/PV.61 p. 42. See also Gaudiosi, Roesch and Wu (n 6) 132.

⁹² A/C.4/67/SR.23 p. 11 paras 52-53 (United States), 54 (United Kingdom) and 55 (France).

status quo in both international law and international relations, their normative content being rather diluted.

The above suggests that some states often act as what Simmons termed ‘false positives’ – that is to say, they vote in favour of a resolution without the intention of supporting it.⁹³ At the same time, there appears to be no trace of ‘false negatives’, meaning states voting against a resolution they are not entirely opposed to or have no clear position about.⁹⁴ A possible explanation for this is that the tension between votes and statements is a form of verbal strategy that states adopt to conduct foreign policy at the General Assembly through persuasion.⁹⁵ Weisband and Franck write that the concept of verbal strategy ‘proposes the planned, deliberate development and use of principles, concepts, and enunciated norms as a conscious part of the conduct of foreign policy’.⁹⁶ This resonates with the behaviour of the Soviet group of states, the most cohesive group in the General Assembly during the Cold War period (also known as the Soviet bloc).⁹⁷ For example, in relation to Resolution 626(VII) containing the Declaration on Permanent Sovereignty over Natural Resources, Canada abstained claiming that:

The resolution adopted is, on the face of it, a general and innocuous statement with which it is difficult to disagree, but in the light of the debates which took place in the [Second] committee and of the tendentious attacks made upon individual Member States, it is impossible to ignore the adverse effects which it may have on what is known as the climate of investment.⁹⁸

A more explicit example is Resolution 3281 (XXIX) on the Charter of Economic Rights and Duties of States. While voting in favour of the resolution, China accused the Soviet Union of ‘engag[ing] in deceitful propaganda and disruptive activities so as to cover up the truth about its arms expansion and preparations for war.’⁹⁹ As Gaudiosi, Roesch and Wu point out, state positioning (that is to say, voting) at the General Assembly and state interests are not the same thing.¹⁰⁰ Similarly, Fasulo writes that, for instance, the US ‘places such great importance on positioning itself strongly within the UN system that it monitors how other nations vote in the 193-member General Assembly and the 15-member Security Council’.¹⁰¹

⁹³ BA Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009), 18.

⁹⁴ *ibid*

⁹⁵ TM Franck and E Weisburd, *World Politics: Verbal Strategy among Superpowers* (OUP 1975), 7 (arguing that ‘verbal behavior constitutes an element... of the complex of signals by which [we] influence the other side’s expectations of our behavior in such a way as to influence its choice of behavior’).

⁹⁶ *ibid*

⁹⁷ Alker and Russett (n 20) 169.

⁹⁸ A/PV.411 p. 498 para 184. Similarly, in a statement on a subsequent resolution on the same subject matter, while casting a positive vote Colombia pointed out that ‘the resolution has gone too far, thus creating the impression that sponsors of the resolution have other ends in mind.’ A/C.2/SR.1061 p. 255 para 48.

⁹⁹ A/PV.2315 p. 1367 para 49. Similarly, commenting on Article 15 of the Charter of Rights and Duties of States, Albania put a reservation on his otherwise vote in favour of the resolution by stating that ‘this thesis of the Soviet social-imperialists, which aims at legalizing and justifying the intensification of their war budget and arms race has been included in this very important document.’ *ibid* p. 1368 para 66.

¹⁰⁰ Gaudiosi, Roesch and Wu (n 6) 26.

¹⁰¹ L Fasulo, *An Insider’s Guide to the UN* (3rd ed, Yale University Press 2015), 229 (also pointing out that Public Law 101-246, Section 406, requires the US State Department to Inform Congress annually about how UN members have voted in comparison with the US).

An alternative explanation is that resolutions provide a means for facilitating the attainment of preconceived goals through bargaining commitments, the latter understood as political agreements.¹⁰² Viewed from this angle, resolutions represent what Schachter termed the international community's 'wider political and social context,' which is devoid of any autonomous legal force.¹⁰³ Hovet also refers to the practice of bargaining votes in more negative terms, describing it as an element of irresponsibility. He writes:

Since there are no binding decisions, members agreeing to vote for a resolution of no primary concern in exchange for votes on an issue of primary concern can undertake such commitments with a realization that essentially they have nothing more than a moral obligation to vote for and implement resolutions they thus support.¹⁰⁴

Indeed, resolutions are often ideologically charged. Those adopted during the Cold War period are replete with examples. For instance, the statement in explanation of vote made by the Polish delegation in relation to the adoption of Resolution 2288(XXII) on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples refers to a 'nefarious conspiracy of monopolistic interests' trying to preserve the colonial system. Accordingly, the Soviet bloc supported by several underdeveloped countries defended the adoption of a resolution 'formulated in strong terms' (meaning prescriptive language) on top of naming and shaming former colonial powers.¹⁰⁵ However, such an attitude has been widely condemned by both former colonial and non-colonial powers. For instance, Canada argued that:

The sponsors of the draft resolution ha[ve] gone so far as to condemn some countries by name and others by implication, without providing any documentation as to the precise nature of the offences which were alleged to have taken place in each case.¹⁰⁶

As Alker and Russett write, such heavily worded resolutions represent an attempt by underdeveloped countries to 'employ the UN as an agency for redistributing wealth'.¹⁰⁷ In such cases, the legal significance attached to resolutions is contested.

A recent example of ideologically charged resolutions is the group of restated resolutions on the glorification of Nazism, which is replete with accusations of Russian attempts to use resolutions for political and propaganda purposes, including attempts at imposing limits on the freedom of expression,¹⁰⁸ reminiscent of those elaborated in relation to the article of the Declaration on Non-

¹⁰² Alker and Russett (n 20) 216 (describing bargaining as 'the exchange of support on one issue for backing another').

¹⁰³ O Schachter, *Sharing World Resources* (Columbia University Press 1977), viii.

¹⁰⁴ Hovet (n 36) 10.

¹⁰⁵ A/PV.1622 para 18. See also A/C.4/SR.1735 pp. 6-7 paras 46-48.

¹⁰⁶ A/C.4/31/SR.9 p. 2 para 2. See also *ibid* p. 10 para 50 (Senegal – admitting that the accusations were based on incomplete information, but accusing the countries named in the resolution of failing to provide evidence in their defence). *Contra* see *ibid* p. 5 para 17 (United States – describing the resolution as biased), p. 6 para 19 (France – arguing that the resolution is based on 'false allegations'), p. 7 paras 26-27 (United Kingdom – rejecting some statements in the resolution as false) and p. 13 para 62 (Bolivia – pointing out the 'categorical and unsubstantiated accusations contained in the resolution, which inevitably call[s] for reservations'). See also Peterson (n 7) 200 (acknowledging that the practice of using abstention as a way to indicate disapproval of a state nominated by a particular group).

¹⁰⁷ Alker and Russett (n 20) 154.

¹⁰⁸ See, for instance, A/C.3/69/SR.50 p. 2 para 3 (United States – denouncing Russian efforts to use the resolution to target its political opponents rather than promoting or protecting human rights); A/C.3/70/SR.50 p. 4 para 25

Interference in the Internal Affairs of States referring to the new international information order.¹⁰⁹ Another example is Resolution 73/240 on the activities of foreign economic interests in developing countries.¹¹⁰ In statements made in explanation of their negative votes, Morocco, Kiribati and Papua New Guinea concurred in lamenting that the report of the Special Committee on which the resolution was grounded contained biased language and had been manipulated and falsified for political reasons.¹¹¹ Similar accusations have been directed at the Special Committee tasked to study the status of the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples during the Cold War.¹¹²

What this reveals about the legal significance of resolutions is that passing a resolution serves the primary function of moulding expectations of future state conduct.¹¹³ As a result, generalizations about the legal significance of resolutions are difficult to sustain. While some resolutions attempt to consolidate or refine established norms, making specific requirements for action redundant,¹¹⁴ other resolutions openly serve the function of challenging and delegitimizing established norms,¹¹⁵ thus ingraining the perception that a new normative concept is being developed.¹¹⁶ Yet such resolutions turn out to be the most ideologically charged, eventually engendering the discrepancy between statements matching or diverging from formal votes cast by delegations (Figure 4.6). In addition, as Jacobsen writes, ‘the degree of voting conflict varies from one issue area to another’, thus confirming the impossibility of generalizing about the legal significance of resolutions.¹¹⁷

It may be objected that the considerations above unavoidably rest on generalizations about the sample, at least to an extent. It is, however, possible to fine tune the analysis and establish whether it is more likely that statements in explanation of votes match the votes cast (positive, negative or abstentions) when resolutions are highly contested – that is to say, adopted with a significant number of negative votes.¹¹⁸ The contention is that the higher the level of contestation of a resolution, the higher the likelihood that statements will match votes, thus signalling that resolutions truly reflect the intention of states (hence pointing to a perceived level of significance of resolutions).

Table 4.3 shows that there is a statistically significant relationship between the variables (votes cast and matching statements) while Table 4.4 clarifies that only the relationship between negative votes

(United States – arguing that the resolution is politicized and calls for unacceptable limits on freedom of expression); *ibid* p. 6 paras 33-34 (Ukraine – stating that the resolution reflects the Russian manipulation of history and is motivated by Russian propaganda).

¹⁰⁹ As discussed in Section 4.2.2 above.

¹¹⁰ UN Doc A/RES/73/240 (20 December 2018).

¹¹¹ A/C.4/73/SR.9 p. 6 para 44 (Morocco), p. 8 paras 57-58 (Kiribati) and p. 9 para 62 (Papua New Guinea).

¹¹² See, for instance, A/C.4/SR.1735 (United States – defining the report of the Special Committee ‘a thinly disguised propaganda assault’) and p. 3 para 20 (United Kingdom – arguing that ‘the Special Committee’s report [is] a thoroughly prejudiced and tendentious document’).

¹¹³ Peterson (n 7) 140.

¹¹⁴ A recent example is the cluster of resolutions on the illicit trade in small arms and light weapons, as discussed above.

¹¹⁵ Schachter (n 103) 3-4.

¹¹⁶ *ibid* 6. The foremost examples are the resolutions on the Charter of Economic Rights and Duties of States and activities of foreign economic interests in developing countries, as discussed above.

¹¹⁷ Jacobsen (n 2) 78.

¹¹⁸ As discussed in Chapter 2, Section 2.3.1.4.

and statements in explanation of votes (matching those votes) is statistically significant, as predicted.

Table 4.3

Logistic regression	Number of obs	=	1,126
	LR chi2(3)	=	27.39
	Prob > chi2	=	0.0000
Log likelihood = -766.7247	Pseudo R2	=	0.0175

votematch	Odds Ratio	Std. Err.	z	P> z	[95% Conf. Interval]
votenumbp	1.000363	.0028336	0.13	0.898	.9948244 1.005932
votenumbn	1.02636	.0055688	4.80	0.000	1.015503 1.037333
votenumba	.9969246	.0039715	-0.77	0.439	.9891708 1.004739
_cons	.791634	.2875096	-0.64	0.520	.3884909 1.613125

Note: _cons estimates baseline odds.

Table 4.3 presents the results of a binary logistic regression comparing the votes cast on individual resolutions with the statements made in explanation of those votes. The results show that, with a *chi-square* of 27.39 with 3 degrees of freedom and a *p* value of <0.001, there is at least one significant predictor in the model.

Table 2.4

Likelihood Ratio Tests: drop 1 term						
logistic regression						
number of obs = 1126						
votematch	Df	Chi2	P>Chi2	-2*log ll	Res. Df	AIC
Original Model				1533.45	1122	1541.45
-votenumbp	1	0.02	0.8981	1533.47	1121	1539.47
-votenumbn	1	25.11	0.0000	1558.56	1121	1564.56
-votenumba	1	0.60	0.4389	1534.05	1121	1540.05

Terms dropped one at a time in turn.

To test the impact of individual parameters on statements matching votes, the χ value (Wald test) has been compared with the Likelihood Ratio (*chi-square*) for each predictor. The results show that, with a *p* value of < 0.001, only the results for negative votes are statistically significant. Specifically, for each increase of 1 negative vote, there is a 2% increase of the odds of a matching vote (odd ratio = 1.02) with a confidence interval ranging between 1.5% and 3.7%.

What this suggests about the legal significance of resolutions is that false positives¹¹⁹ are more likely to be located in relatively uncontested resolutions. Coupled with the consideration that the overwhelming majority of statements made in explanation of abstentions amounts to a mild form of negative votes (Figure 4.6 above), the overall findings suggest that resolutions adopted with large majorities are the least likely to be supported by states once adopted. Hence, the text of those resolutions should be interpreted with caution, without taking it at face-value, irrespective of the wording (descriptive or prescriptive) used in resolutions. This is a counterintuitive finding.

A possible explanation is that the most contested resolutions belong to thematic clusters adopted by the Third Committee – namely, non-interference in the electoral process of states and unilateral coercive measures as a means of political and economic coercion.¹²⁰ The distinctive feature of the Third Committee's working methods is that the text of resolutions are usually not negotiated in advance by states, but only after they have been tabled.¹²¹ In addition, such clusters of resolutions

¹¹⁹ (n 93)

¹²⁰ The cluster of resolutions on coercive measures as a means of political and economic coercion is also discussed in plenary session and presents the same level of contestation.

¹²¹ As discussed in Chapter 3, Section 3.4.4.

aim at achieving two purposes, none of which finds explicit support in the letter of the UN Charter – that is to say, the protection of state sovereignty in context of the electoral process and the elimination of coercive measures.¹²² This is indicative of a more general reluctance by states to endorse resolutions setting benchmarks for international conduct, and potentially developing prescriptions, that go beyond a strict interpretation of the letter of the UN Charter.¹²³ For example, the United Kingdom categorically objected to any suggestion contained in Resolution 2425(XXIII) that allowing foreign investment in dependent territories automatically amounts to a violation of the administering Powers' obligations under the UN Charter or an impediment to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹²⁴ This confirms that – as also Gaudiosi, Roesch and Wu write – some words and provisions contained in resolutions have a contentious history which does not necessarily emerge from the text.¹²⁵

This apparently stands in contrast with the adoption of the Declaration on Friendly Relations among States in the Sixth Committee, which elaborates on the content and meaning of specific provisions of the UN Charter.¹²⁶ However, two considerations should be taken into account. Firstly, contrary to the Declaration on the Granting of Independence to Colonial Countries and Peoples, states commissioned the elaboration of the text of the resolution containing the Declaration on Friendly Relations among States to a group of jurists.¹²⁷ Secondly, in commissioning the Declaration on Friendly Relations, states agreed in advance to adopt a resolution simply clarifying the obligations contained in the UN Charter.¹²⁸ Hence, they did not add or detract anything from their obligations stemming from the UN Charter. It is also noteworthy that, in their statements in explanation of vote, delegations did not refer to the Declaration as an authoritative interpretation of the UN Charter.

What this tells us about the legal significance of resolutions is that, at the time of adoption, resolutions are mostly conceived as a means for political bargaining, not a piece of international legislation. Yet voting for a resolution or not opposing its adoption by consensus is a form of state conduct, as such capable of being interpreted as a precedent. In this context, states are wary that the use of normative or prescriptive language in the text of resolutions is not without consequences. When patterns of state conduct consolidate over time, the positions taken by states end up creating expectations about their intention to take the content of the resolutions seriously and give effect to the recommendations contained therein.¹²⁹ Hence, states often make statements in explanation of votes to qualify their endorsement of resolutions, thus bringing them back to the

¹²² See Chapter 2, Section 2.3.1.4.

¹²³ As discussed in section 4.2.2 above.

¹²⁴ A/C.4/SR.1812 p. 3 para 17. This practice appears to have originated in the 1960s. See Peterson (n 7) 186.

¹²⁵ Gaudiosi, Roesch and Wu (n 6) 41.

¹²⁶ UN Doc A/RES/2526(XXV) (24 October 1970).

¹²⁷ For an account of the work of the Committee by one of its members, see G Arangio-Ruiz, *U.N. Declaration on Friendly Relations and the System of Sources of International Law* (Springer 1979).

¹²⁸ Despite endorsing it, several delegations expressed reservations about the text of the Declaration. See, for instance A/C.6/SR.1184 p. 41 para 8 (Cambodia – referring to the Declaration as ‘far from being satisfactory’); *ibid* paras-11 10 (Morocco and Togo, respectively – arguing that the Declaration ‘contains gaps’).

¹²⁹ Gaudiosi, Roesch and Wu (n 6). See also O Schachter, ‘The Twilight Existence of Nonbinding International Agreements’ 71 *AJIL* (1977) 196, 299 (arguing that there is a general expectation that states will abide by soft law instruments).

realm of international politics rather than, strictly speaking, international law. As a result, resolutions cannot be taken at face-value, irrespective of how they are phrased.

4.2.4 How demanding are the resolutions' requirements to implement?

Explicitly or impliedly, the text of all resolutions require states to mobilize the resources necessary to make the resolutions' requirements effective.¹³⁰ Such resources may be economic, political, military and moral.¹³¹ For example, Resolution 71/193 on human rights and unilateral coercive measures requires states to avoid the extraterritorial application of national laws that run counter to the principles of free trade and hamper the development of human rights.¹³² This is an instance of political capacity. However, states differ in their capacity to mobilize resources, especially economic resources, as demonstrated by the different size of the contributions they make to the UN regular budget.¹³³ This suggests that certain resolutions (or provisions thereof) may prove to be more demanding than others to implement, especially for economically underdeveloped states.

It is possible to determine the degree of association between the level of state action (high or low)¹³⁴ required by resolutions and the type of resource a state needs to activate in order to satisfy the resolutions' requirements. Resolutions demanding high levels of state action bear the risk of being perceived as out of reach by certain states, thus affecting their perception of the legal significance of those resolutions. Accordingly, the assumption is that higher levels of state action are associated with a request to mobilize economic and military resources, the reason being they are material resources immediately available for states to use at their discretion. It is equally expected that moral and political capacities are associated with lower levels of state action, since they are the product of cultural factors and, in general, cannot be easily modified by unilateral actions of the government of the day.

Figure 4.7 shows that there is a moderate, but statistically significant, relationship between levels of state action and resolutions' requirements. Specifically, it turns out that, when state action is required, 85 percent of the resolutions' provisions demand some form of political intervention, 7 percent economic intervention, 6 percent military intervention and 2 percent moral intervention. With regard to the intensity of the intervention, the mobilization of economic and military resources is mostly associated with higher levels of state action, thus confirming the assumption. Political resources are more evenly spread across the whole range of types of action while moral resources are associated exclusively with the lowest ones, as expected.

¹³⁰ Peterson (n 7) 192 (emphasising the need for material resources to implement resolutions).

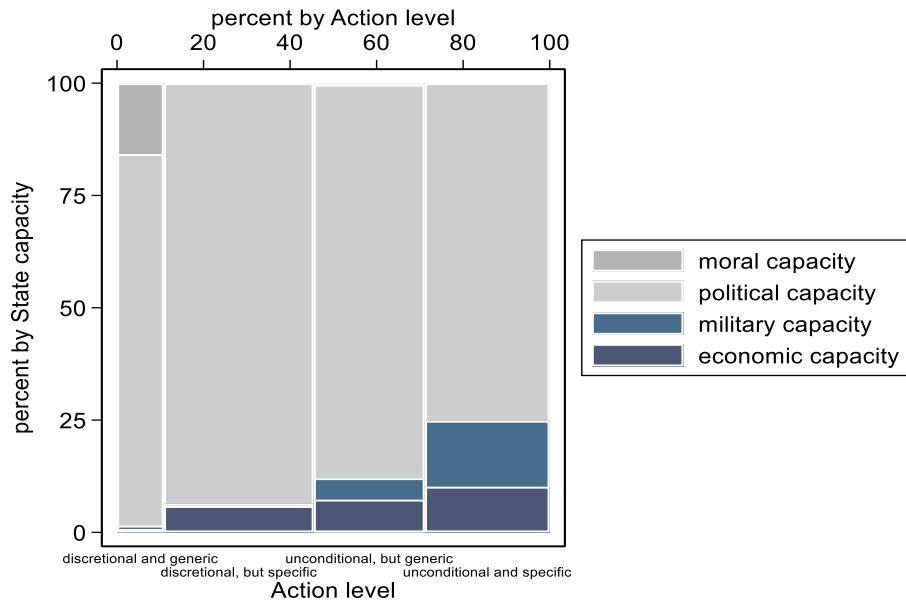
¹³¹ As discussed in Appendix, Section 3.1.4.

¹³² UN Doc A/RES/71/193 (19 December 2016) para 14.

¹³³ Data available at www.un.org/en/ga/contributions/scale.shtml (scale of assessments - accessed 12 June 2020). See also Peterson (n 7) 57 (showing a table on 'material capability, as measured by contributions to the UN regular budget').

¹³⁴ (n 26)

Figure 4.7



Relationship between state resources and action levels. With a p value of <0.001 (*chi-square*), there is a statistically significant relationship between types of action and resolutions requirements. The *Cramér V* coefficient of 0.27 also shows that the strength of the relationship is moderate.

Figure 4.7 does not explain the cause of the association. However, a possible explanation for the relationship between economic resources and the provisions of resolutions with high levels of state action is that those resolutions aim at redistributing wealth among states, thus redressing imbalances of economic power.¹³⁵ Such resolutions are likely to be strongly supported by economically poorer countries and, at least to an extent, opposed by the richer states, thus suggesting that the legal significance of resolutions is split. For instance, the cluster of restated resolutions on the legal aspects of the New International Economic Order adopted by the Sixth Committee attempts to codify principles of international law governing economic relations.¹³⁶ However, whereas developing countries have been keen to present the content of the resolutions as customary international law,¹³⁷ developed countries have unanimously rejected any legal character of resolutions on the New International Economic Order or those cited therein.¹³⁸ This attitude is symptomatic of the type of pressure that groups (or blocs) of states often play at the General Assembly with a view to influencing the outcomes of decisions.¹³⁹ At the same time, it

¹³⁵ As discussed in Sections 4.2.2 and 4.2.3 above.

¹³⁶ UN Doc A/RES/34/150 (17 December 1979) and following ones.

¹³⁷ See, for instance, A/C.6/34/SR.61 p. 8 para 32 (Jamaica – arguing that ‘many features of economic relations between the developing and the developed countries have attained the status of rules of customary international law because they are either based on or intimately connected with other rules of international law that govern political and social relationships between states’).

¹³⁸ See, for instance, A/C.6/34/SR.61 p. 6 para 25 (United States – arguing that the preambular paragraphs of Resolution 34/150 ‘try to attribute to General Assembly resolutions a character they do not possess’); *ibid* p. 7 para 28 (Netherlands – clarifying that the resolutions on the New International Economic Order do not contain norms of international law); *ibid* p. 9 paras 34 (Canada – stating that the Charter of Economic Rights and Duties of States does not contain principles and norms of international law) and 37 (Norway – pointing out that previous General Assembly resolutions do not contain principles of international economic law); *ibid* p. 11 para 46 (United Kingdom – arguing that the resolutions mentioned in the text do not reflect customary international law or *jus cogens*).

¹³⁹ Fasulo (n 101) 10 (stating regional blocs control most of the votes in the General Assembly) and 89 (pointing out that large voting blocs consist mainly of developing countries); Gaudiosi, Roesch and Wu (n 6) 60-61 (arguing that

turns out that the numerical strength of majority voting and perceptions of legal significance of resolutions do not necessarily support each other. Similarly, Peterson writes that:

majorities which do not include states with material capability to implement resolutions will not get very far along the path from decision to outcome. Such a majority can assert standards as much as it likes, but those standards will have little effect unless states with the capacity to act abide by. [...] the lack of material power will make their attainment unlikely.¹⁴⁰

Similarly, the association of military resources with calls for high levels of state action appears to be mostly linked to the demands of self-determination of developing countries against colonial or former colonial countries. Notable examples are Resolution 72/111 on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples whose paragraph 14 calls for terminating all military activities in former colonial countries.¹⁴¹ Developed countries have firmly objected to this provision, arguing that it places too much weight on granting or preserving independence without respecting the will of the people to take measures to contain the risk of outbreaks of civil unrest.¹⁴² Similarly, several resolutions on the activities of foreign economic interests in developing countries contain an implicit endorsement to recourse to armed struggle against former colonial countries,¹⁴³ which has been unequivocally opposed by Western countries.¹⁴⁴ These are resolutions adopted by the Fourth Committee and usually not negotiated in advance.¹⁴⁵ As a result, such resolutions have a confrontational, rather than conciliatory, nature. Under such circumstances, the legal significance of resolutions is perceived differently by opposing sides. As Fasulo writes, ‘the end of colonialism changed the world, and much faster than expected. Decolonization also transformed the UN,’ including the General Assembly.¹⁴⁶

Overall, the findings above suggest that economic requirements found in the text of resolutions and the economic capacity of states to act on resolutions are different concepts. The economic capacity of states also comes into play in relation to provisions containing political, military and, to a lesser extent, moral requirements. For instance, Resolution 72/156 on combating the glorification of Nazism ‘encourages states to adopt further measures to provide training for the police and other law enforcement bodies on the ideologies of extremist political parties, movements and groups whose advocacy constitutes incitement to racist and xenophobic violence’.¹⁴⁷ To be implemented, the provision requires political will, which in turn presupposes the economic capacity of states to accommodate the required change to their domestic order. This suggests that determining what role the economic capacity of states plays in voting for resolutions can provide an indication of how demanding the resolutions’ requirements are to implement.

groups are a powerful form of alliance, especially for small delegations: ‘a group means you don’t have to go it alone. There is a power that comes from the numbers.’ The caution is that delegations may be fully aligned on specific issues, but have different positions on other issues).

¹⁴⁰ Peterson (n 7) 197.

¹⁴¹ UN Doc A/RES/72/111 (7 December 2017).

¹⁴² A/C.4/72/SR.9 p. 10 paras 63 (Belgium) and 65-66 (United States). See also A/C.4/73/SR.9 p. 8 para 55 (Australia).

¹⁴³ A/RES/47/15 and previous ones.

¹⁴⁴ See, for instance, A/C.4/47/SR.8 p. 4 para 5 (United Kingdom); A/C.4/43/SR.6 p. 5 para 26 (Denmark); A/C.4/42/SR.9 p. 4 para 18 (Canada) and p. 5 para 25 (Norway).

¹⁴⁵ As discussed in Chapter 1, Section 1.4.5.

¹⁴⁶ Fasulo (n 101) 92.

¹⁴⁷ UN Doc A/RES/72/156 (19 December 2017) para 25.

States' contributions to the UN regular budget are taken as a proxy for economic capacity.¹⁴⁸ The contention is that economic capacity and votes (positive, negative or abstentions) are related. If this is so, such a relationship is likely to affect the degree of perceived legal significance of resolutions by delegations with different levels of economic capacity. As Peterson writes, 'those with the resources and those with the votes' are not necessarily the same.¹⁴⁹

The tables below present the results of the statistical analysis in relation to four models.¹⁵⁰ The first model compares the statements matching (or not matching) positive votes and economic capacity (Table 4.5). The second model compares statements matching (or not) negative votes and economic capacity (Table 4.6). The third model compares statements matching (or not) abstentions and economic capacity (Table 4.7). The fourth model compares statements made in explanation of a delegation's support for a resolution adopted by consensus and economic capacity (Table 4.8).

Table 4.5 – Positive votes

Two-sample t test with unequal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[95% Conf. Interval]	
differen	284	.8531232	.1596542	2.69054	.5388629	1.167384
matching	266	1.417951	.2445539	3.988554	.9364352	1.899467
combined	550	1.126295	.1445394	3.389748	.8423767	1.410212
diff		-.5648279	.2920549		-1.138753	.0090971

diff = mean(differen) - mean(matching) t = -1.9340
Ho: diff = 0 Satterthwaite's degrees of freedom = 460.666

Ha: diff < 0 Ha: diff != 0 Ha: diff > 0
Pr(T < t) = 0.0269 Pr(|T| > |t|) = 0.0537 Pr(T > t) = 0.9731

Relationship between economic capacity and statements matching positive votes. The results of the *t*-test show that the difference in mean economic capacity between states casting matching votes and those casting non-matching votes is -0.56 and statistically significant using a two-tailed test based on the assumption of unequal variance [$t(460.67) = -1.93, p = 0.03$]. The effect, however, is small (Cohen's *d* value = 0.17).

Table 4.6 – Negative votes

Two-sample t test with unequal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[95% Conf. Interval]	
differen	10	8.301	3.942974	12.46878	-.6186261	17.22063
matching	234	8.690248	.6297685	9.633606	7.449479	9.931016
combined	244	8.674295	.6231573	9.734029	7.446816	9.901774
diff		-.3892477	3.99295		-9.354761	8.576265

diff = mean(differen) - mean(matching) t = -0.0975
Ho: diff = 0 Satterthwaite's degrees of freedom = 9.4648

Ha: diff < 0 Ha: diff != 0 Ha: diff > 0
Pr(T < t) = 0.4622 Pr(|T| > |t|) = 0.9244 Pr(T > t) = 0.5378

Relationship between economic capacity and statements matching negative votes. The results of the *t*-test show that the difference in mean economic capacity between states casting matching votes and those casting non-matching votes is -0.39. With a *p* value of

¹⁴⁸ The focus remains on economic capacity, since military expenditure depends on the economic capacity of the state. Likewise, political and moral capacities do not feature prominently in this aspect of the analysis, since they do not easily lend themselves to be quantified and systematically analysed.

¹⁴⁹ Peterson (n 7) 127.

¹⁵⁰ The test aims at establishing whether the mean economic capacity of states casting a matching vote statistically differs from that of states casting non-matching votes.

0.46, the results are not statistically significant using a two-tailed test based on the assumption of unequal variance.

Table 4.7 – Abstentions

Two-sample t test with unequal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[95% Conf. Interval]	
differen	271	4.291869	.4606438	7.583155	3.384958	5.19878
matching	52	3.135615	.8128967	5.861882	1.503657	4.767574
combined	323	4.105723	.4082787	7.337667	3.302492	4.908954
diff		1.156254	.9343414		-.7007576	3.013265

diff = mean(differen) - mean(matching) t = 1.2375
Ho: diff = 0 Satterthwaite's degrees of freedom = 87.3119

Ha: diff < 0 Ha: diff != 0 Ha: diff > 0
Pr(T < t) = 0.8904 Pr(|T| > |t|) = 0.2192 Pr(T > t) = 0.1096

Relationship between economic capacity and statements matching abstentions. The results of the *t*-test show that the difference in mean economic capacity between states casting matching votes and those casting non-matching votes is 1.16. With a *p* value of 0.11, the results are not statistically significant using a two-tailed test based on the assumption of unequal variance.

Table 4.8 – Adoption by consensus

Two-sample t test with unequal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[95% Conf. Interval]	
differen	15	.5258	.399577	1.547555	-.3312074	1.382807
matching	234	2.731162	.4135495	6.326091	1.916388	3.545937
combined	249	2.598309	.390708	6.165269	1.82878	3.367838
diff		-2.205362	.5750521		-3.357248	-1.053477

diff = mean(differen) - mean(matching) t = -3.8351
Ho: diff = 0 Satterthwaite's degrees of freedom = 56.1825

Ha: diff < 0 Ha: diff != 0 Ha: diff > 0
Pr(T < t) = 0.0002 Pr(|T| > |t|) = 0.0003 Pr(T > t) = 0.9998

Relationship between economic capacity and statements matching consensus. The results of the *t*-test show that the difference in mean economic capacity between states casting matching votes and those casting non-matching votes is -2.21 and statistically significant using a two-tailed test based on the assumption of unequal variance [$t(56.18) = -3.84, p = 0.002$]. The effect size is medium (Cohen's *d* value = -0.36).

The results show that the relationship between statements matching votes and economic capacity is statistically significant only in relation to positive votes and resolutions adopted by consensus (that is to say, without voting). What this suggests about the legal significance of resolutions is that there is a statistically significant difference between the mean economic capacity of states casting positive matching votes, thus confirming the finding about the likely presence of false positives in resolutions adopted by majority (Figure 4.5). Similarly, there is a statistically significant difference between the mean economic capacity of states adopting resolutions by consensus. This indicates a mild presence of false positives in those resolutions, although generalizations are difficult to sustain.

An example is the cluster of resolutions on building a peaceful world through sport and the Olympic ideal, which have been adopted bi-annually since 2001 with a view to fostering friendly relations and international cooperation for development.¹⁵¹ As the statements in explanation of vote show, several delegations have repeatedly lamented that the resolutions on this issue have

¹⁵¹ UN Doc A/RES/56/75 (11 December 2001) and following ones.

never been fully implemented despite their unanimous support,¹⁵² one reason being the politicization of issues surrounding sport competitions and the Olympic Games.¹⁵³ This supports the finding that the text of resolutions adopted by large majorities or by consensus cannot be taken at face-value, since it does not represent a shared view of states, irrespective of the language – prescriptive or otherwise – used in the text of resolutions.¹⁵⁴ This further suggests that states often adopt resolutions they are unwilling or incapable to implement.

With regard to negative votes, the relationship is not significant. Considering that the majority of members at the General Assembly are developing countries, this means that the vote is a genuine indication that states oppose the content of a resolution.¹⁵⁵ Hence, it is a strong indication of a perceived lack of legal significance of resolutions on part of the delegations casting negative votes.¹⁵⁶ Similarly, the relationship is not significant in relation to abstentions, thus confirming that they amount to a mild form of negative vote.¹⁵⁷ As a result, the presence of abstentions provides a strong signal that the text of resolutions lacks in legal significance, thus suggesting unwillingness on part of states to implement resolutions they would otherwise be capable of implementing.

A possible explanation for the finding above is that by adopting resolutions states intend to bargain political commitments.¹⁵⁸ Hence, they adopt resolutions aimed at influencing other states' conduct in order to achieve their own political ends. An alternative explanation is that the majority of states at the General Assembly, which are developing countries, often resort to resolutions as a means to redistribute wealth.¹⁵⁹ However, such resolutions are mostly opposed by developed countries, which are those with the means to implement the various resolutions' requirements. In relation to this, Peterson argues that 'control over votes in the Assembly does not correlate perfectly with control over capability in the international system'.¹⁶⁰ Similarly, Schermers and Blokker write that equality of voting does not guarantee parity of interest among member states.¹⁶¹ As a result, economic capacity becomes a form of political power capable of influencing the course of action at the General Assembly and, through the actions of delegates, international relations.

What this indicates about the legal significance of resolutions is that, far from being a neutral engagement with the technicalities governing the decision-making process at the General Assembly, patterns of state conduct are largely created, and conditioned, by strategies of power, which in turn consolidate structures of power in the text of resolutions.¹⁶² As Schachter writes,

¹⁵² A/62/PV.40 p. 14 (Cyprus).

¹⁵³ A/68/PV.44 pp. 16 (Belarus) and 20-21 (Ukraine).

¹⁵⁴ As discussed in Section 4.2.3 above.

¹⁵⁵ This can also be seen as a manifestation of two conflict dimensions at the General Assembly – namely, North-South and, to a lesser extent, East-West – since developed countries are mostly Western countries located in the global North. See Jacobsen (n 2) 82.

¹⁵⁶ As discussed in Section 4.2.3 above. See also HG Schermers and NM Blokker, *International Institutional Law* (6th rev ed, Brill/Nijhoff 2018), 563, para 772 ('majority decisions will lack the necessary authority for those who were outvoted, which may in turn affect the implementation of such decisions').

¹⁵⁷ As discussed in Section 4.2.3 above.

¹⁵⁸ *ibid*

¹⁵⁹ (n 107)

¹⁶⁰ Peterson (n 7) 90.

¹⁶¹ Schermers and Blokker (n 156) 578, paras 792-793.

¹⁶² O Schachter, 'The Role of Power in International Law' 93 ASIL Proc (1999) 200, 204.

It cannot be said that the more powerful states always prevail in such bodies [like the General Assembly], but their ability to withhold their consent on issues where their participation is essential gives them a critical bargaining advantage, which is enhanced in situations in which consensus is sought.¹⁶³

Ultimately, it is ‘the friction between demands and capabilities’ that gives shape and direction to the rules and principles stated in resolutions.¹⁶⁴ Along these lines, Alker and Russett argue that ‘winning resolutions in the Assembly does not insure that the resolutions will have influence outside the Assembly.’¹⁶⁵ It follows that states’ perceptions of the legal significance of resolutions are a manifestation of the relations of power at the General Assembly at a given point in time rather than a constraint to state action under the guise of an immutable legal obligation contained in a given resolution. International law itself can be seen as ‘reflect[ing] and sustain[ing] the existing distribution of power and political order’.¹⁶⁶ This further suggests that the concept of legal significance is not static, but evolves as new relations are forged at the General Assembly.¹⁶⁷ The fact that resolutions like the ones on the New International Economic Order, which are still adopted annually by the General Assembly, are systematically dismissed by the developed states as anachronistic¹⁶⁸ confirms that the concept of legal significance is in constant flux, hence not amenable to facile generalizations.

Overall, the considerations above show that resolutions can only be as demanding to implement as states are willing or capable to mobilize the resources necessary to achieve their stated goals. Ultimately, resolutions are a bargained commitment which is not intended to impose any specific course of action on states. The related concept of legal significance turns out to be flexible and context-dependent, not a unitary or static legal construct.

4.3 Assessing the emergent analytics

This section examines the emergent analytics – that is to say, the key concepts emerging from the empirical analysis¹⁶⁹ – stemming from the empirical investigation. The findings bring to the fore three emergent analytics. Two of them refer to the environment, political and legal, in which states adopt resolutions. I refer to them as international polyarchy and General Assembly quasi-supranationalism, respectively. They each reveal a distinctive trait of the functioning of the General Assembly. As Fasulo writes, ‘the UN has many parts, many facets, each of which can offer a particular feel of the world body’.¹⁷⁰ As a primary organ of the UN, the General Assembly, is one such part. It is against this backdrop that the third concept emerges: the scale of perceived degree

¹⁶³ *ibid*

¹⁶⁴ *ibid* 205.

¹⁶⁵ Alker and Russett (n 20) 172. See also Peterson (n 7) 114 (arguing that ‘[s]ecuring a favorable decision does not end the effort required to turn demand into outcome. The decision must be acted upon to have real political effect’).

¹⁶⁶ Alker and Russett (n 20) 205.

¹⁶⁷ *ibid* 201.

¹⁶⁸ See, for instance, A/C.2/71/SR.24 p. 4 para 17 (United States) and *ibid* p. 5 paras 19-21 (Slovakia – on behalf of the European Union). *Contra* see A/C.2/69/SR.33 p. 4 para 22 (Cuba – arguing that the world is facing an economic crisis similar to that of the 1970s).

¹⁶⁹ The New Legalist approach on which this study builds is discussed in Chapter 1, Section 1.4.2.

¹⁷⁰ Fasulo (n 101) 5 (also quoting Nancy Pelosi: ‘There is no such single thing at the UN. [...] You can’t say what the UN is because you touch one area and it comes out looking differently on the other side’).

of legal significance of resolutions at the adoption stage. I refer to this as the scale of legal significance.

Sub-section 4.3.1 examines how states use the General Assembly as a political system. Specifically, it elaborates on the idea that voting on the text of resolutions is a form of negotiation of expectations of future state conduct. It then shows that the political and institutional aspects of the idea of General Assembly autonomy are not mutually exclusive but reinforce each other. Building on this, sub-section 4.3.2 delves into the socially constructed meaning of the normative boundaries of General Assembly resolutions. It shows that, irrespective of their stated aims and textual formulations, there are limits to the scope of resolutions dictated by the UN Charter's division of power between the UN principal organs as well as international law considerations. Hence, there are socially constructed limits to the concept of legal significance of resolutions. Finally, sub-section 4.3.3 examines the political and legal conditions under which states appear willing to implement resolutions, as manifested at the adoption stage. As a result, it sheds light on how states frame the legal significance of resolutions at the time of adoption.

4.3.1 International polyarchy

Over time, the General Assembly has developed a defined set of informal practices, both in plenary session and in the work of the six main committees.¹⁷¹ Such practices complement the General Assembly's Rules of Procedure and the relevant provisions of the UN Charter.¹⁷² They also impart a distinctive character to the General Assembly as a political system open to the entire UN membership. Yet the General Assembly is not a world parliament, since it lacks legislative powers.¹⁷³ According to Articles 10-14 of the UN Charter, resolutions are only recommendations. This begs the question of what type of political system the General Assembly is and how this affects the perception of legal significance of resolutions by states at the adoption stage.

The frequency distribution of references to normative provisions in the text of resolutions shows a clear pattern indicating that states treat resolutions as political, rather than legal, instruments.¹⁷⁴ Yet the adoption of resolutions is accompanied by an expectation that states will give some form of consideration to them.¹⁷⁵ As a result, a majority of the General Assembly is able to influence the course of the debate as well as the outcome. Considering that the General Assembly has been dominated by developing countries since 1964¹⁷⁶ and that for many such developing countries it represents the only global forum where they have the right to be heard on an equal footing with the other member states in relation to any potential matter concerning them,¹⁷⁷ voting at the General Assembly has become a means for public contestation.

This simultaneous presence of the condition of formal equality of states and the possibility of public contestation of issues of international concern makes the General Assembly what Dahl

¹⁷¹ As discussed in Chapter 3, Section 3.4.

¹⁷² Peterson (n 7) 10.

¹⁷³ Bailey (n 21) 149.

¹⁷⁴ As discussed in Section 4.2.1 above.

¹⁷⁵ As discussed in Section 4.2.2 above.

¹⁷⁶ Peterson (n 7) 13.

¹⁷⁷ *ibid* 2-3.

termed a polyarchy, meaning a regime ‘that ha[s] been substantially popularized and liberalized, that is, highly inclusive and extensively open to public consultation’.¹⁷⁸ Dahl developed the concept of polyarchy in relation to national regimes.¹⁷⁹ However, it appears amenable to be applied to other types of regimes, including international organizations. As noted above,¹⁸⁰ states use the General Assembly as a forum for discussion with a view to reaching broad political agreements, rather than specific action points, on the issues under discussion.¹⁸¹ From this perspective, resolutions turn out to be a means for formalising the outcome of the discussion.¹⁸²

At the same time, the General Assembly serves different purposes for different states.¹⁸³ For instance, it has often been used by the developing countries-led majority to pursue avenues for forcing a redistribution of wealth from the developed to the developing countries. This creates an unusual situation in international relations where the General Assembly effectively acts as an institution ‘that permits the weak to formulate an alternative agenda for the political system’.¹⁸⁴ As a result, states place different expectations on resolutions, including their legal significance at the time of adoption.

For instance, some resolutions adopted by majority have a deliberately condemnatory, rather than conciliatory, content.¹⁸⁵ Most notably, the resolutions on the activities of foreign economic interests in developing countries contain unsubstantiated allegations as to practices conducted by selected countries in violation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. As Canada pointed out in relation to the adoption of Resolution 32/35, the resolution is ‘not a report of findings but to some extent a bill of indictment’.¹⁸⁶ In such and similar situations, the consultation turns out to be one-sided, despite the fact that voting for resolutions is formally open to the entire UN membership. Also relevant is the fact that the developing countries-led majority lacks the material resources needed to translate the resolutions’ content into concrete outcomes. Yet the sheer power of numbers allows it to mount a verbal and symbolic challenge to the existing world economic and political paradigms.¹⁸⁷ This confirms Dahl’s observation that ‘developing a system of public contestation is not necessarily equivalent to full democratization’.¹⁸⁸ Hence, the reluctance of states to agree on the value of resolutions in general, and the condemnatory ones in particular.

The observations above in turn reveal that there is a significant association between economic development and political development of the states of the international community represented at the General Assembly. Likewise, there is a significant association between economic well-being

¹⁷⁸ RA Dahl, *Polyarchy: Participation and Opposition* (Yale University Press 1971), 8.

¹⁷⁹ *ibid* 11-12.

¹⁸⁰ See Section 4.2.2 above.

¹⁸¹ Peterson (n 7) 240.

¹⁸² Bailey describes the practice of having a debate followed by a vote at the General Assembly as a form of ‘parliamentary diplomacy’. Bailey (n 21) 9-10.

¹⁸³ As discussed in Section 4.2.2 above.

¹⁸⁴ Peterson (n 7) 51.

¹⁸⁵ *ibid* 2, 242 and 255 (describing the General Assembly as a place to pursue conflict).

¹⁸⁶ A/C.4/32/SR.9 p. 11 para 43.

¹⁸⁷ Peterson (n 7) 13-14.

¹⁸⁸ Dahl (n 178) 6.

of states and democracy (or, in the case of the General Assembly, polyarchy).¹⁸⁹ Specifically, the issue of economic inequality affecting the majority of UN members sitting at the General Assembly appears to produce an issue of political inequality affecting the minority of (mostly developed) countries. This effectively makes the General Assembly a near-inclusive, as opposed to a fully inclusive, polyarchy. As a result, regularly having resolutions adopted by a compact group of developing countries forcing developed states to redistribute wealth at their own terms and conditions turns out to be a form of tyranny of the majority that goes against the idea of inclusiveness.¹⁹⁰ Irrespective of historical considerations justifying the existence of such practice, this consolidated trend affects the perception of both the role of the General Assembly as a forum for discussion and the legal significance of resolutions adopted therein. In the absence of a centre of global authority,¹⁹¹ the General Assembly turns out to be ‘a deliberative body in a decentralized political system’.¹⁹²

The political context at the General Assembly, as evidenced by the presence of regional groups, also points to the existence of different cultures and worldviews that impinge upon states’ expectations about the value, real or symbolic, of discussions at the General Assembly and the outcome thereof. Dahl writes that ‘[i]f a country is divided into majority and minority subculture, the members of the majority have less need to be conciliatory toward the minority, since they can form a majority coalition among themselves’.¹⁹³ The resolutions opposing any foreign investment in developing countries are an example, since they are grounded on widely discredited generalizations about the harmful nature of investments.¹⁹⁴ It follows that ‘opponents in a conflict cannot be expected to tolerate one another if one of them believes that toleration of another will lead to his own destruction or severe suffering’.¹⁹⁵

As Dahl writes, ‘the closer a country approaches a system of mutual veto the more it runs the risk of *immobilisme*. The risk of *immobilisme* is the price a country with potentially hostile subcultures pays for tolerating the political expression of its cleavages’.¹⁹⁶ This explains why resolutions tend to reflect a minimum common denominator when adopted by consensus or why the strongest signal of legal significance attached to resolutions is found in opposition to highly contested resolutions.¹⁹⁷ It may be objected that voting is not the only form of participation in the General Assembly: informal contacts among delegations do matter as well.¹⁹⁸ Yet this observation only supports the findings that the process of bargaining expectations not supported by genuine commitments at the General Assembly imparts different shades of meaning to the text of resolutions for different states or groups of states, thus perpetuating the status of political

¹⁸⁹ RA Dahl, *A Preface to Economic Democracy* (University of California Press 1985), 45; Dahl (n 178) 65 (arguing that there is ‘[a] relationship between socioeconomic development and inclusive or near inclusive polyarchy’).

¹⁹⁰ Dahl (n 178) 89 (recognizing that polyarchies have tolerated a good deal of inequality).

¹⁹¹ Bailey (n 21) 18.

¹⁹² Peterson (n 7) 7.

¹⁹³ Dahl (n 178) 116.

¹⁹⁴ As discussed in Section 4.2.2 above.

¹⁹⁵ Dahl (178) 217.

¹⁹⁶ *ibid* 219.

¹⁹⁷ As discussed in Section 4.2.3 above.

¹⁹⁸ See Gaudiosi, Roesch and Wu (n 6) 19 (‘individuals, and not just the flag, influence the negotiation’); Fasulo (n 98) 96 (people really matter at the UN). See also RA Dahl and EE Tufte, *Size and Democracy* (Stanford University Press 1973), 61.

inequality of states at the General Assembly eventually affecting the perception of legal significance of resolutions at the adoption stage.

Voting at the General Assembly turns out to be a form of negotiation of commitments and expectations within a political system¹⁹⁹ which is representative but not fully democratic. Hence, the endemic ambiguity as to the face-value significance of the text of resolutions. This pragmatic observation about resolutions reveals other theoretical, often underestimated, aspects of the General Assembly as a political system.

On the one hand, states act within the General Assembly in various capacities – namely, as the General Assembly member states and as independent international actors. By taking part in the decision making process, they aim to find common solutions to common problems in a mutually beneficial way, thus preserving their own interests. Schermers and Blokker describe this functional connection as a paradox:

In order to exercise their functions and *to remain as independent as possible*, states are forced to cooperate due to the unavoidable reality of interdependence and cooperation.²⁰⁰

From this perspective, the political autonomy of the General Assembly brings to the fore the existence of an inescapable tension between the will of the General Assembly and the separate will of its member states. The institutional law of any international organization is specifically designed to manage the relationship between the international organization (and organs thereof) and its member states, especially through the decision making process. In this respect, the concept of international polyarchy appears to embrace both the political and the institutional aspects of the concept of General Assembly autonomy, showing that they are not mutually exclusive but reinforce each other.²⁰¹

On the other hand, the nature of the General Assembly as an international polyarchy suits well the feature of international law as a state-centred, consensual system, since it preserves state autonomy. This contradicts some of the international institutional law literature, which maintains that international law is incapable of accommodating the corporate nature of international organizations.²⁰² A possible explanation for the discrepancy is that the scholarly literature refers to the external relations of international organizations, such as actions governed by the law of treaties or the responsibility of international organizations for wrongful acts, instead of the relationship between international organizations and their member states.²⁰³ The problem raised by external relations actions is how to hold the international organization (or organs thereof) accountable for

¹⁹⁹ Peterson (n 7) 239 (describing the General Assembly as a political institution).

²⁰⁰ Schermers and Blokker (n 156) 2, para 4 (emphasis added). See also *ibid* 26, para 23 ('all international organizations seek to reconcile the wish of the member states *to remain as independent as possible* with the reality of interdependence and the need to cooperate in a certain area.' Emphasis added).

²⁰¹ This echoes a rather isolated scholarly position. See J d'Aspremont, 'The multifaceted concept of the autonomy of international organizations and international legal discourse' in R Collins and N White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011), 63, 64 (describing the concept of autonomy as a complex one comprising the idea of political autonomy of the international organization and the idea of autonomy of the international organization's legal order from general international law).

²⁰² Brölmann (n 3) 325.

²⁰³ *ibid* 320.

violations of rules created by states under international law, which is a legal order designed for sovereign states. Conversely, the power of recommendation originates in the separate legal order of the international organization and aims at streamlining an agreed course of action between states acting as the members of the organization as a matter of institutional, not international, law. The fact that the resolutions address states does not alter the latter's rights and duties under international law.

It stems from the above that resolutions cannot produce legal effects on the international plane simply by virtue of their adoption by a representative body. However, this does not prevent states from relying on international law in the text of resolutions.²⁰⁴ Nor does it preclude them from relying on resolutions in their capacity as sovereign entities outside the context of the General Assembly's decision making process. Indeed, the degree of legal significance attached to resolutions at the adoption stage may well disclose the intention of states to rely on resolutions as a means for altering patterns of international relations, possibly influencing the development of international law.

4.3.2 General Assembly quasi-supranationalism

The polyarchic nature of the General Assembly preserves the autonomy of both the General Assembly and states acting as its members. This enables states to freely discuss any matter within the remit of the General Assembly's mandate and adopt resolutions formalising the outcome of such deliberations. While resolutions are not binding *per se*, it appears that states nonetheless elaborate the recommendations contained in resolutions following a structured and principled approach.²⁰⁵ Accordingly, the language used in resolutions is carefully negotiated and scrutinized by delegates with a view to facilitating consensus on the text submitted for adoption.²⁰⁶ In relation to this, it is noteworthy that resolutions often refer to international law as part of the background of the recommendations formulated. This raises a number of questions: does international law serve a specific function – enabling or restraining – in the process of negotiation of the text of resolutions? Does it impose any limits to the content of resolutions and the related concept of legal significance? How open is the General Assembly to international law?

The UN Charter is silent about the content of resolutions. Article 10 of the UN Charter simply states that UN members can discuss any issue they deem relevant. However, the general theory of institutional law clarifies that acts of international organizations have a functional character, meaning that they must contribute to the achievement of the aims of the international organization.²⁰⁷ This is also the view endorsed by the International Court of Justice (ICJ) in the *Reparation for Injuries* advisory opinion:

²⁰⁴ See also Amerasinghe (n 6) 169 (arguing that the language used in a particular resolution may be indicative, although not necessarily associated, with particular legal effects).

²⁰⁵ As discussed in Section 4.2.2 above.

²⁰⁶ Fasulo (n 101).

²⁰⁷ ND White, *The United Nations System: Toward International Justice* (Lynne Rienner 2002), 14.

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being *essential to the performance of its duties*.²⁰⁸

In practice, the General Assembly itself determines the circumstances under which international law acquires relevance in the process of negotiation of the text of resolutions. Such a socially constructed role of international law is important, as it reveals an aspect of the implied powers of the General Assembly and how reliance on such powers affects the degree of legal significance that states attach to resolutions at the adoption stage (and related expectations of compliance).

The selected sample of resolutions²⁰⁹ is replete with statements in explanation of vote recognizing the existence of three types of limits to the content of resolutions. Effectively, such self-constructed limits amount to a qualification of the General Assembly's power of recommendation.

The first limit is a functional one. It holds that resolutions cannot alter the letter and spirit of the UN Charter by recognizing rights and duties not contemplated in the text of the Charter. For instance, in relation to the adoption of the Declaration on Non-Intervention in the Internal Affairs of States,²¹⁰ several delegations clarified that resolutions 'do not impose obligations comparable to those of the Charter'.²¹¹ Similarly, in relation to the cluster of resolutions on the Declaration on the Preparation of Societies for a Life in Peace, delegations clarified that they do not impose 'legal obligations'.²¹² In general, delegations treat resolutions (including declarations) as political statements, not a precise legal definition of the principles stated in the UN Charter.²¹³ There are even instances in which resolutions have been unilaterally declared null and void by states for violating the spirit of the UN Charter.²¹⁴

Although not mentioned in the statements, such and similar views expressed by member states find support in the case law of international courts. For example, in *Interpretation of Peace Treaties*, the ICJ held that the meaning assigned to the provisions of an international organization's constitutive treaty should not be contrary to its letter and spirit.²¹⁵ This suggests that states cannot derive any implied power of amendment from the power of recommendation, as stated in Article 10 of the UN Charter. They cannot construe the legal significance of resolutions as the power of resolutions to impose a specific path to achieve the aims and goals of the UN Charter on member

²⁰⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Rep 174, p. 182 (emphasis added).

²⁰⁹ See Chapter 2, Section 2.3.1.3.

²¹⁰ UN Doc 2131(XX).

²¹¹ A/C.1/SR.1483 p. 360 para 16 (New Zealand); *ibid* p. 362 para 33 (France); *ibid* p. 363 para 38 (Australia); *ibid* para 43 (Italy).

²¹² A/C.1/33/PV.67 p. 6 and A/C.1/36/PV.51 p. 16 (United States).

²¹³ *ibid* p. 362 para 29 (Canada); *ibid* p. 363 para 38 (Australia); A/C.6/SR.1006 p. 286 para 29 (United States); A/C.1/SR.1422 p. 434 para 39 (Philippines).

²¹⁴ A/C.1/60/PV.21 p. 21 (Venezuela – defining Resolution 60/1 containing the 2005 World Summit Outcome 'null and void and illegal' *ab initio* because of the manner in which it was negotiated and adopted). See also A/PV.2315 p. 1370 para 84 (Brazil – arguing that Article 3 of the Charter of Economic Rights and Duties of States violates the letter and the essence of the UN Charter); A/C.1/34/PV.55 p. 42 (United States – arguing that the Declaration on Non-Intervention in the Internal Affairs of States 'undermines the principles of the UN Charter').

²¹⁵ ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, advisory opinion, [1950] ICJ Rep 221, p. 229.

states. That would amount to an arbitrary interpretation of the UN Charter provisions. There are many possible ways in which the General Assembly can implement its mandate and the UN Charter does not delineate any hierarchy of sort within the range of possible choices. Already in 1927, the Permanent Court of International Justice (PCIJ) recognized the power of international organizations to exercise the functions bestowed on them by the constitutive treaty ‘to their full extent, in so far as the [constitutive treaty] does not impose restrictions upon it.’²¹⁶

The second limit is a constitutional one. It entails that resolutions cannot change the division of powers between the General Assembly and the Security Council, as established in the UN Charter. For instance, resolutions encouraging military action against former colonial countries are deemed to be *ultra vires*, since only the Security Council can authorize the use of military force or adopt mandatory sanctions.²¹⁷ Conversely, the resolutions on special political missions remain *intra vires*, even when a situation is being discussed by the Security Council, since they do not impinge upon the primary role of the Security Council in maintaining international peace and security.²¹⁸

This type of delegations’ statements reiterate that the UN Charter is the basis of competence of the General Assembly. Accordingly, the interpretation of the power of recommendation cannot extend beyond the limits set forth in the provisions of the UN Charter. As the ICJ also noted in the *Conditions of Admission* advisory opinion:

The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.²¹⁹

Even more poignantly, in his dissenting opinion in *Namibia*, Judge Fitzmaurice stated that the power of recommendation of the General Assembly

is acceptable if it is read as being related and confined to existing and specified duties; but it would be quite another matter, by a process of implication, to seek to bring about *extension* of functions, such as would result for the Assembly if it were deemed (outside Articles 4, 5, 6, 17) to have non-specified power, not only to discuss and recommend, but to take executive action, and to bind.²²⁰

It stems from the above that states cannot use resolutions to substitute or supplement the Charter powers of an organ with those of the General Assembly. For all practical purposes, this would

²¹⁶ PCIJ, *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, advisory opinion, [1927] Publ PCIJ, Series B, No 14, p. 64.

²¹⁷ A/C.4/34/SR.28 p. 17 para 95 (Finland); A/C.4/SR.2121 p. 226 para 77 (Denmark); A/C.4/37/SR.9 p. 3 para 4 (Sweden); A/C.4/36/SR.22 p. 16 para 100 (Finland); *ibid* p. 17 para 107 (Norway); A/C.4/39/SR.11 p. 19 para 97 (Mongolia); A/C.4/42/SR.9 p. 4 para 18 (Canada); A/C.4/43/SR.6 p. 4 para 15 (Greece on behalf of the European Union).

²¹⁸ A/C.4/67/SR.23 p. 11 para 53 (United States); *ibid* para 55 (France).

²¹⁹ ICJ, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, advisory opinion, [1948] ICJ Rep 57, p. 64.

²²⁰ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion, [1971] ICJ Rep 16, 282 (dissenting opinion of Judge Fitzmaurice – supporting the conclusions of the ICJ in the *Reparation of Injuries* advisory opinion of 1949. Emphasis original).

deprive a primary organ like the Security Council of the capacity of executing its mandate, thus changing the balance of power of the entire UN Charter. In theory, nothing prevents the member states of an international organization reshaping the purposes of the organization by unanimous agreement, even without a formal amendment to the constitutive treaty. This is how the North Atlantic Treaty Organization repurposed itself after the end of the Cold War.²²¹ However, absent such consensus, resolutions of the General Assembly initiating a *de facto* constitutional change do not possess a high degree of legal significance at the adoption stage and are unlikely to elicit state compliance once adopted.

The third limit is a procedural one. It establishes that resolutions cannot be used as a means for creating new rights and duties under international law outside the traditional channels of treaty and custom. On several occasions, delegations have acknowledged that resolutions are political statements, not an elaboration of international law.²²² For instance, some delegations have clarified that the provisions of the Declaration on the Granting of Independence to Colonial Countries and Peoples and subsequent ones assessing its implementation do not necessarily reflect conventional or customary international law.²²³ Similarly, delegations have pointed out that the resolutions on the New International Economic Order do not contain or create norms of international economic law.²²⁴ Other delegations have emphasised that resolutions cannot derogate from existing rules of international law.²²⁵ For example, they have criticized the resolutions on the New International Economic Order adopted by the Second Committee for dealing with attributes and characteristics of international trade currently regulated by WTO law.²²⁶ Similarly, some delegations have firmly opposed the provisions of the resolutions on permanent sovereignty over natural resources delimiting national jurisdiction over marine resources, since they confer to the General Assembly competences that they consider belong to the Conference on the Law of the Sea.²²⁷

The considerations above suggest that resolutions cannot create a power of the General Assembly greater than that of recommendation. In particular, resolutions cannot bind member states against their will or replace existent rules or regimes of international law. However, this stance finds only partial support in the case law of the ICJ. On the one hand, in *Effect of Awards*, the Court held that the General Assembly had the power to establish an administrative tribunal.²²⁸ The purpose of the tribunal was to exercise judicial functions, which the General Assembly does not possess. Article 22 of the UN Charter only allows the General Assembly to establish such subsidiary organs as it deems necessary for the performance of its functions. On the other hand, the ICJ recognized that creating an administrative tribunal is one of the possible means for regulating staff relations, which

²²¹ Schermers and Blokker (n 156) 25-26, para 23.

²²² A/C.1/SR.1483 p. 363 para 42 (United States).

²²³ A/C.4/72/SR.9 p. 10 para 68 (United States).

²²⁴ A/C.6/34/SR.61 p. 7 para 28 (Netherlands); A/C.6/40/SR.47 p. 4 para 13 (Chile – casting reservations on the creation of the concept of common heritage of mankind through General Assembly resolutions).

²²⁵ A/PV.1478 p. 6 (Belgium); A/C.1/34/PV.55 p. 39 (Ireland – complaining that the Declaration on Non-Intervention in the Internal Affairs of States contains recommendations amounting to intervention in the internal affairs of states).

²²⁶ A/C.2/73/SR.23 para 34 (United States).

²²⁷ A/PV.2203 p. 2 para 27 (United Kingdom).

²²⁸ ICJ, *Effects of Awards of Compensation Made by the U. N. Administrative Tribunal*, advisory opinion, [1954] ICJ Rep 47.

is a General Assembly's attributed power under article 101 of the UN Charter.²²⁹ Hence, it is a means to achieve the purposes of the United Nations. The ICJ reached the same conclusion in *Application for Review* in relation to the creation of a committee endowed with review powers.²³⁰

Effectively, the ICJ established that an implied power cannot interfere with an attributed power. Applied to the resolutions attempting to replace international law, the reasoning of the ICJ lends support to the concerns expressed by delegations, since allowing resolutions to produce binding effects simply by virtue of their adoption would transform them into a new source of international law, thus fundamentally changing the nature of the power of recommendation set forth in Article 10 of the UN Charter. It is reasonable to further infer from this that, while these types of resolutions attract unequivocal signals of legal significance (or lack thereof) from member states, it is unlikely that they will secure compliance of the entire membership of the General Assembly once adopted.

Some resolutions also aim to codify, instead of replacing, international law. However, the line between codification of existent rules and progressive development of international law is often blurred. Indeed, resolutions attempting to codify international law often generate great controversy among states. As a result, they do not provide any clear indication as to the legal significance of resolutions. For example, several delegations have objected to the adoption of the Charter of Economic Rights and Duties of States on the basis that it contains principles that are not universally accepted.²³¹ Similarly, several delegations have cast reservations on the inclusion of the principle of non-intervention in the domestic affairs of states in the text of the Declaration on Friendly Relations among States through a simple reference to Resolution 2131(XX), the latter being considered a political statement (hence not suitable to be included in the outcome of the process of codification).²³² The reference was eventually dropped. Yet the United States has remained adamant that the Declaration does not possess any normative character.²³³

It transpires from the above that states trying to pursue their objectives through resolutions do not have much space for normative manoeuvre.²³⁴ International law appears to serve a constraining function in determining the degree of autonomy of member states taking part in the decision making process. While states can debate any matter within the remit of the General Assembly's mandate, the recommendations contained in resolutions cannot contradict the balance of powers set forth in the UN Charter or existent norms of international law. This is a negative constraint that effectively amounts to an implied duty of (the General Assembly through its) member states not to change the *status quo* through resolutions.

²²⁹ UN Charter (n 31) art 101: 'The staff shall be appointed by the Secretary-General under regulations established by the General Assembly'.

²³⁰ ICJ, *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, advisory opinion, [1973] ICJ Rep 166, p. 173.

²³¹ A/44/PV.83 p. 17 (Turkey).

²³² A/C.6/SR.1006 p. 286 para 29 (United States), para 30 (Belgium), para 32 (Canada) and para 34 (New Zealand).

²³³ A/C.6/34/SR.61 p. 6 para 25. (It is also noteworthy that in the same statement the US delegate points out that the US voted against the Declaration on Friendly Relations among States despite the fact that it has been adopted by consensus, that is to say, without voting).

²³⁴ See also Peterson (n 7) 196 ('Governments may claim that the terms of a properly adopted resolution should be ignored because they violate the Charter, international law, or a treaty obligation').

The power of recommendation seems to have a narrower scope than the power of discussion, since recommendations are addressed to states and states, in turn, are bearers of rights and duties under international law. The latter is neither a unitary nor a neutral system, as it embeds and preserves imbalances of power and historical inequalities – political, economic, social and cultural – among states. Understandably, a body with a quasi-universal membership currently dominated by a developing country majority constantly tries to induce change in the system of values underpinning the international community and the normative structures that preserve it. However, achieving agreement at the General Assembly requires a significant level of bargaining among delegations, which usually leads to a minimum common denominator outcome in the text of the resolutions.²³⁵ From this perspective, it appears that states are firmly in control of the decision making process at the General Assembly. Hence, resolutions do not produce any direct effect in the domestic law of member states.

It would nonetheless be a mistake to conclude that there is a complete separation between the institutional autonomy of the General Assembly and the autonomy of member states *qua* independent subjects of international law. While the resolutions of the General Assembly do not bind member states, even when adopted by majority, they do impose some limits on the content of the recommendations that states can formulate. This means that states are not free to use the General Assembly as a platform for international law making – at least not without the explicit, unanimous approval of the entire membership.²³⁶ The implications are two-fold.

Firstly, from the perspective of the General Assembly's minority, the presence of the socially constructed limitations to the power of recommendation determines that international law preserves states' freedom under domestic law. Secondly, from the perspective of the majority, the same socially constructed limitations prevent states from challenging obligations imposed on them by international law, effectively constraining the expansion of domestic law according to the wish of individual states. The resolutions on the activities of foreign economic actors in developing countries exemplify the struggle that the majority of developing countries routinely undergo.²³⁷

As a result, the socially constructed limitations can be seen as the formalization of the phenomenon of *immobilisme* discussed above²³⁸ – that is to say, a sort of politically motivated veto within a highly divided political system. This leads to the further conclusion that the General Assembly has a quasi-supranational character, meaning that resolutions are neither binding nor without effects in the domestic law of member states. Some scholars argue that the level of supranationalism at the General Assembly is directly related to the level of state support to individual resolutions.²³⁹ Indeed, the empirical evidence discussed in this chapter suggests that the degree of quasi-supranationalism at the General Assembly changes in relation to both the subject matter of resolutions and the international law framework on which the latter are grounded.

²³⁵ As discussed in Section 4.2.3 above.

²³⁶ J Klabbers, *An Introduction to International Institutional Law* (CUP 2015), 27 ('the general rule among international organizations is that binding law-making decisions... can usually only be taken by unanimity, or consensus').

²³⁷ As discussed in Section 4.2.2 above.

²³⁸ See Section 4.3.1.

²³⁹ Alker and Russett (n 20) 77-78, 81 and 132. See also Peterson (n 7) 141 ('the attitudes of governments still determine the legal weight of Assembly resolutions').

4.3.3 Scale of legal significance

The preceding analysis suggests that the degree of legal significance attached to resolutions, if any, is a form of restatement or acceptance of state obligations under the UN Charter and international law. Specifically, it appears to manifest itself as a commitment by states to abide by those obligations along agreed lines which do not bear the character of binding precedent. From this perspective, the degree of legal significance of resolutions turns out to be a flexible, context-specific concept susceptible to variation caused by the political nature of the General Assembly as an international polyarchy.²⁴⁰ As a result, resolutions, including those framed in normative and prescriptive language, cannot be taken at face-value as an indicator of their legal significance.²⁴¹ Other modes of assessment may prove useful in this regard.

While no test can fully assess the legal significance of resolutions,²⁴² the empirical findings show that it is possible to create a scale of degrees of legal significance that takes into consideration both the political and the legal conditions under which states seem to support resolutions at the adoption stage. In particular, the proportion of statements matching votes coupled with considerations about the capability of states to implement the resolutions they support appears to be a reliable indicator. The caution in designing the scale is that the findings can only be taken as a reasonable approximation, not a definitive answer. As Peterson notes, the General Assembly ‘does not determine either the structure of the international system or the choices of goals and means made by individual states’.²⁴³

The suggested technique for capturing the degrees of perceived legal significance of resolutions aims at predicting the probability that states declaring support for a resolution possess the material resources necessary to implement the resolution’s requirements. The goal is achieved by comparing statements matching votes with the economic resources of states, as evidenced by their contribution to the UN regular budget. The technique is appropriate for clusters of restated resolutions, not individual resolutions, because it requires large numbers of observations to assess the strength of the relationship. Indeed, the higher the number of observations, the higher the level of precision of the prediction.²⁴⁴

With 498 available and relevant observations, the resolutions on activities of foreign economic interests in developing countries turn out to be a suitable case study. Since they are among the restated resolutions adopted with the highest levels of disagreement among the states present and

²⁴⁰ As discussed in Section 4.3.1 above.

²⁴¹ As also discussed in Section 4.2.3 above.

²⁴² Peterson (n 7) 149.

²⁴³ *ibid* 4.

²⁴⁴ The selected scale of significance takes the form of a logistic regression (logit) model. This is a generalizable model (meaning that it works with any cluster of restated resolutions) whose performance improves as the number of observations increases, the minimum being 100 observations. The formula for the scale of degrees of legal significance of resolutions reads:

$$\Pr(Y_i = 1) = \frac{e^{(\alpha + \beta X_i)}}{1 + e^{(\alpha + \beta X_i)}}$$

where Y = the statements matching votes, X = the economic resources of states making the statements, α = the intercept, β = the slope and e is the transcendental number 2.718.

voting at the General Assembly, the expectation is that, in relation to them, there is a significant difference between statements matching votes and the economic resources of states.

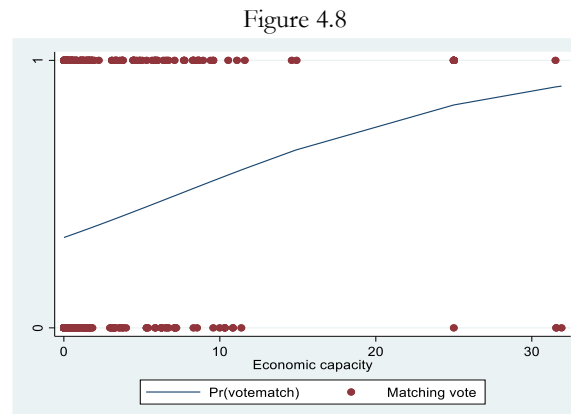


Figure 3.8 presents the results of a binary logistic regression comparing the statements matching votes and the economic resources of states. With a chi-square of 24.14 and a p value of <0.001 , the results are statistically significant at 95%.

The results (Figure 4.8) confirm that there is a significant difference between the economic resources of states casting matching votes and those of states casting different votes. The prediction outcome refers to instances in which statements match positive votes, negative votes and abstentions. However, a closer scrutiny of the data reveals that there is a significant variation between the three categories of votes.

In relation to positive votes, it turns out that the poorest among the economically poor countries²⁴⁵ are the ones casting the vast majority of statements both matching and not matching votes (with a ratio of 1 matching vote to 2 nonmatching votes) while the richer states tend not to cast positive votes altogether. The most recurrent reason for statements matching votes is the general condemnation of foreign investments as harmful for former colonial countries under all circumstances.²⁴⁶ The main reasons justifying statements not matching votes consist of an appearance of bias in the reports of the Special Committee forming the background of the resolutions²⁴⁷ as well as the qualification of the apartheid regime in South Africa as a colonial issue²⁴⁸ (which is, in turn, described as evidence of the ideological premises of this cluster of resolutions).²⁴⁹

In relation to negative votes, the situation is the reverse. The richer states tend to cast significantly more votes than the economically poor ones, with most of the statements matching those votes. The United States and the EU member states turn out to be the delegations most active on this front. The main reasons for opposing the resolutions are the generalization about foreign

²⁴⁵ The tabulation of data shows that they are those contributing between 0.1 and 0.4 percent of the UN regular budget.

²⁴⁶ See, for instance, A/C.4/SR.1735 p. 3 para 15 (Guinea); A/44/PV.80 pp. 15-17.

²⁴⁷ See, for instance, A/C.4/SR.1735 p. 4 para 25 (Greece); A/C.4/SR.1812 p. 3 paras 15 (Argentina) and 20 (Honduras); A/C.4/44/SR.6 p. 9 para 43 (Chile).

²⁴⁸ See, for instance, A/43/PV.59 pp. 39-401; A/C.4/47/SR.8 p. 6 para 14 (Botswana).

²⁴⁹ As also discussed in Section 4.2.3 above.

investments as harmful to developing countries²⁵⁰ and the reference to apartheid, which is a problem of racial discrimination, in the context of decolonization issues.²⁵¹ Conversely, the poorest among the economically poor countries tend not to cast negative votes.

In relation to abstentions, virtually all of the statements in explanation of vote do not match the vote. Non-matching statements come mainly from the poorest among the economically poor states²⁵² and amount to a mild form of negative votes. The main reason for abstaining is the refusal to endorse the practice of selectively naming and shaming individual countries in the text of the resolutions,²⁵³ which is increasingly perceived as discriminatory and outdated.²⁵⁴ Among the statements made by the developed countries, most of them come from European countries lamenting that the text of the resolutions violates the division of competence between the Security Council and the General Assembly by encouraging recourse to armed struggle against former colonial countries.²⁵⁵ From Resolution 46/64 (1991) onwards, the same reasons appears in statements in explanation of negative votes,²⁵⁶ thus confirming the nature of abstention as a mild form of negative vote.²⁵⁷

Overall, the distribution of statements matching (or not) votes reveals a divided UN membership on economic and colonial issues. The division is apparent not only between developing and developed countries, but also within the developing countries themselves. This suggests that this cluster of restated resolutions is not widely supported, despite the fact that the text of resolutions itself is written in prescriptive language. It is also noteworthy that the provisions of the UN Charter are invoked as limits to the actual scope of the resolutions' recommendations by the developed country minority. The number and type of statements not matching votes suggests that the degree of legal significance attached to this cluster of resolutions is divided, despite the clear and unambiguous formulation of their text as a condemnation of neo-colonial practices.

4.4 Conclusion

The concept of legal significance of resolutions is complex and multifaceted. This chapter has shown that the use of either prescriptive or normative language in the text of resolutions is not *per se* indicative of the degree of legal significance of resolutions. Hence, the text of resolutions cannot be taken at face-value. Other considerations, political rather than legal, appear to influence the degree of significance that individual states attach to resolutions at the adoption stage. They can be discerned by analysing the statements in explanation of vote that delegations routinely make, since a level of substantive opposition to the content of resolutions may emerge from the statements in explanation of negative as well as positive votes. Specifically, statements matching

²⁵⁰ See, for example, A/C.4/49/SR.13 p. 6 para 16 (United States); A/C.4/50/SR.14 p. 25 para 95 (Ireland on behalf of the European Union).

²⁵¹ See, for example, A/C.4/48/SR.12 (Belgium on behalf of the European Union).

²⁵² The tabulation of data shows that they are those contributing 0.1 percent of the UN regular budget.

²⁵³ See, for instance, A/C.4/39/SR.11 p. 12 para 63 (Burundi) and 64 (Togo).

²⁵⁴ A/C.4/46/SR.17 p. 23 para 87 (Malawi).

²⁵⁵ See, for example, A/C.4/45/SR.6 p. 4 para 10 (Italy); *ibid* p. 5 para 16 (Austria); *ibid* pp. 5-6 para 17 (Sweden).

²⁵⁶ See, for example, A/C.4/46/SR.17 p. 9 para 38 (Netherlands).

²⁵⁷ As discussed in Section 4.2.3 above.

votes appear to be a reliable indicator of a delegation's future expectation of conduct, provided that the delegation possesses the necessary means for acting on the resolution's recommendations.

Equally, resolutions at the General Assembly often represent the means for either supporting or opposing changes to existent rules and principles of international law. When states attempt to alter rules and principles accepted by the international community to achieve their own gains, clashes unavoidably emerge between opposing groups, effectively turning the General Assembly from a forum of cooperation into a forum of reciprocal accusation. In this context, states backing the resolutions often frame their argument in normative or prescriptive language to sound more convincing. As a result, while states often take a clear and unambiguous stance towards the legal significance of individual resolutions, the latter may not necessarily exert a strong pull toward compliance.

Taking a holistic approach focusing on the relationship between the votes cast on resolutions, the statements made in explanation of votes and the economic capacity of states to act on the recommendations contained in the text of resolutions helps determine the degree of legal significance of resolutions at the adoption stage. However, the degree of compliance with resolutions ultimately depends on the actual practice of states at the implementation stage. It is indeed widely accepted that '[r]esolutions persistently contradicted by behavior are not strong evidence for the existence of a legal rule'.²⁵⁸ Chapter 5 examines the use of resolutions within domestic law while Chapter 6 analyses the use of resolutions in international practice. In both chapters, the aim is to evaluate the circumstances under which states attribute legal significance to resolutions.

²⁵⁸ Peterson (n 7) 149.

CHAPTER 5

THE LEGAL SIGNIFICANCE OF RESOLUTIONS WITHIN DOMESTIC LEGAL SYSTEMS

5.1 Introduction

Once adopted, resolutions take on a life of their own: they are no longer regulated by the institutional law of the General Assembly, irrespective of the degree of legal significance attached to them at the adoption stage. As recommendations addressed to states, they become part of general international law in the form of soft law. This raises a series of interconnected questions: do states incorporate resolutions in domestic law? Do they internalize only the resolutions that they support at the adoption stage? Which state organs decide to incorporate resolutions and what does the process of incorporation tell us about the legal significance of resolutions?

To answer the questions above, this chapter provides an original inquiry into the use of General Assembly resolutions within domestic legal systems. The scholarly literature is silent on this, being entirely focused on the use of resolutions by international courts and tribunals. As a result, this chapter supplements the current academic debate by revealing a neglected aspect of the legal significance of resolutions. Specifically, the analysis revolves around two interrelated issues. On the one hand, it discerns instances of automatic incorporation of resolutions based on characteristics of individual domestic legal systems and instances of mediated incorporation of specific resolutions through an act of incorporation, such as legislation, or recognition through case law. The latter is a recognized instance of state practice for the purposes of identification of both customary international law¹ and general principles of law.² As the case law of the International Court of Justice shows,³ as a matter of international law, the decisions of national courts are evidence of state practice and, as such, those courts can be considered to speak on behalf of states at the international level.⁴ Hence, domestic case law possesses evidentiary value as

¹ UNGA Res 73/203 (20 December 2018), Annex, Conclusions on Identification of Customary International Law, Conclusion 6 para 2 ('Forms of evidence of state practice include... decisions of national courts'), Conclusion 10 para 2 ('Forms of evidence of acceptance as law (*opinio juris*) include... decisions of national courts') and Conclusion 13 para 2 (stating that subsidiary means for the determination of rules of customary international law include decisions of national courts).

² International Law Commission, Second Report of the Special Rapporteur on General Principles of Law, UN Doc A/CN.4/741, p. 34 para 109 ('the materials that are relevant for purposes of the identification of general principles of law derived from national legal systems, which, as explained above, are essentially domestic legal sources, such as national legislation and decisions of national courts') and p. 56, Draft Conclusion 8 para 3 (referring to 'decisions of national courts concerning the existence and content of general principles of law as a subsidiary means for the determination of [general] principles'). See also First Report of the Special Rapporteur on General Principles of Law, UN Doc A/CN.4/732, p. 9 para 35 (acknowledging that state practice for the purposes of creation and identification of general principles of law include 'includes, inter alia, statements, diplomatic exchanges, pleadings before international courts and tribunals, treaties and their drafting histories, and decisions of national courts').

³ ICJ, *Jurisdictional Immunities of the State e (Germany v. Italy: Greece intervening)*, Judgment, ICJ Rep 2012, pp. 132, para 73 (referring to decisions of domestic courts concerning the question of whether a State was entitled to immunity in proceedings concerning acts allegedly committed by its armed forces in the course of an armed conflict as the most pertinent state practice to decide the case); ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Rep 2002, p. 24, para. 58 (stating that, after consideration of state practice, including decisions of higher national courts, the Court was unable to deduce the existence of any exception to the customary rule according immunity to incumbent Ministers of Foreign Affairs suspected of having committed war crimes or crimes against humanity).

⁴ In addition, the International Law Commission's Commentary to the Conclusions on Identification of Customary International Law clarifies that 'Decisions of national courts at all levels may count as State practice' while recognizing that 'it is likely that greater weight will be given to the higher courts'. No other distinction as to the value of decisions

a source of legal significance of resolutions as well. On the other hand, the analysis evaluates the functions that resolutions serve within domestic legal systems. It examines the relationship between method of incorporation and functions served with a view to ascertaining the extent to which reliance on resolutions supplements domestic law.

In the following sections, the analysis unfolds along three lines. Firstly, Section 5.2 evaluates the formal legal status that national institutions attach to resolutions. It shows that the practice of national courts concerning the recognition of the legal status of resolutions in domestic law is not uniform. It fluctuates from granting resolutions the status of constitutional norms to denying that the principles contained in resolutions can prevail over incompatible legislation. The analysis shows that the main factor determining the formal legal status of resolutions in domestic law is the structure of individual domestic legal orders. Secondly, Section 5.3 discerns the functions that resolutions serve within the national legal order. By comparing the process of incorporation of resolutions through legislation and case law, the analysis reveals that the functions resolutions serve within domestic law greatly varies depending on the subject area covered by the resolutions. Thirdly, Section 5.4 compares the modes of reception of resolutions utilised by the three organs of the state – parliament, government and the executive – with a view to determining whether there are any areas of convergence, thus suggesting that the content of certain resolutions has taken root in state practice. Since the findings reveal that the resolutions incorporated mostly address human rights issues, Section 5.5 elaborates on the legal status of the Universal Declaration of Human Rights (UDHR), which appears to have acquired special status in several jurisdictions.

Taking stock of the preceding analysis, Section 5.6 conceptualises the source of legal significance of resolutions within domestic legal systems. It shows that, despite the considerable differences in patterns of incorporation, both within and across jurisdictions, the dominant factor influencing the level of legal significance attributed to resolutions is the perceived degree of persuasive authority of both the content of resolutions and the General Assembly as an institution. Section 5.7 concludes by arguing that the emphasis on incorporation of resolutions addressing human rights issues may be regarded as signifying the emergence of a body of law – neither solely domestic law nor solely international law – common to the international community of states. Yet the source of the legal significance of resolutions, including the human rights ones, can be ultimately traced back to the will of individual states to rely on resolutions depending on context and circumstances.

5.2 Legal status of resolutions in domestic law

Resolutions become part of domestic law through a process of incorporation. The two main channels of incorporation by means of direct reference to resolutions are legislation and case law.⁵

of domestic courts or the relationship between decisions of national courts and decisions of other organs of the state is made, thus suggesting that decisions of domestic courts count as verbal acts of states for the purpose of custom creation. See UN Doc A/73/10, p. 134 para 6.

⁵ Incorporation through legislation can take two forms. Direct incorporation entails an explicit reference to resolutions in the text of legislation. Indirect incorporation consists of the internalization of the content of resolutions without explicitly referring to them. For the purposes of this study, indirect incorporation does not feature prominently due to the difficulties of performing a comparative analysis of the legislative history of discrete pieces of legislation. The main reason for restricting the focus of the inquiry to direct incorporation lies in the barriers to access to legal

In theory, constitutions also represent a viable channel for incorporation. In practice, from my research, only the UDHR features in the text of a limited number of constitutions. It seems therefore appropriate to evaluate the legal significance of the process of incorporation of the UDHR through constitutions separately as part of the analysis of the legal status of the UDHR in domestic law.⁶ Accordingly, this section provides an overview of the legal status of resolutions in domestic law restricted to legislation and case law.

As a preliminary observation, it is noteworthy that the specific status resolutions acquire in domestic law through incorporation may significantly differ from one jurisdiction to the other.⁷ In this respect, the pronouncements of domestic courts turn out to be central in determining the legal status of resolutions in domestic law, since they have to disclose the applicable law to decide the case at hand.⁸ In applying the law to which they are bound, courts shed light on the interface between national and international law, including soft law. Hence they reveal judicial understanding of the legal status of resolutions within their jurisdiction.

On one end of the spectrum, domestic courts have equated the status of certain resolutions to that of constitutional norms and principles. For example, the Supreme Court of Nicaragua held that the UDHR, like the other treaties listed in Article 46 of the Constitution, has ‘constitutional status’. Hence, it prevails over incompatible national laws.⁹ Likewise, the Supreme Court of Argentina has consistently upheld the constitutional status of the UDHR and other international instruments by virtue of their incorporation through Article 75(22) of the Constitution.¹⁰

This approach has occasionally met with a degree of resistance. For example, in a case involving the legality of pardon for crimes against humanity committed by state officials, the Argentinian Supreme Court held that crimes against humanity are not subject to prescription, as recognized by General Assembly Resolution 95(I) affirming the principles of international law recognized by the Charter of the Nurnberg Tribunal and Resolution 2391(XXIII) adopting the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.¹¹ In his dissenting opinion, Judge Fayt disagreed with the majority’s reliance on resolutions arguing that international law does not prevail over the Constitution.¹² The interpretation given by the Constitutional Court of Peru to the Final and Transitory Disposition of the Peruvian Constitution is similar to the position of Judge Fayt, in that it recognizes that the provisions of the Constitution

information in several jurisdictions and the availability of multilingual translations, as discussed in Chapter 2, Section 2.3.2.

⁶ See Section 5.5 below.

⁷ As noted by Nollkaemper in relation to the incorporation of international law in general. A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2012), 13-14.

⁸ *ibid* 58.

⁹ *Board of Directors of the National Cement Production Company v General Accounting Office*, 57-2010, ILDC 1802 (NI 2010), para 7.

¹⁰ *Asociación Derechos Civiles v Estado Nacional – PAMI*, extraordinary appeal ruling, A 917 XLVI, ILDC 2441 (AR 2012), paras 1 and 6; *SYQC v Government of the City of Buenos Aires*, Q 64 LXVI, ILDC 2384 (AR 2012) (citing the UDHR), para 8(II).

¹¹ *Riveros v Office of the Public Prosecutor*, recourse of cassation, M 2333 XLII, ILDC 1084 (AR 2007), para 5 (referring to the UDHR, UN Doc A/RES/95(I), 11 December 1946 and UN Doc A/RES/2391(XXIII), 25 November 1968).

¹² *ibid* para 16.

must be interpreted in the light of the UDHR and international human rights law, but only where those instruments provide a higher level of protection to individuals than the constitution itself.¹³

The granting of constitutional status to resolutions appears to be a form of automatic incorporation by virtue of the provisions of the constitutions. However, this observation is subject to a double qualification. First, this is a technique of incorporation that is not exclusive to resolutions. As Nollkaemper notes in his study on the role of domestic courts in giving effect to international law, the constitution of several states contains a provision allowing the incorporation of the international law instruments listed therein.¹⁴ Secondly, the examples above refer to Latin American jurisdictions, thus suggesting the presence of a geographical factor. Hence, the examples provided cannot be regarded as conclusive on this point nor can the findings be generalized.

On the other end of the spectrum, domestic courts have affirmed that, unless incorporated, resolutions do not prevail over incompatible domestic law. For example, the Supreme Court of Cassation of Romania held that General Assembly resolutions, including the UDHR, and resolutions of the Parliamentary Assembly of the Council of Europe are political documents containing simple recommendations. It stated that unlike treaties, resolutions do not enjoy direct application in the Romanian legal order by virtue of Articles 11 and 20 of the Constitution.¹⁵ The *Guerin* case presented a similar situation before the Federal Court of Canada. The plaintiffs claimed that the domestic regulations governing the system of minimum pay for inmates did not comply with Section 76 of the Standard Minimum Rules for the Treatment of Prisoners (also known as the Mandela Rules).¹⁶ The court rebutted the argument holding that the Mandela Rules would be binding under Canadian law if they were customary international law. However, they did not have that status nor did they constitute a norm of *jus cogens*.¹⁷ By implication, the court concluded that a resolution is not *per se* binding. It held that:

the attempt, *in extremis*, to transform a United Nations General Assembly Resolution with no binding effect into a rule of fundamental justice that could fit within the basic tenets of our legal system must fail.¹⁸

The decision of the Canadian Federal Court is not unique or uncommon. Other jurisdictions have denied any legal significance to resolutions. For example, faced with the question of whether Hong Kong has a legal obligation under customary international law not to expel refugees to frontiers of other territories where they could face persecution, the Court of First Instance recognized that although the Refugee Convention (which had been ratified by the United Kingdom) did not extend

¹³ *RJS v Peruvian Superior Court*, appeal to the constitutional court, No. 3081-2007-PA/TC, ILDC 969 (PE 2007), para 27; *Callao Bar Association v Congress and National Jury of Elections*, constitutional review, No. 7-2007-PI/TC, ILDC 961 (PE 2007), paras 10, 17 and 39-40. See also *The Attorney General v Dow*, Appeal Court of Botswana 1994 (6) BCLR 1, p. 38.

¹⁴ Nollkaemper (n 7) 73.

¹⁵ *BC v Romania*, decision on second appeal, N 4146/2012, File 30091/2010, ILDC 2070 (RO 2012), para 27. The same conclusions appear in *WKA v SR*, decision on second appeal, No 2589/2012, File 35346/2010, ILDC 2069 (RO 2012), para 67.

¹⁶ *Guerin v Canada*, 2018 FC 94, para 93 (referring to UN Doc A/RES/70/175, 17 December 2015, Annex).

¹⁷ *ibid* paras 98 and 106.

¹⁸ *ibid* para 108.

to Hong Kong,¹⁹ the principle of *non-refoulement* had matured into a norm of customary international law.²⁰ It also recognized that the UDHR proclaims the right to political asylum.²¹ However, it concluded that in the absence of legislation incorporating either the customary rule or the provisions of the UDHR, those norms cannot form part of domestic law. The court unequivocally stated that: ‘Hong Kong’s refusal to pass legislation incorporating the rule [of *non-refoulement*] is the equivalent of passing legislation for the purpose of excluding it’.²²

Making the applicability of resolutions conditional to the existence of an authorizing instrument is not a peculiar feature of the process of incorporation of resolutions. The powers and willingness of courts to apply international law in general are highly uneven throughout the world, due to various factors such as legal tradition, modes of reception of international law and cultural factors.²³ In any case, to say that the degree to which (if any) international law becomes part of the applicable law is fully contingent upon national law is to recognize the characteristic of ‘neutrality’ of the international legal system.²⁴ As Nollkaemper writes,

[the international legal system] does not make international law automatically part of the law of a domestic court in the way that it is automatically part of the applicable law of an international court.²⁵

Between the two ends of the spectrum concerning the legal status of resolutions in domestic law, courts have occasionally relied on resolutions in the presence of a legislative act covering the same subject matter of resolutions. For instance, the Indian Supreme Court recognized that persons with disabilities are entitled to the human rights protections set forth in the Indian Disability Act (2005), which incorporates the Declaration on the Right of Mentally Retarded Persons.²⁶ However, absent an act of incorporation, the dominant approach is that resolutions can neither create international obligations nor override the provisions of an incompatible piece of legislation.²⁷

There are also instances in which domestic courts have equated the adoption of resolutions to the conclusion of treaties, thus implying that the two instruments possess the same legal status within domestic law.²⁸ In the vast majority of cases, the qualification of resolutions as instruments signed and ratified by states appears to be a terminological inaccuracy rather than a statement of law.²⁹

¹⁹ *C v Director of Immigration*, [2008] HKEC 281, paras 31 and 89.

²⁰ *ibid* para 135.

²¹ *ibid* para 165.

²² *ibid* para 149.

²³ Nollkaemper (n 7) 64; A Roberts, PB Stephan, PH Verdier and M Versteeg, ‘Comparative International Law: Framing the Field’ (2015) 109 AJIL 467, 470-471.

²⁴ Nollkaemper (n 7) 73.

²⁵ *ibid* 69.

²⁶ *Ghosh v India*, writ petition (civil), (2016) 7 SCC 761, para 41 (referring to UN Doc A/Res/2856(XXVI), 20 December 1971). The case was decided prior to the Disability Convention being ratified by India in 2017.

²⁷ As emphasised in *People’s Union for Civil Liberties v India*, writ petition (civil), AIR 2005 2419, paras 18-19.

²⁸ For a contrary position, see *Javor*, Court of Cassation, France, Bulletin des arrêts, 132 (denying that resolution 3074 has treaty force).

²⁹ See, for instance, *Corporation of the City of Victoria v Adams*, ILDC 1843 (CA 2008), paras 85-86; *Arar v Syrian Arab Republic*, ILDC 639 (CA 2005), para 24 (Canada ‘is a party’ to the UDHR); *Wakaba v Attorney General*, final judgment, (2010) eKLR, Misc App No. 1411/2004, ILDC 1543 (KE 2010), para 35 (the UDHR has been ‘ratified’ by Kenya); *Fang v Jiang*, Case No. CIV 2004-404-5843, ILDC 1226 (NZ 2006), High Court, para 66 (New Zealand is ‘a signatory’ of the UDHR); *Barse v Secretary*, appeal, writ petition n. 539 of 1986, ILDC 2794 (IN 1986), para 5 (India has ‘ratified’

However, on occasion the glitch seems to be a genuine misconception as to the legal status of General Assembly resolutions. For example, in 2009 the constitutional court of Mozambique declared the law creating the National Human Rights Commission partly unconstitutional for violation of ‘the Paris Convention on Human Rights’, which Mozambique allegedly signed without reservation.³⁰ The document referred to by the court is actually the Principles Relating to the Status of National Institutions (the Paris Principles) adopted by the General Assembly in 1993.³¹ As a result of the misconception, the court ended up declaring a piece of legislation unconstitutional for violations of a soft law instrument which is not part of Mozambican law.

The considerations above show that, from a purely formal perspective, resolutions possess a legal status in domestic law that is largely predetermined by the constitutional arrangements of each jurisdiction. As a result, domestic courts claim their authority to determine the relationship with soft law at the domestic level based on the authorizing rule of domestic law – be that the text of the constitution, legislation passed by parliament or an international treaty signed and ratified by the executive.³² Absent such an authorizing instrument, resolutions do not seem to constitute a valid source of domestic law. Approached from this perspective, legal status and legal significance of resolutions coincide. However, reliance on resolutions within domestic law may serve a variety of functions and it would be arbitrary to confine the appreciation of their legal significance to such a formalistic approach of the sources of domestic law.

5.3 Functions of resolutions

The incorporation of resolutions in domestic law may serve a variety of functions. Some functions are distinctive of the process of incorporation through legislation, other functions are distinctive of the process of incorporation through case law, while others are shared. In general, the incorporation of resolutions serves three main functions – namely, resolutions as a source of legal obligation, resolutions as a source of political commitment and resolutions as standard-setting documents. The following sub-sections examine the three functions separately with a view to assessing their relationship with the concept of legal significance of resolutions.

5.3.1 Resolutions as a source of legal obligation

States often rely on resolutions as a source of legal obligation. With regard to legislation, some states have adopted laws specifically aimed at implementing the content of resolutions in domestic law. For instance, Section 1826e of the United States Annotated Code instructs ‘[t]he Secretary of State, on behalf of the United States, to seek to enhance the implementation and effectiveness of

the Declaration on the Rights of the Child); *Kham and Mang v India*, writ petition n. 1884/2015, ILDC 2895 (IN 2015), para 15 and *Aandolan v India*, ILDC 169 (IN 2000), para 266 (India is ‘a signatory’ to the UDHR); *Hassan v Pakistan*, final appeal, 2010 PLD Supreme Court 265, ILDC 1622 (PK 2009), para 105 (Pakistan is ‘a signatory’ to Resolution 58/4 adopting the Convention against Corruption).

³⁰ *National Human Rights Commission case*, preventive review of constitutionality, 04/CC/2009, ILDC 2573 (MZ 2009), para 21.

³¹ UN Doc A/RES/48/134 (20 December 1993).

³² M Kanetake, ‘The Interfaces between the National and the International Rule of Law: A Framework Paper’ in M Kanetake and A Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart 2016) 3, 23-24.

the United Nations General Assembly resolutions and decisions regarding the moratorium on large-scale driftnet fishing on the high seas through appropriate international agreements and organizations'.³³ Similarly, the Philippines created the Commission for the International Youth Year in order to implement Resolution 34/151 establishing the International Youth Year³⁴ while New Zealand accepted the competence of the United Nations Office for the Coordination of Humanitarian Affairs to deploy resources at short notice (upon request) in the case of a state of national emergency, as defined in Resolutions 46/182 and 57/150 strengthening the coordination of humanitarian emergency assistance by the United Nations.³⁵ In terms of content, it appears that the obligations contained in legislation aim at strengthening international cooperation in key areas of national interest rather than influencing the development of domestic law in those areas.

In the absence of a piece of legislation internalizing resolutions, the practice of domestic courts shows that resolutions may become a source of legal obligation in two main ways.

Firstly, in the areas of detention and juvenile justice, courts have treated resolutions establishing minimum standards of protection of fundamental rights as binding. For example, the Court of Appeal of Hong Kong found that the conviction of a 14 years old offender to a period of 48 months of imprisonment for selling stolen goods in mainland China was 'manifestly excessive'.³⁶ The Court of Appeal held that the District Court 'should have borne in mind that the well-being of the juvenile [should] be the guiding factor in sentencing, and that any restriction on his freedom should be kept to a minimum'.³⁷ The Court of Appeal grounded its conclusion on Article 17(1) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice adopted by Resolution 40/33,³⁸ effectively treating the resolutions as the law applicable to the case at hand. The Supreme Court of Bangladesh went even further in a case concerning a minor who was sentenced to death for the killing of another minor.³⁹ The court held that, in the absence of legislation incorporating the provisions of the Convention on the Rights of the Child (CRC), which Bangladesh ratified in 1990, the CRC must be interpreted and applied in the light of the Guidelines on Juvenile Justice adopted by Resolutions 40/33 and 45/112.⁴⁰

Secondly, courts have occasionally derived the existence of either a specific right or the general principles governing an entire area of domestic law from the text of resolutions. For example, the Israeli Supreme Court held that the principles set forth in Resolution 43/173⁴¹ apply to all forms of detention, without exception, effectively treating them as binding. The relevant passage from the case reads:

³³ 16 U.S.C.A., Ch. 38, Section 1826e.

³⁴ Executive Order No 795 (3 May 1982), Preamble; Executive Order No 887 (18 March 1983) amending Executive Order No 795, Preamble.

³⁵ National Civil Defence Emergency Management Plan Order 2005, SR 2005/295 (4 November 2005), para 82(3).

³⁶ *HKSAR v Bu Hua Lai*, [2007] KH CLRT 688, p. 695.

³⁷ *ibid* 696.

³⁸ *ibid*

³⁹ *Bangladesh v MD Rushan Mondal*, criminal appeal, 2006 26BLD (HCD) 549.

⁴⁰ *ibid* paras 44, 46 and 67.

⁴¹ UN Doc A/RES/43/173 (9 December 1988) (adopting the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment).

[The provisions of Resolution 43/173] establish principles for all forms of detention, including administrative detention. These principles, even if they are not directly binding in internal Israeli law, set forth *standards by which any reasonable government authority should act*.⁴²

Reasoning along the same lines, the Supreme Court of Bangladesh attached even greater significance to resolutions when it recognized the existence of a right to clean environment in the absence of any specific provision in the Bangladeshi Constitution. Specifically, the court pointed out that both the Stockholm Declaration (1972) and Resolution 45/94 recognize the right to a healthy environment, in addition to other international instruments aimed at the preservation of the environment.⁴³ Hence, it treated the soft law instruments as an integral part of Bangladeshi law.

Compared to the legal obligations contained in legislation incorporating resolutions, those contained in case law aim at supplementing, rather than replacing, the domestic provisions. The fact that the resolutions referred to in the examples above have all being adopted by consensus at the General Assembly⁴⁴ suggests that the principles contained therein are supported (or, at least, not opposed) by the international community of states. As a result, the courts find themselves uniquely positioned to develop the content of domestic law in the light of a state's existing international commitments. However, their contribution remains discretionary and confined to a gap-filling function.

Beyond the differences outlined above, the processes of incorporation of resolutions through legislation and case law share a common feature: they both incorporate resolutions producing direct effects in domestic law. Nollkaemper describes the concept of direct effect imparted by national courts to an obligation not incorporated in domestic law as follows:

Direct effect necessarily presumes a general or specific rule of reference. What is meant by direct effect is that the enforcement... of an international obligation is not dependent on subsequent legislation that makes that particular obligation part of domestic law. [...] Direct effect also does not necessarily imply that a provision that has direct effect is supreme over national law.⁴⁵

By analogy, the same applies to recommendations contained in resolutions. It is also noteworthy that direct effect is not synonymous with automatic incorporation of resolution in domestic law.⁴⁶

⁴² *Yassin v Ben-David and Ben-Elizer*, final decision, case No. HCJ 5592/02, ILDC 72 (IL 2002), para 11 (emphasis added).

⁴³ *Metro Makers and Developers Limited v Bangladesh Environmental Lawyer Association*, Civil Appeal No. 256 of 2009, ILDC (BD 2012), para 74. UN Doc A/RES/2994(XXVII) (15 December 1972); UN Doc A/RES/45/94 (14 December 1990).

⁴⁴ With the exception of the Stockholm Declaration, which was adopted by 112 votes with none against and 2 abstentions.

⁴⁵ Nollkaemper (n 7) 120. This is the reverse effect of the one generated by domestic judicial decisions in the development and enforcement of international law; see A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 57, 60 (describing domestic courts as 'international actors seeking to create and shape international norms' as opposed to impartially enforce international law).

⁴⁶ Nollkaemper (n 7) 126 (arguing that the decision whether to allow courts to give direct effect to international law is primarily a political choice).

It may more appropriately be considered a form of reliance on self-executing norms, provided that resolutions contain sufficiently clear and detailed provisions.⁴⁷ This leads to the further conclusion that, by relying on resolutions to supplement the rules and principles of domestic law, states unequivocally attach a high degree of legal significance to resolutions.

5.3.2 Resolutions as a source of political commitment

It is not infrequent for states to rely on resolutions to confirm a political commitment. Specific commitments may vary in scope and intensity, but it appears that reference to resolutions in legislation is the strongest form of commitment to act on resolutions. For example, the Preamble to the Canadian Indigenous Languages Act (2019) states that ‘the Government of Canada is *committed* to implementing the United Nations Declaration on the Rights of Indigenous Peoples’.⁴⁸ Similarly, Section 6201 of the United States Annotated Code establishes that ‘*[i]t is the policy* of the United States to promote the right of freedom of opinion and expression, including the freedom “to seek, receive, and impart information and ideas through any media and regardless of frontiers”, in accordance with Article 19 of the Universal Declaration of Human Rights’.⁴⁹

In case law, the function of resolutions as a source of states’ political commitment is less pronounced than in legislation. Essentially, it takes the form of the recognition of resolutions as an integral part of the background of international law informing the courts’ reasoning.⁵⁰ With the exception of the Declaration on Friendly Relations restating the principle of sovereign equality of states,⁵¹ the resolutions cited in case law address aspects of international human rights law. They include the UDHR,⁵² the Declaration on the Rights of the Child,⁵³ the Declaration on the Rights of Indigenous Peoples,⁵⁴ the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵⁵ and the principles of international law recognized by the Charter of the Nurnberg Tribunal.⁵⁶

⁴⁷ *ibid* 136.

⁴⁸ Indigenous Languages Act, S.C. 2019, c. 23 (amended 29 August 2019), Preamble (emphasis added).

⁴⁹ 22 U.S.C.A. Ch. 71, Section 6201 (emphasis added).

⁵⁰ This is to be distinguished from the several instances in which courts refer to a treaty or convention adopted by a General Assembly resolution. See, for instance, *Fighters and Lovers, T1 and Others v A*, Appeal, ILDC 2250 (DK 2009), para 318 (Denmark – referring to the International Convention for the Suppression of Financing of Terrorism).

⁵¹ UN Doc A/RES/2625(XXV) (24 October 1970), cited by *Hope v The Queen*, final appeal judgment, ILDC 758 (CA 2007), para 40 (Canada) and *R v Jones*, appeal judgment, [2006] UKHL 16, para 15 (United Kingdom).

⁵² See, for instance, *Jumbe and Mwula v Attorney General*, Case No. 1 of 2005, ILDC 1077 (MN 2005), para 52 (Malawi – fair trial); *Tito Street case v Ljubljana Municipality*, U-I-109/10-11, ILDC 2025 (SI 011), para 6 (Slovenia – human dignity); *A v B*, constitutional appeal, case No. 0345/99, ILDC 1529 (PT 1999), para 4.2 (Portugal – fair trial); *Villegas Namuche case*, Exp-2488-2002-HC/TC, ILDC 332 (PE 2004), para 11 (Peru – right to truth).

⁵³ *Kioa and others v Minister for Immigration and Ethnic Affairs*, 55 ALR 669, p. 8 (Australia); *ZH v Secretary of State for Home Department*, appeal judgment, [2011] UKSC 4, para 22 (United Kingdom). See also *R v Public Prosecutor*, cassation complaint, N 88-405-19, ILDC 1035 (RU 2005), para 15 (Russian Federation – referring to the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, adopted by resolution 41/85).

⁵⁴ *Lameiguran v Attorney General*, Misc Civil App N. 305 of 2004, ILDC 698 (KE 2006), para 26 (Kenya – also referring to the Declaration on Minorities, resolution 47/135).

⁵⁵ *A v Secretary of State for the Home Department*, appeal judgment, [2005] UKHL 71, para 31 (United Kingdom).

⁵⁶ *R v Jones* (n 36) para 14 (United Kingdom – crime of aggression); *R ex parte Pinochet v Bartle and others*, appeal, [1999] UKHL 17, paras 32, 233, 309 and 311 (United Kingdom – torture).

The examples above are representative, rather than exhaustive, of the practice of the states included in the sample.⁵⁷ They show that, although the political commitment of states to the principles contained in resolutions is stronger in legislation, case law referring to resolutions is wider in scope. This suggests that the process of incorporation of resolutions mostly unfolds on a case-by-case basis at the discretion of courts rather than uniformly through the adoption of legislation. A possible explanation is that, in general, domestic courts are the natural site for the application of international human rights law, including soft law.⁵⁸ Another explanation is that the power to shape a state's policy before the international community lies in the executive, not parliament, within the limits set forth in the constitution. In this respect, courts turn out to be a crucial site for balancing competing rights and interests involved in individual cases.⁵⁹

Yet the incorporation of resolutions as a source of political commitment through legislation and case law presents a common trait. Specifically, turning the focus from the branch of government incorporating the resolutions to the content of resolutions reveals that the ultimate object of state commitment is the protection of substantive human rights, not the incorporation of resolutions as such. Taken in isolation, the finding may not appear particularly significant, since human rights are widely acknowledged in domestic law. They also belong to the body of customary international law.⁶⁰ However, put in context of wider international practice, it acquires a peculiar significance, especially in relation to case law. Specifically, by showing that courts are committed to delivering justice through the protection of human rights, it provides clear evidence that courts attach legal significance to resolutions.

5.3.3 Resolutions as standard-setting documents

The standard-setting function of resolutions has an internal and external dimension. The empirical findings suggest that the internal dimension is unique to the method of incorporation through case law. This conclusion stems from the observation that courts often refer to resolutions to strengthen the conclusions they reach on the basis of domestic law. In such instances, resolutions operate as a normative standard – that is to say, they offer an additional source of legal argumentation for the court. For example, in a case concerning immigration, the Australian Federal Court qualified the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment⁶¹ as an ‘aid for interpretation’ of domestic legislation.⁶² This aligns with other scholarly works describing General Assembly resolutions as ‘aids to interpretation [by domestic courts] of international norms’.⁶³ Similarly, the Hungarian Constitutional Court held that

⁵⁷ As detailed in Chapter 2, Section 2.3.3.

⁵⁸ W Sandholtz, ‘How Domestic Courts Use International Law’ 38 *Fordham Int’l LJ* (2015) 595, 607.

⁵⁹ V Fikfak, ‘Judicial Strategies and Their Impact on the Development of the International Rule of Law’ in Kanetake and Nollkaemper (n 32) 45, 46 (arguing that domestic courts are entrusted to safeguard constitutional principles and the rule of law, which they uphold also by relying on international law – whether hard law, like a treaty provision, or soft law, like a resolution of the General Assembly).

⁶⁰ R McCorquodale, ‘The Rule of Law Internationally’ in CA Feinäugle (ed), *The Rule of Law and Its Application to the United Nations* (Hart 2016) 51, 66.

⁶¹ UN Doc A/RES/43/173 (9 December 1988).

⁶² *Wu v Minister for Immigration and Ethnic Affairs*, 135 ALR 583, p. 20.

⁶³ Sandholtz (n 58) 613.

its consistent practice regarding the interpretation of marriage is compatible with the provisions of Article 16 of the UDHR.⁶⁴

In a more controversial case, the Constitutional Court of Uganda held that the customary practice of demanding the payment of a bride price as a necessary condition for both marriage and divorce is not against the Constitution.⁶⁵ On the one hand, Judge Mukasa-Kykonyoko pointed out that, as a cultural practice, the request of a bride price is not *per se* unconstitutional.⁶⁶ On the other hand, Judge Mpagi-Bahigeine argued that there is not enough evidence showing that failure to refund the bride price required to divorce necessarily leads to domestic violence, as defined in Resolution 48/104 containing the Declaration on the Elimination of Violence Against Women.⁶⁷ On point of law, the case is interesting, as it is a rare instance of judgment in which resolutions are used as a benchmark for assessing the constitutionality of a customary practice. On point of substance, it is noteworthy that the court relied on a definition of bride price retrieved from Wikipedia and subsequently grounded the entire judgment on it.⁶⁸

The internal dimension of the standard-setting function applies the technique of consistent interpretation to give legal significance to resolutions. The chief difference with the process of direct effect⁶⁹ is that the latter operates in the absence of relevant domestic law whereas consistent interpretation applies the content of resolutions through a provision of national law. Consistent interpretation is instrumental to support a particular outcome. Hence, by its nature, it is a highly selective technique. As Nollkaemper writes, ‘when a court cites a particular UN resolution to support a particular right, the question is why it did not cite the background principle of positive international law’.⁷⁰

The external dimension of the standard-setting function of resolutions is unique to the technique of incorporation through legislation. Although rare, laws incorporating resolutions set out specific international standards. For example, Section 6912 of the United States Annotated Code states that the Congressional-Executive Commission on the People’s Republic of China ‘shall monitor acts of the People’s Republic of China which reflect compliance with or violations of human rights, in particular, those contained in... the Universal Declaration of Human Rights’.⁷¹ Likewise, Section 8203 thereof establishes that one of the criteria for assessing the democratic quality of a country is that such country does not violate the ‘core principles in the United Nations Charter, the Universal Declaration of Human Rights [...] and the United Nations General Assembly Resolution 55/96 (entitled “Promoting and Consolidating Democracy”)’.⁷² Domestic legislation has also been adopted to prevent a state from concluding international agreements that would contravene a

⁶⁴ *Six petitioners*, review of constitutionality, ILDC 1451 (HU 2008), para 1.2.

⁶⁵ *Mifumi (U) LTD and 12 others v Attorney General*, constitutional petition No. 12 of 2007.

⁶⁶ *ibid* p. 11.

⁶⁷ *ibid* p. 18.

⁶⁸ *ibid* p. 5.

⁶⁹ As discussed in Section 5.3.1 above.

⁷⁰ Nollkaemper (n 7) 146.

⁷¹ 22 U.S.C.A., Ch. 77, Section 6912(a).

⁷² 22 U.S.C.A., Ch. 89, Section 8203(G).

resolution of the General Assembly⁷³ or to formalize an expectation that the principles set forth in a resolution will be refined and incorporated into a future treaty.⁷⁴

As peculiar as it is, such reliance on resolutions neither supplements nor replaces domestic law instruments. Quite the contrary, it strengthens the perceived legitimacy of certain state conduct by presenting it as compliant with international standards, thus fulfilling a self-serving function. As a result, this dimension of the standard-setting function of resolutions resembles a unilateral declaration of intent to pursue a certain course of action targeted to achieve a predetermined objective rather than a principled approach to international cooperation. In this respect, it amounts to a statement of foreign policy in written form. Overall, the degree of legal significance attached to resolutions serving a standard-setting function appears to be not as significant as the legal significance that states attach to resolutions serving other functions.⁷⁵

5.4 Modes of incorporation by state organs

As the preceding analysis shows, the process of incorporation of resolutions is not uniform or standardized.⁷⁶ It takes various shapes and forms depending on the branch of government involved in the process of incorporation. This has a direct impact on the extent to which resolutions acquire significance within selected areas of domestic law, irrespective of the type of legal document utilised to incorporate specific resolutions.

States may formalize legal or political commitments and set standards of conduct by incorporating the content of resolutions directly into the text of legislation or by presenting resolutions as the sole background of legislation.⁷⁷ For instance, the United Kingdom's Social Services and Well-Being Act (2015) refers to the United Nations Principles for Older People as the normative basis of the duty of care and support in relation to adults.⁷⁸ Similarly, Germany's Asylum Procedure Act (2015) refers to the relevant resolutions adopted by the General Assembly in order to determine the status of refugees in domestic law.⁷⁹ On such occasions, parliaments internalize the resolutions directly and autonomously – that is to say, without the need of formal acceptance of the text of the resolutions by the executive as in the case of treaty obligations.

⁷³ 16 U.S.C.A., Ch. 38, Section 1826(d) ('The United States... may not enter into any international agreement with respect to the conservation and management of living marine resources or the use of high seas by fishing vessels that would *prevent full implementation* of the global moratorium on large-scale driftnet fishing on the high-seas, as such moratorium is expressed in Resolution 46/215 of the United Nations General Assembly.' Emphasis added).

⁷⁴ 30 U.S.C.A., Ch. 26, Section 1401 ('The Congress finds that [...] on December 17, 1970, the United States supported (by affirmative vote) the United Nations General Assembly Resolution 2749 (XXV) declaring inter alia the principle that the mineral resources of the deep seabed are the common heritage of mankind, *with the expectation that this principle would be legally defined under the terms of a comprehensive International Law of the Sea treaty* yet to be agreed upon.' Emphasis added).

⁷⁵ As discussed in Sections 5.3.1 and 5.3.2 above.

⁷⁶ See Section 5.3.

⁷⁷ *ibid*

⁷⁸ Social Services and Well-Being (Wales) Act 2015, para 11.

⁷⁹ Asylum Procedure Act (2 September 2008), Federal Law Gazette I, p. 1798, as amended by Article 2, Act of 23/12/2015, I 2439, Sub-chapter 2, Section 3, para 3.

However, the most common method of incorporation of resolutions into domestic law consists of references to treaties adopted by the General Assembly and subsequently ratified by states.⁸⁰ In such instances, the incorporation of the content of resolutions in domestic law is mediated by executive intervention – namely, the act of ratification. For example, Swaziland and Rwanda mention several conventions adopted by the General Assembly as the background of their counter-terrorism legislation⁸¹ while South Africa and Canada refer to the United Nations Convention on the Rights of the Child (1989) to clarify the definition of child in various areas of domestic law, ranging from parental responsibilities and rights⁸² to banking.⁸³ Although the resolutions adopting the text of the treaty are not binding, they remain the formal source of the text of the treaty.⁸⁴ As a result, they produce an indirect, mediated effect in domestic law.

Courts have also relied on resolutions to determine the meaning of specific terms used in legislation. For example, the District Court of Hong Kong referred to the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities contained in Resolution 48/96 to support its interpretation of the term disability in the Disability Discrimination Ordinance of (1995).⁸⁵ Similarly, the Indian Supreme Court relied on Resolution 51/210 to establish the definition of terrorism.⁸⁶ In such and similar instances, reliance on resolutions performs a gap-filling function in relation to a discrete piece of legislation. Conversely, by holding that the legislation on immigration must be interpreted in the light of the UDHR and applied accordingly, the Court of Appeal of Macao appears to have relied on resolutions to provide the authoritative interpretation of an entire area of domestic law.⁸⁷ Effectively, this amounts to a rare form of consistent interpretation based on an express mandate in domestic law stemming from a court decision rather than the constitution or legislation.⁸⁸

There are also instances in which the text of legislation puts resolutions and international treaties on an equal footing, thus suggesting that the two documents have equal legal significance in domestic law.⁸⁹ For example, Australia and the United States acknowledge a number of resolutions as an integral part of the body of international human rights law recognized by the state⁹⁰ while

⁸⁰ See also Sandholtz (n 58) 597 (arguing that domestic courts cite treaties more often than other types of international legal materials).

⁸¹ Suppression of Terrorism Bill 2008, Bill No 5 of 2008, Swaziland Government Gazette Vol XLVI, No 42 (11 April 2008), Part I; Law 47/2008 (9/9/2008) on Prevention and Penalising the Crime of Money Laundering and Financing Terrorism, Official Gazette of the Republic of Rwanda Year 48, No 12bis of 23 March 2009, Preamble.

⁸² Children's Act 2005, Act No 38 of 2005, Government Gazette vol 492, 19 June 2006, No 28944, Chapter 3.

⁸³ Bank Act, S.C. 1991 c. 46 (amended 9 May 2020), Part I, Section 2. See also Canada Cooperatives Act, S.C. 1998 c.1 (amended 1 May 2018), Part I, section 2; Cooperative Credit Associations Act, S.C. 1991, c.48, Part I, Section 2.

⁸⁴ For example, the CRC was adopted as part of a Resolution 1386(XIV), adopted on 20 November 1959. See also HG Schermers and NM Blokker, *International Institutional Law* (6th rev ed, Brill/Nijhoff 2018), 823, para 1262.

⁸⁵ *K and others v Secretary for Justice*, [2000] 3 HKLRD 777, 27 September 2000.

⁸⁶ *Singh v Bihar*, appeal decision, [2004] INSC 225, 2 April 2004.

⁸⁷ *A v Secretary for Security*, award, TSI-A-209/2001, ILDC 628 (MO 2002), para 1.2.

⁸⁸ Nollkaemper (n 7) 147.

⁸⁹ There is also a tendency among scholars to treat the UDHR as a *de facto* treaty. See, for instance, Z Elkins, T Ginsburg and B Simmonds, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' 54 Harv Int'l LJ (2013) 61, 63.

⁹⁰ Australia Human Rights Commission Act 1986, Part I, Section 3 (mentioning the Declaration on the Rights of the Child of 1989, the Declaration on the Rights of Disabled Persons of 1975 and the Declaration on the Rights of Mentally Retarded Persons of 1971 as part of the body of human rights law recognized by Australia); 22 U.S.C.A., Title 22, Section 6401 ('Freedom of religious belief and practice is a universal human right and fundamental freedom articulated in numerous international instruments, including the Universal Declaration of Human Rights, the International

South Africa puts an emphasis on the instrumental role of resolutions to the protection of the right to self-determination.⁹¹ From this perspective, it appears that parliament and the executive equally, and independently, contribute to the development of human rights law in domestic law through the incorporation of resolutions.

The considerations above show that the process of incorporation of resolutions takes different forms depending on the organ of the state involved, thus reversing the perception that international law is grounded on the idea of unity of the state.⁹² Yet it appears that the processes of incorporation of resolutions by the three state organs – parliament, government and the judiciary – converge on human rights issues. This suggests that the actual impact of the process of incorporation is wider than the development of a selected area of domestic law. Accordingly, the legal significance attributed by state organs to resolutions dealing with human rights issues appears to have acquired a distinctive character within domestic legal systems.

5.5 The legal status of the Universal Declaration of Human Rights in domestic law

The UDHR is the most cited resolution of the General Assembly in domestic law and, from a purely quantitative perspective, it appears to have achieved a special status. It is indeed the only resolution mentioned in the text of constitutions, further suggesting that it enjoys a special status.

Specifically, 40 constitutions mention the UDHR (Table 5.1).⁹³ The references are equally split between the preamble and the main text of the constitutions (Table 5.1). However, in terms of geographical distribution, the majority of references appear in constitutions of African countries (Table 5.2). In terms of legal traditions,⁹⁴ it turns out that the majority of constitutions belong to countries with a civil law tradition or a mixed civil law and customary law system. Conversely, the common law tradition does not feature prominently and nor do the countries grounded on a religious legal tradition (Table 5.3).

Table 5.1

Preamble	16
Text	19
Preamble and text	4
Final and transitory disposition	1
TOT.	40

Table 5.2

Africa	24
Europe	6
Middle East	3
Oceania	1
Latin America	2

Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.’ Emphasis added).

⁹¹ Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004, Act No 33 of 2004, Official Gazette vol 476, 11 February 2005, No 27266, Ch 1, Section 1(4) (establishing that acts committed in accordance with international law – ‘in particular, international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations among States in Accordance with the said Charter’ – in the exercise of the right to self-determination, do not constitute terrorist activities). See also Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 2006, Act No 27 of 2006, Official Gazette vol 509, 16 November 2007, No 30477, Section 1(2) (providing an identical definition of the relevant international law framework).

⁹² Nollkaemper (n 7) 266.

⁹³ In addition, the constitution of Madagascar refers to the ‘International Charter of the Rights of Man’ in the Preamble. It is difficult to determine whether the reference is to the UDHR. Therefore, it is not included in the count.

⁹⁴ As described in Chapter 2, Section 2.3.2.

Citations to the UDHR in preamble and main text

Central America	2
Asia	2
TOT.	40

Citations to the UDHR by geographical region

Table 5.3

Civil law	13
Common law	0
Customary law	1
Islamic law	1
Mixed:	25
- Civil/customary	15
- Civil/common/customary	1
- Civil/Islamic	4
- Customary/common	2
- Civil/Islamic/customary	2
- Civil/common/Islamic/customary	1

Citations to the UDHR by legal traditions

The findings qualify the widespread perception among scholars that the UDHR has unequivocally become binding through customary international law,⁹⁵ as it appears that the strongest commitment to uphold the UDHR remains confined to a specific geographical area. Equally, it may be argued that some constitutions pre-date the adoption of the UDHR, hence they do not refer to it. Moreover, some legal traditions, such as the common law one, place great value on the work of courts as engines for the development of the legal system, including the promotion and protection of human rights. Therefore, an inquiry into the legal significance of the UDHR must include an assessment of the courts' understanding of the role and place of the UDHR in domestic law.

As it turns out, references to the UDHR in case law also abound. The spectrum of positions taken by courts as to the legal status of the UDHR ranges from the recognition of its binding character under international law⁹⁶ to the denial of it.⁹⁷ The bone of contention is whether the UDHR (or provisions thereof) is binding on courts – that is to say, whether courts are bound to apply it over incompatible domestic law. Some courts consider the UDHR as an integral part of domestic law. For example, the High Court of Mauritius held that Section 8(2) of the Constitution 'reproduces in substance' Article 11 of the UDHR.⁹⁸ Other courts have categorically denied that the UDHR has constitutional or higher status. For example, the Court of Appeal of the Bahamas held that the UDHR does not prevail over the constitution. Hence, it maintained that the Criminal Law

⁹⁵ See, among many, H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' 25 Ga J Int'l & Comp L (1995-1996) 287; Sandholtz (n 58) 604-605 (implying that the UDHR has achieved customary status).

⁹⁶ See, for instance *Siderman v Argentina*, 965 F.2d 699, at 61 (the UDHR is 'a powerful statement of the customary international law of human rights'); *Aditeur Militaire v Krumkamp*, Military Court of Brabant, 17 ILR 388, 390 (the UDHR as a guiding principle of international law); *Gallón Giraldo v Ministry of Interior and Justice*, judgment No. C-370/2006, File D-6032, ILDC 660 (CO 2006), section 4.1.1 (the UDHR as a fundamental element of the right to peace).

⁹⁷ *Januzi v Secretary of State for the Home Department*, [2006] UKHL 5, para 16 (the UDHR is of declaratory value only).

⁹⁸ *Director of Public Prosecutions v Labovarde and Anor*, 9 March 1965, 44 ILR 104, para 74.

(Measures) Act of 1991 authorizing corporal punishment for certain offences was not unconstitutional.⁹⁹

Some courts have also excluded the applicability of the UDHR to domestic law. For instance, in a case concerning an alleged violation of Articles 8 and 10 of the UDHR in relation to the procedure followed for criminal charges of false accusations and defamation, the Slovakian Constitutional Court held that the UDHR had not been promulgated in accordance with the Constitution and the Act of Collection of Laws in Slovakia. As a result, it did not represent a valid source of law in Slovakia.¹⁰⁰ It thus concluded that a complaint concerning a violation of UDHR rights cannot constitute the subject matter of the proceedings before the Constitutional Court.¹⁰¹ The complaint was subsequently rejected as manifestly ill-founded.¹⁰² In another criminal case concerning a sentence of penal servitude, the Irish Supreme Court held that the UDHR ‘is not part of the domestic law of Ireland’.¹⁰³ After clarifying that a sentence of penal servitude was not related to the prohibition of slavery and servitude set forth in Article 4 of the UDHR,¹⁰⁴ Judge Walsh argued that the UDHR cannot be invoked before an Irish court ‘unless and until the provision sought to be relied upon shall be made part of the domestic law of the State’.¹⁰⁵

The High Court of Kenya reached similar conclusions, eventually denying the applicability of the UDHR to domestic law in a case concerning a piece of legislation openly discriminatory against children born out of wedlock. After noting that the impugned piece of legislation was inconsistent with the provisions of the Convention on the Rights of the Child, the court stated that it was not in a position to interpret it in the light of Article 2 of the UDHR, since the latter contains an absolute prohibition of discrimination, thus spoiling the court of any ‘margin of appreciation’.¹⁰⁶

The considerations above suggest that the perceptions of the legal status of the UDHR in domestic law greatly vary among jurisdictions. It is not unusual to find a variety of approaches within jurisdictions as well. For example, German courts have both upheld and denied the legal character of the UDHR, both before and after unification. For instance, in a case concerning a claim for compensation, the Federal Supreme Court of the Federal Republic of Germany held that the UDHR ‘contains only general guiding principles... and nothing more than the duty of member states to seek to ensure that this declaration is put into place in their own countries’.¹⁰⁷ The same court in a later case concerning the right to enter into marriage with the partner of one’s choice, which is also recognized in Article 6(1) of the German Basic Law, held that Article 16 of the

⁹⁹ *Prince Pinder v Regina*, petition, 29 January 1999, [2003] 1 A.C. 620 (P.C. 2002), p. 3.

¹⁰⁰ *K v Judicial and Criminal Police of the District Police Directorate and General Prosecutor of Slovakia*, ÚS 126/06, ILDC 1207 (SK 2007), para 27.

¹⁰¹ *ibid* para 28.

¹⁰² *ibid* para 29.

¹⁰³ *Re Woods*, 53 ILR 1967, para 161.

¹⁰⁴ As claimed by the plaintiff. Judge Ó Dálaigh explained that ‘[a] sentence of penal servitude is no more and no less than a sentence of imprisonment. The word “servitude” in Article 4 [of the UDHR] means the condition of being a slave or a serf; slavery and serfdom are in another world entirely’. *ibid*.

¹⁰⁵ *ibid* paras 165-166. Similarly, the Italian Court of Cassation held that the UDHR is not self-executing. See *Presidency of the Council of Ministers v Italian Federation of Transport Workers of Trento Province*, Cass N. 530, ILDC 18 (IT 2000), paras 6-7; *United States v Tissino*, case n. 4461/2009, ILDC 1262 (IT 2009), para 13.

¹⁰⁶ *RM v Attorney General, JK v Attorney General*, civil case 1351, ILDC 699 (KE 2006), para 75.

¹⁰⁷ *Z v Federal Republic of Germany*, 5 ILR 239, 242.

UDHR ‘reflected a consensus under international law’.¹⁰⁸ Similarly, the German Constitutional Court recognized that Article 15 of the UDHR was expressly mentioned in the drafting history of Article 16 of the German Basic Law.¹⁰⁹

Conversely, in a case concerning a declaration made by the Federal and the Democratic German republics according to which expropriations undertaken in the former Soviet occupation zone between 1945 and 1949 were ‘no longer reversible’, the German Constitutional Court held that Article 17 of the UDHR was not binding international law and could not be relied upon to decide the case at hand.¹¹⁰ The court restated its position as to the legal status of Article 17 of the UDHR in a subsequent case concerning the existence of a customary rule on the protection of property rights against one’s own state.¹¹¹

The use of the UDHR by US Federal courts is also illustrative of the lack of consistency as to the customary (hence binding) status of the UDHR in domestic law. In particular, the history of judicial precedent in this area of law reveals that the task of assigning customary status to the UDHR poses two distinct problems. As a matter of US constitutional law, customary international law does not equate with the law of nations. Only the latter forms the basis of jurisdiction for US courts and has historically been confined to three areas aimed at governing interstate relations.¹¹² Conversely, the provisions of the UDHR confer rights directly on individuals. As Bellia and Clark write, ‘at the time the Constitution was written, the law of state-state relations *prohibited* one nation from interfering with how another nation governed its own citizens in its own territory.’¹¹³ On top of that, the Constitution does not contain any self-executing provision designed to facilitate judicial enforcement of modern customary international law. This, in essence, is the position endorsed by the Supreme Court in *Sosa* and supported by other judges even before this landmark decision.¹¹⁴ For instance, in *Tel-Oren* the judges pointed out that ‘[s]ome of the rights specified in the documents relied upon by appellant as stating principles of international law recognizing individual rights are clearly not expected to be judicially enforced throughout the world, e.g. the Universal Declaration of Human Rights.’¹¹⁵

Yet, as a matter of international law, customary international law is part of the law applicable by international courts and violations thereof may be a cause of state responsibility.¹¹⁶ It is therefore in the interest of any state to remain compliant with international law, an attitude also shared by US federal courts. The problem with relying on the UDHR as evidence of fully formed customary

¹⁰⁸ *Basic Right To Marry case*, Case No. 1 BvR 636/68, 72 ILR 295, 296.

¹⁰⁹ O, 2 BvR 699/04, para 36.

¹¹⁰ *East German Expropriation case*, 2 BvR 955/00, para 118.

¹¹¹ *Egerer Stadtwald, City of Cheb v Germany*, R O 5 K 09.1350, ILDC 2879 (DE 2010), para 117.

¹¹² AJ Bellia and BR Clark, *The Law of Nations and the United States Constitution* (OUP 2017), 140 (referring to ‘the law of merchant, the law of state-state relations and the law maritime’).

¹¹³ *ibid* (emphasis original).

¹¹⁴ *ibid* 182-187. For a critical account of *Sosa*, see J Davis, *Justice Across Borders: The Struggle for Human Rights in U.S. Courts* (CUP 2008), 24-39.

¹¹⁵ *Hanoch Tel-Oren et al. v. Libyan Arab Republic et al.* 726 F.2d 774 (1984), p. 27. A strand of scholarship also supports this position. See, for instance, E Posner, *The Twilight of Human Rights* (OUP 2014), 15-17.

¹¹⁶ For instance, Article 38, para 1, of the Statute of the International Court of Justice reads: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...] b. international custom, as evidence of a general practice accepted as law’. See, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Annex, Article 38.

international law – that is to say, a practice shared by the international community of states, including the US – is that the practice of US federal courts is fraught with both misconceptions as to the place of the UDHR among the sources of international law and marked differences as to the already acquired customary status of the UDHR.

With regard to misconceptions, in *Copeland*, the judge referred to the UDHR as an instrument ‘to which the United States is a signatory,’ thus confounding a nonbinding resolution with a treaty concluded in simplified form.¹¹⁷ Likewise, in *Ishtyaq*, the judge considered the plaintiffs’ claim that a violation of the UDHR amounts to a violation of ‘general principles of customary international law,’ thus conflating two distinct sources of international law listed in article 38 of the ICJ Statute to which the UDHR does not belong.¹¹⁸

With regard to the customary status of the UDHR, US judges sharply diverge in their approach to finding supporting evidence. On the one hand, some judges have considered the UDHR and customary international law as independent legal instruments. For instance, in *Siderman*, the court held that the UDHR ‘creates legal obligations only insofar as it represents evidence of customary international law.’¹¹⁹ Likewise, in *Schiffer*, the court held that the relevance of the UDHR provisions must be evaluated only under norms established in customary international law.¹²⁰ Conversely, in *Phaidin*, the judge maintained that ‘while the Declaration is an authoritative statement of customary international law, it is not a binding resolution’¹²¹ while in *MacArthur* the court simply stated that the UDHR ‘is not quite universal enough’ to count as evidence of customary international law.¹²²

On the other hand, judges often limit themselves to asserting the customary – that is to say, binding – status of the UDHR provisions without proving evidence of state practice, *de facto* using the UDHR itself as a form of international custom. This attitude emerges plainly in *Kane*, where the judge held that the UDHR is ‘evidence of both state practice and *opinio juris*.’¹²³ In fairness, assertion has been used both to find evidence of the customary status of UDHR provisions, especially in relation to torture,¹²⁴ and to deny it.¹²⁵ However, the validity of assertion as an interpretative technique has been questioned, and so has the practice of finding evidence of the customary status of the UDHR only in the writings of scholars and references to the content of international legal instruments. For instance, in *Fernandez v Wilkinson*, the court found evidence of custom in the

¹¹⁷ *Vincent Copeland v. The Secretary of State* 226 F. Supp. 20 (1964), footnote 6. See also T Cheng, ‘The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?’ 41 Cornell J Int’l L (2008) 251, 278.

¹¹⁸ *Mohamed Ishtyaq et al. v. Alan Nelson et al.* 627 F. Supp. 13 (1983), pp. 2, 41 and 43-44. For an early recognition that most of the UDHR provisions are identical to general principles of international law, see E Schwelb, ‘The Influence of the Universal Declaration of Human Rights on International and National Law’ 53 ASIL Proc (1959) 217, 218.

¹¹⁹ *Susana Siderman de Blake et al v. The Republic of Argentina et al.* 965 F.2d 699 (1992), p. 62.

¹²⁰ *United States of America v. Nikolaus Schiffer* 836 F. Supp. 1164 (1993), p. 18.

¹²¹ *Ailish Nic Phaidin v. The United States* 28 Fed. Cl. 231 (1993), p. 7.

¹²² *Dr. Steven MacArthur et al. v. San Juan County et al.* 391 F.Supp.2d 895 (2005), p. 1050. See also K Mickelson, ‘How Universal Is the Universal Declaration?’ 47 Univ New Brunswick LJ (1998)19, 47 (warning against the temptation of elevating the significance of the UDHR to mythic proportions, since its true value lies in its historical character as a landmark document in the development of international human rights law).

¹²³ *Michael Kane v. David L. Winn* 319 F. Supp. 2d 162 (2004), p. 95.

¹²⁴ See, for instance, *Siderman* (n 96) and *United States of America v. Juan Ramon Matta-Ballesteros* 71 F.3d 754 (1995) (differentiating kidnapping from torture).

¹²⁵ See, for instance, *In re Alien Children Education Litigation* 501 F. Supp. 544 (1980) (arguing that the right to education is not customary international law).

prohibition of arbitrary detention contained in several international instruments¹²⁶ while in *Filartiga* it provided an in-depth discussion of writings of scholars.¹²⁷ Conversely, in *Forti*, the court denied evidentiary value to both scholarly works and references to international legal materials.¹²⁸ Even more explicitly, in his dissenting opinion in *Abdullahi*, Judge Weasley lamented the practice of finding custom where there is none.¹²⁹

The considerations above point to a lack of widespread and uniform practice among judges as to the binding status of the UDHR. They also confirm the initial reservations about the unqualified acceptance that the UDHR has achieved customary, binding status simply by virtue of it been widely cited in constitutions as well as by courts. It is more likely that individual provisions of the UDHR, rather than the entire document, have become binding through customary international law. Yet this does not necessarily translate in a statement of recognition of the legal significance of a General Assembly resolution *qua* resolution.

5.6 Conceptualising the legal significance of resolutions

The preceding analysis shows that the use of resolutions by states is uneven and contradictory, ranging from an acknowledgement that resolutions are binding under domestic law to the denial of their legal character. This attitude towards resolutions is common both across and within jurisdictions, thus suggesting that there is a gradation of legal significance attached to resolutions, which is not determined by a single factor. For example, the legal tradition of a state does not seem to be determinative of the legal status of resolutions. Likewise, the subject matter of resolutions does not provide any conclusive indication, since the near totality of resolutions mentioned in legislation and case law address human rights issues. If this is so, why do states – and, in particular, domestic courts – cite resolutions?

A possible explanation is that there is a correlation between the degree of legal significance of resolutions and the functions they serve within domestic legal systems. The empirical findings show that, when courts cite resolutions as a source of political commitment, they do so with a view to clarifying the legal background of the decision. In such cases, resolutions form part of a cluster of international legal materials informing the court's decision.¹³⁰ Arguably, the main reason for citing resolutions is the content of resolutions – that is to say, the genuine intention of states to protect the substantive rights listed in resolutions – rather than the authority of the General Assembly. However, in the absence of an explicit statement justifying the reason for citing resolutions, it cannot be excluded that courts cite resolutions simply because they are decisions of the representative organ of the United Nations.

¹²⁶ *Pedro Rodríguez Fernández v. George C. Wilkinson* 505 F. Supp. 787 (1980).

¹²⁷ *Dolly M.E. Filartiga and Joel Filartiga v. Americo Norberto Pena-Irala* 630 F.2d 876 (1980). For a commentary of the case along these lines, see T Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989), 122-126.

¹²⁸ *Alfredo Forti and Debora Benchoam v. Carlos Guillermo Suarez-Mason* 694 F. Supp. 707 (1988), pp. 13-14.

¹²⁹ *Abdullahi et al. v. Pfizer* 562 F.3d 163 (2009). See also JL Kunz, 'The United Nations Declaration of Human Rights' 43(2) AJIL (1949) 316, 320 (pointing out that having a list of human rights enumerated in a constitution – and, by analogy, other international instruments – is not proof in itself that those rights exist).

¹³⁰ As discussed in Section 5.3.2 above.

The same considerations apply to the decision of courts to cite resolutions as a source of legal obligation. In such cases, courts rely on resolutions to fill a gap in the domestic normative system.¹³¹ This suggests that the main aim of the citation is the incorporation of the content of resolutions. At the same time, considering that the resolutions cited by courts are mostly resolutions adopted by consensus,¹³² it is equally possible that courts sometimes decide to rely on resolutions because they are acts of the General Assembly.

In relation to resolutions serving a standard-setting function, domestic courts rely on resolutions to strengthen conclusions they reach on the basis of other normative sources.¹³³ As a result, courts do not justify why they rely on resolutions. It may be argued that they do so because it is useful to cite an additional, nonbinding source. Such an attitude emerges in patterns of citations of international legal materials in general. As Sandholtz writes, national courts invoke treaties and other international legal materials as guides or aids in the interpretation of domestic laws because they are useful, not because they are binding.¹³⁴ However, even this observation may equally support the conclusion that courts cite resolutions because of their content or because they are decisions of the General Assembly.

Ultimately, the analysis reveals broad trends. Yet the findings remain inconclusive. An alternative explanation is that domestic courts consider resolutions as an authoritative source of legal principles, at least to a certain extent. Consequently, the question arises as to what is the source of authority for the legal significance of resolutions. Considering that resolutions are formally recommendations (hence, they are not binding on states), it is likely to be a form of persuasive authority.¹³⁵

Persuasive authority may come in two forms – namely, the persuasive authority of the General Assembly as an institution¹³⁶ and the persuasive authority of resolutions as documents containing legal principles.¹³⁷ Given the number of resolutions cited in the field of human rights (as opposed to a dominant resolution) and the fact that courts do not go as far as to characterize resolutions as an expression of the will of the General Assembly, it is possible to conclude that courts recognize both types of persuasive authority simultaneously, on occasion preferring one over the other.

It may also be argued that reliance on resolutions on part of domestic courts is a manifestation of the General Assembly's quasi-supranational character: as noted in Chapter 4,¹³⁸ once adopted, it is difficult to completely disregard the existence of resolutions – that is to say, decisions of the

¹³¹ As discussed *ibid.*

¹³² As discussed *ibid.*

¹³³ As discussed in Section 5.3.3 above.

¹³⁴ Sandholtz (n 58) 598.

¹³⁵ Scholars refer to the authority of a nonbinding source of law like resolutions as persuasive authority. See, for instance, HP Glenn, 'Persuasive Authority' 32 (1987) McGill LJ 261 (providing a historical reconstruction of the concept of persuasive authority).

¹³⁶ F Schauer, 'Authority and Authorities' 94 (2008) Fordham JIL 1931, 1935-1939 (positing that a true source of authority is context-independent) and 1948 ('At times, optional authorities are selected as *authorities* because the selector trusts the authority as an authority even if the selector does not agree with the conclusion'. Emphasis original).

¹³⁷ *ibid* 1942 (arguing that '[a] decision driven by the intrinsic or substantive reasons for a conclusion is very different from one based solely on authority, plain and simple').

¹³⁸ Chapter 4, Section 4.3.2.

representative, political organ of the United Nations. Hence the courts' reliance on them. The fact that the vast majority of General Assembly resolutions are adopted by the Third Committee by consensus also confirms Klabbers' view that international organizations in general work best when they act as an *agora* – that is to say, as a true forum for discussion rather than a diplomatic platform.¹³⁹ This, in turn, suggests that the persuasive authority of resolutions is ultimately a reflection of the relative autonomy of the General Assembly from its member states.¹⁴⁰

Taken together, the considerations above show a trend and are not necessarily generalizable to all situations, present and future.¹⁴¹ However, they demonstrate that the basis of the authority of both the resolutions and the General Assembly lies in their usage by states. Neither the resolutions nor the General Assembly possess unique features. It has simply become common practice to rely on resolutions as an authoritative source.¹⁴² This conforms to a stream of scholarly thought recognizing that:

The status of a source as an authority is the product of an informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted.¹⁴³

Overall, various degrees of legal significance of resolutions serving different functions within domestic law are discernible. However, it is ultimately the will of states that determines the legal significance of resolutions through usage. As the analysis in Section 5.2 shows, resolutions acquire binding status through the provisions of the constitution or legislation. In such cases, the preconceived, automatic process of incorporation determines the degree of legal significance of resolutions.¹⁴⁴ In all other cases, resolutions turn out to be an optional source that courts rely upon, thus turning them into an authoritative source of law.¹⁴⁵

5.7 Conclusion

The legal significance of resolutions in domestic legal systems is a complex concept. There exists a wide range of gradations spanning across and within jurisdictions. On the one hand, the formal status assigned to resolutions depends on the constitutional arrangements of individual states rather than any peculiar character of resolutions *qua* resolutions. On the other hand, resolutions serve a variety of functions within domestic law, variously supplementing its normative provisions through an act of incorporation or recognition.

¹³⁹ As discussed in Chapter 3, Section 3.4.4.

¹⁴⁰ As discussed in Chapter 1, Section 1.4.

¹⁴¹ As Griffin notes, '[t]he best choice of authority will depend on context, including the type of legal argument, the identity of the decision maker, and the extent of mandatory authority (if there is any)'; AJ Griffin, 'Dethroning the Hierarchy of Authority' (2018) 97 Oregon L Rev 51, 92.

¹⁴² Schauer (n 136) 1944 (pointing out that, in general, courts do not describe their actual reasoning).

¹⁴³ *ibid* 1957. See also C Flanders, 'Toward a Theory of Persuasive Authority' 62 (2009) Oklahoma L Rev 55, 61 (arguing that persuasive authority 'has no independent binding force').

¹⁴⁴ Flanders reaches similar conclusions; *ibid* 67 ('To have any legal force, a persuasive authority must be adopted into a legal decision').

¹⁴⁵ Schauer (n 136) 1934 (describing law as an authoritative practice).

Related to this, the findings show that the overwhelming majority of resolutions cited in legislation and case law have been adopted by consensus at the General Assembly and address human rights issues. The source of legal significance of resolutions appears to lie both in the persuasive authority of the General Assembly and that of the legal principles contained in resolutions.

Overall, the analysis leads to the conclusion that it is ultimately the will of states, rather than the will of the General Assembly, that determines the extent to which and under what conditions resolutions acquire legal significance in practice through usage. The next chapter examines whether the same holds true in relation to the use of resolutions by states in international practice. By providing an original reconstruction of the extent to which resolutions serve similar or different functions in international practice compared to the functions they serve within domestic legal systems, it sheds light on another dimension of the concept of legal significance of resolutions.

CHAPTER 6

THE LEGAL SIGNIFICANCE OF RESOLUTIONS IN INTERNATIONAL PRACTICE

6.1 Introduction

Once adopted, resolutions take on a life of their own. While Chapter 5 examined the functions that resolutions serve within domestic law, the aim of this chapter is to determine what functions resolutions serve in international practice. As explained in Chapter 2,¹ the notion of international practice remains restricted to the use that states make of resolutions before selected international courts and tribunals. By shifting the focus of the inquiry from the decisions of international courts and tribunals to states' submissions before them, the analysis in this chapter provides an innovative angle of inquiry that finds no counterpart in scholarly works on the legal significance of resolutions.

A potential limitation of the assessment of the legal significance of resolutions in submissions made by states before international courts and tribunals is that statements on the normative value of resolutions coexist with the interest of states to cite sources that suit their litigation strategies. Consequently, while recognizing that litigation strategies play a more prominent role in contentious cases rather than in advisory cases, this chapter discerns attitudes of states in their submissions before international courts and tribunals in both contentious and advisory proceedings with a view to finding any differences or similarities between them on point of attribution of legal significance to resolutions. In addition, building on the findings of the analysis in Chapters 4 and 5 – which indicate that statements by delegates within the General Assembly as well as those contained in instruments incorporating resolutions into domestic law are evidence that states make an instrumental use of resolutions to (try to) achieve outcomes desirable for them – this chapter acknowledges that the presence of litigation strategies aligns with a broader attitude of states to resort to resolutions as a means to an end, thus suggesting that any understanding of the legal significance of resolutions requires a contextual type of analysis.

Since it is widely recognized that states refer to resolutions for a variety of reasons, in examining the different functions that resolutions serve in state submissions before international courts and tribunals, the inquiry revolves around two interrelated issues. On the one hand, it discerns between instances in which states treat resolutions as evidence of state practice and instances in which states treat resolutions as the practice of the General Assembly. On the other hand, the analysis evaluates the extent to which states and judges hold different views on the legal significance of resolutions. In general, judges tend to adopt a structured and methodical approach to the assessment of the legal significance of resolutions. For instance, a passage from the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion reads:

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to

¹ See Chapter 2, Section 2.3.3.

its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.²

The chapter is divided into two main sections. Section 6.2 evaluates the different types of functions that resolutions serve in international practice. It provides an original systematization of functions by discerning those shared with the process of internalization of resolutions³ and those distinctive of international practice. It shows that states and judges often rely on different means to attribute legal significance to resolutions. It also reveals that state practice oscillates between endorsing an understanding of resolutions as a manifestation of the will of the international community and resolutions as a manifestation of the separate will of the General Assembly, thus precluding the possibility of making generalizations about the legal significance of resolutions.

Taking stock of the previous analysis, Section 6.3 elaborates on the findings and demonstrates that issues relating to the legal significance of resolutions revolve around a double dichotomy generated by the different positions taken by states and judges in relation to assertion and attribution of the source of the legal significance of resolutions to state practice or the separate will of the General Assembly. It contends that it is difficult, if not impossible, to generalize about the legal significance of resolutions given the character of international polyarchy of the General Assembly. It thus offers insights into the concept of autonomy of the General Assembly from its member states. Section 6.4 gathers up the threads of the analysis and provides some concluding remarks.

6.2 Functions of resolutions

Like in domestic law, resolutions serve a variety of functions in international practice. This section streamlines those functions by inquiring into the reasons leading states to rely on resolutions to substantiate their arguments before international courts and tribunals. The caveat is that differentiating between functions is partly an arbitrary choice, for there are not always neat and clean lines between one function and the other. Accordingly, the description of functions must not be seen as rigid.

Sub-section 6.2.1 examines the functions of resolutions in international practice that match the corresponding functions of resolutions in domestic law.⁴ I refer to them as generic functions to signify that they are not distinctive of the role of resolutions in international practice. In contrast to these shared functions, sub-section 6.2.2 analyses the distinctive functions that resolutions serve in international practice with no counterpart in domestic law.

6.2.1 Generic functions

The category of generic functions includes instances in which states refer to resolutions with a view to opposing the existence of a legal duty to the claims advanced by other states (sub-section 6.2.1.1), invoking the existence of a right under international law (sub-section 6.2.1.2) and acknowledging standards of state conduct engendering related expectations (sub-section 6.2.1.3).

² ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, 8 July 1996, pp 254-255, para 70.

³ As discussed in Chapter 5, Section 5.3.

⁴ As discussed *ibid*.

It shows that resolutions are mostly regarded as having a declaratory, as opposed to constitutive, value. At the same time, recourse to normative language in the text of resolutions does not appear to be the leading factor in determining the attribution of legal significance of resolutions. The following sub-sections expand on individual generic functions.

6.2.1.1 Framing duties

It is not infrequent for states to refer to resolutions to claim the existence of binding duties under international law. The specific technique adopted is assertion about the existence of a duty – that is to say, a statement not accompanied by further elaboration about the scope, content and origin of the inclusion of the purported duty in the text of the cited resolutions. Examples of assertion abound in relation to both contentious and advisory jurisdiction of the selected courts and tribunals.

For instance, in *Germany v Italy*, Greece submitted that the Preamble to Resolution 60/147 adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law recognizes the duty of states to ‘promote the right of reparation for victims of violations of international law that are so widespread throughout the world’.⁵ Similarly, in *Belgium v Senegal*, Belgium emphasised the duty of states to prosecute and punish crimes against humanity stemming from resolutions of the General Assembly.⁶ Even more explicitly, in *Croatia v Serbia*, Croatia stated that Resolution 96(I) ‘affirms that genocide is a crime under international law for which both private individuals and public officials are to be held responsible’.⁷

Submissions before the ICJ in advisory jurisdiction contain similar statements. For example, in *Legality of the Threat or Use of Nuclear Weapons*, Egypt stated that Resolution 1653(XVI) adopting the Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons ‘must be seen as a prohibition *de lege lata* of nuclear weapons’.⁸ In *Construction of a Wall*, the same state argued that aggression is ‘categorically prohibited according to the rules of international law’. The latter include Resolution 3314(XXIX), especially Article 5.1, adopting the definition of aggression.⁹ Similarly, in the same case, Morocco, Malaysia, Sweden, South Africa and Cuba stated that Resolution

⁵ ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, written statement of Greece, 3 August 2011, p 12 para 47.

⁶ ICJ, *Questions Relating to the Obligation To Prosecute or Extradite (Belgium v Senegal)*, application instituting proceedings, 19 February 2009, p 13 para 12 (referring to Resolution 3074(XXVIII) para 1); *ibid*, memorial of Belgium, 1 July 2020, p 62 para 4.64 (referring to Resolution 2840(XXVI), especially para 4).

⁷ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, memorial of Croatia, 1 March 2001, p 329 para 7.11.

⁸ *Legality of the Threat* (n 2), written statement of Egypt, 20 June 1995, p 7 para 11. See also ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, statement by Mexico, 9 June 1994 (citing several resolutions declaring the illegality of the use of nuclear weapons); *ibid*, written statement of Costa Rica, 9 September 1994.

⁹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, memorandum submitted by Egypt, 28 January 2004, p 39.

2625(XXV) prohibits the acquisition of territory by force,¹⁰ while Slovenia expressed the same position in *Unilateral Declaration of Kosovo*.¹¹

Although rare, there are also instances in which international tribunals have referred to resolutions to deny the existence of a duty of states under international law. For example, an ICSID *ad hoc* Committee ruled that Resolution 3281(XXIX) adopting the Charter of Economic Rights and Duties of States casts doubt on the existence of a duty of states to protect foreign-owned property.¹² This reading of the legal significance of the Charter of Economic Rights and Duties of States finds abundant support in the scholarly literature.¹³

It stems from the preceding that states and courts alike attach binding character to resolutions (or parts thereof) recognizing the existence of duties that apply to the international community of states as a whole. Occasionally, reference to resolutions also serves the purpose of clarifying duties of individual states. For example, in *Construction of a Wall*, Indonesia asserted a duty of Israel to apply the Fourth Geneva Convention to the occupied Palestinian territories based on the letter of Resolution 56/60 addressing the issue of compliance with arms limitation and disarmament agreements.¹⁴ Similarly, in the *Chagos* advisory opinion, India stated that resolution 2066(XX) ‘obligated the UK to complete the decolonization of Mauritius and report the same to the General Assembly’.¹⁵ A contrary position appears in a statement by the UK before ITLOS. The relevant passage reads:

A general reference to United Nations General Assembly resolutions and international law in complaints which turn on a claim of territorial sovereignty can hardly be read as raising a dispute as to whether the [Marine Protected Area], on its own terms, breaches the obligations of the United Kingdom or the rights of Mauritius as states parties to UNCLOS’.¹⁶

Taken together, the considerations above suggest that states invoke resolutions to try to impose duties on other states. This, in part, suits the adversarial nature of international litigation.¹⁷ Equally, it shows an instrumental use of resolutions as representing the will of the international community.¹⁸ From this perspective, the legal significance of resolutions derives from the

¹⁰ *ibid*, statement by Morocco, 30 January 2004, p 5; *ibid*, written statement of Malaysia, 30 January 2004, p 23 para 58; *ibid*, statement of Sweden, 30 January 2004, p 1 para 5; *ibid*, written statement of South Africa, 30 January 2004, p 7 paras 15-16; *ibid*, written statement of Cuba, 30 January 2004, p 5.

¹¹ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, written comments of Slovenia, 17 July 2009, p 6 para 7.

¹² *AMCO v Indonesia*, ICSID Case No ARB/81/1, *ad hoc* committee decision on application for annulment, 16 May 1986 (referring to Article 2(2)(a) of Resolution 3281: ‘No state shall be compelled to grant preferential treatment to foreign investment’).

¹³ S Murase, ‘International Law Making for the New International Economic Order’ (1982)25 Japanese Annual of Int’l L 45, 52 (arguing that the subsequent practice of states does not appear to support the view that the principles embodied in the Charter of Economic Rights and Duties have crystallized into binding norms of international law).

¹⁴ *Wall* (n 9), written statement of Indonesia, 30 January 2004, p 7 para 11.

¹⁵ ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius*, written statement of India, 28 February 2018, p 25 para 62.

¹⁶ ITLOS, *Mauritius v United Kingdom*, preliminary objections to jurisdiction submitted by the United Kingdom, 31 October 2012, p 47 para 4.20.

¹⁷ This applies to both contentious cases and advisory opinions. In both cases, states put a legal argument before the court or tribunal through their submissions.

¹⁸ J Higashi, ‘The Role of Resolutions of the United Nations General Assembly in the Formative Process of International Customary Law’ (1982)23 Japanese Annual of International Law 11, 13 (‘the resolutions of the U.N.

representative character of the General Assembly as opposed to the consent of states to be bound by the resolutions. Effectively, resolutions recognizing duties of states are a convenient tool of litigation strategy. The fact that the language used by states to demonstrate that certain resolutions are intended to create duties for states is neither uniform nor unambiguous further strengthens this conclusion. Terms like responsibility or obligation often appear in state submissions, thus creating an appearance of prescriptiveness in the text of resolutions.

For example, New Zealand claimed before ITLOS that several resolutions recognize the responsibility of states to exercise effective control over their nationals, including the beneficial owners or operators of vessels, in order to deter them from engaging in illegal, unreported and unregulated fishing.¹⁹ In cases like this, the term responsibility appears to be synonymous with duty, as it demands a specific conduct of states. Another example is the use of the term obligation in submissions before the IACtHR. The most recurring instance is the statement affirming that the UDHR establishes obligations for states.²⁰ Such a generic assertion is not accompanied by any indication of the conditions under which the UDHR establishes obligations of conduct for states. Instead, it suggests that the UDHR is a binding document in its own right, effectively determining an abstraction of the legal significance of that resolution.²¹ A similar instance is the statement by Cuba before the ICJ according to which Resolution 1514(XV) adopting the Declaration on the Granting of Independence to Colonial Countries and Peoples and Resolution 2066(XX) on the islands composing the territories of Mauritius contain ‘international obligations that must be complied [with] in good faith by the international community, and in accordance with the principles of international law’.²² This is an assertion of the obligatory character in principle of those resolutions.

In such and similar cases,²³ the use of the term obligation appears to be indicative of the declaratory, as opposed to constitutive, character of resolutions proclaiming the existence of state duties under international law. As a result, the legal significance of resolutions is assumed (and subsequently declared). This conclusion finds support in the statements of judges, which have

General Assembly constitute expressions of the collective will [of states]’); G Rosner Lande, ‘The Effect of the Resolutions of the United Nations General Assembly’ (1966)19 *World Politics* 83, 96 (arguing that resolutions express ‘the collective interpretation of the organ’); MYA Kadir, ‘The United Nations General Assembly Resolution (UNGAR) as a Source of International Law: Toward a Reformulation of the Sources of International Law’ (2011)8 *Indonesian J Int’l L* 275, 289 (arguing that resolutions are ‘a manifestation of world community willingness’). *Contra*, see G Arangio-Ruiz, *The Declaration on Friendly Relations and the System of the Sources of International Law* (Sijhoff 1979), 10-11 and 30-32.

¹⁹ ITLOS, Case No 21, advisory opinion, statement by New Zealand, 27 November 2013, p 15 para 33.

²⁰ See, among many, IACtHR, request for an advisory opinion submitted by Argentina, Uruguay, Brazil and Paraguay, 6 April 2011, p 39; Advisory Opinion OC-26/20, 9 November 2020, statement by Panama, p 7; Advisory Opinion, OC-24/17, statement by Bolivia, 7 December 2016, p 3.

²¹ Similarly, Ellis argues that ‘[d]espite the absence of legislative authority, General Assembly resolutions, such as the [UDHR], have created international law’. ME Ellis, ‘The New International Economic Order and General Assembly Resolutions: the Debate over the Legal Effects of General Assembly Resolutions Revisited’ (1985)15 *California Western Int’l LJ* 647, 667.

²² *Chagos* (n 15), written statement of Cuba, 1 March 2018, p 1.

²³ ITLOS, *Request for an Advisory Opinion Submitted by the Subregional Fisheries Commission*, Case No 21, written statement of Chile, 29 November 2013, p 5.

acknowledged that resolutions establish international legal obligations without elaborating on the roots of those obligations.²⁴

6.2.1.2 Establishing rights

In their submissions before international courts and tribunals, states often rely on resolutions to emphasise the existence of rights under international law. The empirical evidence shows that this practice is more pronounced in submissions before the ICJ in its advisory jurisdiction.

For instance, states have pointed out that Resolution 1514(XV) adopting the Declaration on the Granting of Independence to Colonial Countries and Peoples has been of fundamental importance for the development of self-determination into a right – not a mere principle – of colonial territories and peoples.²⁵ As Higgins points out, Resolution 1514(XV) taken together with several years of evolving practice of UN organs, including the General Assembly, ‘provides ample evidence that there now exists a legal right to self-determination’.²⁶ However, the restriction of the scope of application of Resolution 1514(XV) to former colonial countries has also been accompanied by a qualification of the right to self-determination.

For example, in *Kosovo*, Serbia argued that ‘[R]esolution 2625(XXV) does not transform a minority suffering from human rights violations into a people having a right to self-determination’.²⁷ Taken at face-value, this statement aligns with the academic position recognizing that instances of discrimination by a government against a people does not justify a unilateral right to secession, unless the discriminatory practice in question is ‘deliberate, sustained and systematic’.²⁸ From a different perspective, Spain also noted that the provisions of Resolution 2625(XXV) do not justify the secession of Kosovo. It substantiated its position by arguing that it fully endorsed the response of the international community to establish an international administration regime for Kosovo.²⁹

Finally, states have referred to resolutions to acknowledge aspects of the right to self-determination of specific populations. For instance, Argentina submitted that Resolution 2066(XX) on the territorial integrity of Mauritius recognizes the right of the Mauritian people to independence.³⁰

²⁴ ICJ, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v Australia)*, separate opinion of Judge Cançado Trindade, 3 March 2014, p 45 para 55 (qualifying the presumption of inviolability of the correspondence between states and their legal advisers contained in Resolution 90(I) as ‘an international law obligation’). See also *Legality of the Use* (n 8), dissenting opinion of Judge Weeramantry, 8 July 1995, p 141 (arguing that Resolution 2849(XXVI) clarifying the relationship between development and the environment ‘recognizes the obligation of States’ to protect the environment).

²⁵ *Chagos* (n 15), written statement of the Netherlands, 27 February 2018, p 6 para 3.3; *ibid*, written statement of the Republic of Korea, 28 February 2018, p 3 para 6; *ibid*, written statement of Mauritius, 1 March 2018, p 199 para 6.22 (‘A first notable feature of Resolution 1514(XV) was the fact that it spoke not merely of the *principle* of self-determination, but of the *right* to self-determination’. Emphasis original).

²⁶ R Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963), 104.

²⁷ *Kosovo* (n 11), written statement of Serbia, 17 April 2009, p 215 para 589.

²⁸ G Anderson, ‘Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects’ (2013) 41 *Denver J Int’l L & Pol’y* 345, 359.

²⁹ *Kosovo* (n 11), written comments of Spain, 17 July 2009, p 5 para 8.

³⁰ *Chagos* (n 15), written reply of Argentina, 12 September 2018, p 2.

The examples above show that, contrary to the technique used for framing duties under international law,³¹ states do not confine themselves to assertion in order to establish the existence of a right. Quite the contrary, they place the text of the resolutions in a wider political context, justifying their positions in support of the interpretation given to the text of resolutions. This is an open, direct manifestation of the legal significance (including the limits thereof) attributed to resolutions. The caveat is that the observation is not fully generalizable, since there are instances of assertion of rights as well. For instance, states have submitted that Resolution 1803(XVII) recognizes the right to permanent sovereignty over natural resources without justifying their statements in any detail.³² Likewise, they have referred to resolutions that acknowledge the existence of rights of the individual. Examples include invoking Articles 1 and 2 of the UDHR to recognize the right to equality³³ as well as Article 3 thereof in relation to the right to life.³⁴ Similarly, states have referred to Resolution 40/144 adopting the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live to reaffirm the existence of rights that belong to the individual *qua* individual.³⁵

The empirical findings also show that judges share the attitude of resorting to assertion with a view to substantiating their reliance on resolutions as evidence of internationally recognized rights. For instance, judges, like states, have invoked several provisions of the UDHR to affirm the right to a fair trial,³⁶ the right to asylum³⁷ and the right to private property.³⁸ Equally, they have referred to resolutions conferring rights directly on individuals³⁹ or groups of individuals.⁴⁰

A possible justification for resorting to resolutions to affirm the existence of a right by both states and judges is that resolutions dealing with human rights issues enjoy a special place in national⁴¹ as well as international law.⁴² Another reason could be the fact that the recognition of the existence of a right requires the use of normative language, which is particularly suited to the needs of

³¹ As discussed in Section 6.2.1.1 above.

³² ITLOS, *Land Reclamation in and around the Straights of Johor (Malaysia v Singapore)*, response of Singapore, 20 September 2003, p 8 para 22.

³³ IACtHR, advisory opinion, OC-24/17, statement by Mexico, 22 February 2017, p 5 para 14.

³⁴ IACtHR, advisory opinion, OC-21/14, statement by Costa Rica, 19 August 2014, p 29.

³⁵ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, memorial of the Republic of Guinea, 23 March 2001, p 41 para 3.7; ICJ, *Jadhav (India v Pakistan)*, memorial of India, 13 September 2017, p 38 para 129.

³⁶ IACtHR, Advisory opinion, OC-16/99, 1 October 1999, partly dissenting opinion of Judge Jackman, p 1 para 5 (referring to UDHR, Article 11).

³⁷ IACtHR, Advisory opinion, OC-18/03, 17 September 2003, concurrent opinion of Judge Cançado Trindade, p 14 para 38 (referring to UDHR, Article 14).

³⁸ IACtHR, Advisory opinion, OC-22/16, 26 February 2016, concurrent opinion of Judge Caldas, p 2 para 4 (referring to UDHR, Article 17).

³⁹ *Urbaser S.A. and Consorcio de Aguas Bilbao, Bilbao Biskaia Ur Partzerguoa*, ICSID Case No ARB/07/26, award, 8 December 2016, pp 261-262 para 1197 (stating that Resolution 64/292 recognizes access to water and sanitation as a basic right); IACtHR, Advisory opinion, OC-16/99, 1 October 1999, p 57 para 82 (referring to resolution 40/144).

⁴⁰ *Abey Arbitration*, PCA Case No 2008-07, dissenting opinion of Judge Al-Khasawneh, p 22 para 67 and IACtHR, Advisory opinion, OC-22/16, 22 February 2016, p 29 para 78 (both referring to Resolution 61/295 adopting the on the Rights of Indigenous Peoples); *Wall* (n 9), advisory opinion, 9 July 2004 p 171 para 88 (referring to Resolution 2625(XXV) adopting the Declaration on Friendly Relations among States).

⁴¹ As discussed in Chapter 5.

⁴² CC Joyner, 'U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation' (1981)11 *California Western Int'l LJ* 445, 465 (arguing that 'human rights resolutions carry substantial normative suasion').

international adjudication.⁴³ However, the silence surrounding assumptions could equally support the opposite conclusion – namely, that the language used in resolutions is not necessarily indicative of the legal character of resolutions.⁴⁴ The factors triggering the reliance on resolutions affirming or qualifying the existence of a right may be of extra-legal nature. For example, while denying that Resolution 2625(XXV) confers a right to unilateral secession for violations of human rights in relation to Kosovo, Serbia has consistently supported the recognition of the right to self-determination of colonial peoples, as set forth in Resolution 1514(XV).⁴⁵ This suggests that political factors play an important role in attributing legal significance to resolutions framed in normative language.⁴⁶

Likewise, the text of resolutions, especially declarations, concerning the creation of new rules of international law may remain open to interpretation as to its scope. The Declaration on Permanent Sovereignty over Natural Resources is an example.⁴⁷ This suggests that the language used in resolutions is not determinative of their legal character. As Okafor writes, certain resolutions have ‘a declaratory authority as to what constitutes a human right’, which does not necessarily coincide with the legal significance of such resolutions.⁴⁸

The considerations above suggest that resolutions recognizing rights of peoples and individuals engender a significant degree of expectation of compliance. They also show that states appear to cite resolutions simply because they are decisions of the General Assembly, irrespective of their content. Indeed, key provisions of resolutions often remain open to interpretation and are invoked selectively by states depending on the circumstances of the dispute. Effectively, while presented as a manifestation of the will of the General Assembly, states subordinate their support for resolutions recognizing rights to extra-legal considerations. As a result, the legal effects of resolutions remain mostly hortatory.⁴⁹

6.2.1.3 Standard-setting

In international practice like in domestic law, resolutions serve a standard-setting function. The distinctive trait is that, contrary to the function of recognizing rights,⁵⁰ this function is more

⁴³ This includes legal arguments made in advisory proceedings as well.

⁴⁴ BU Eka, ‘Decisions *ex aequo et bono* and General Assembly Resolutions as Secondary Sources of International Law’ (1970) 4 Nigerian LJ 119, 132 (‘there is doubt whether the language employed in framing a resolutions can be a material factor in considering the legal effect of such a resolution’) and 133 (‘General Assembly resolutions have no binding legal effects on members irrespective of the gravity of the language used’).

⁴⁵ *Chagos* (n 15), written comments of Serbia, 14 May 2018, p 5 para 16 (arguing that Resolution 1514(XV) and Resolution 2066(XX) are ‘of a legal nature’ and reflect the UN Charter obligations of the administering states).

⁴⁶ Higgins (n 26) 9-10 (emphasising the need to consider the dynamic interplay between law and politics in interpreting legal rules).

⁴⁷ Eka (n 44) 130 (pointing out that the adoption of the Declaration on Permanent Sovereignty over Natural Resources has not resolved the issue of compensation in case of expropriation of foreign property); K Hossain, ‘Introduction’, in K Hossain and SR Chowdhury (eds), *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice* (Frances Printer Publisher 1984), xiii (arguing that the principle of permanent sovereignty over natural resources lacks precise scope and implications, especially in relation to the standards of compensation).

⁴⁸ OC Okafor, ‘The Status and Effects of the Right to Development in Contemporary International Law’ (1995) 7 African J Int’l & Comp L 865, 871. See also Joyner (n 42) 463 (‘resolutions substantively effect norm creation by expressing an expectation of some certain desirable behavior’).

⁴⁹ See also Arangio-Ruiz (n 18) 18 and 39 (arguing that declarations have a merely hortatory effect).

⁵⁰ As discussed in Section 6.2.1.2 above.

prominent in state submissions before international courts and tribunals in contentious, rather than advisory, cases.

In terms of subject matter, it appears that resolutions serve a standard-setting function in a variety of fields. For example, in *Diallo*, Guinea referred to the criterion of ‘prompt and adequate’ compensation accompanying an act of expropriation, as set forth in Resolution 1803(XVII) adopting the Declaration on Permanent Sovereignty over Natural Resources.⁵¹ It also referred to Resolution 60/147 adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law as establishing relevant rules governing financial compensation for damage resulting from violations of internationally protected individual rights.⁵² Similarly, in *Bolivia v Chile*, Bolivia invoked resolution 53/101 establishing the Principles and Guidelines on International Negotiation to maintain that negotiations should be conducted in good faith⁵³ while in *Immunities and Criminal Proceedings*, Equatorial Guinea invoked Resolution 37/10 adopting the Manila Declaration on the Peaceful Settlement of International Disputes in support of the view that initiating proceedings ‘can in no way be considered an unfriendly act between states’.⁵⁴

The variety of fields covered by the standard-setting function in international practice is significantly different from the number of fields covered within the domestic legal system, where the majority of resolutions set standards in the human rights area.⁵⁵ It is also noteworthy that judges sitting in international courts, like judges sitting in domestic courts, often refer to resolutions as standard-setting documents in the field of human rights.⁵⁶ This suggests that states and judges attach a different degree of significance to resolutions in this field. A possible reason for such discrepancy is that resolutions establishing basic principles and guidelines are by their nature adopted to set standards of state conduct. The latter require the mobilization of resources – political, economic and moral – by states, which may not always be in a position to do so. Standard-setting resolutions nonetheless engender expectations of compliance, hence judges may decide to enforce the duty of states to consider resolutions in good faith, setting priorities on human rights protection over other considerations. As Lauterpacht noted in the *South West Africa* case:

Whatever may be the content of the recommendation and whatever may be the nature and the circumstances of the majority by which it has been reached, [a Resolution] is nevertheless a

⁵¹ *Diallo* (n 35), reply of the Republic of Guinea, 19 November 2008, p 87 para 2.97. See also, ITLOS, advisory opinion Case No 17, statement by the Netherlands, p 10 para 3.15 (referring to Principle 4 of Resolution 61/36 establishing that states should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities within its jurisdiction and control).

⁵² *ibid*, memorial of the Republic of Guinea, 6 December 2011, p 4 para 22.

⁵³ ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, memorial of Bolivia, 17 April 2014, p 101 para 231; *ibid*, reply of Bolivia, 21 March 2017, p 65 para 175.

⁵⁴ ICJ, *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, written statements of Equatorial Guinea on the preliminary objections raised by France, 31 July 2017, p 2 para 11.

⁵⁵ As discussed in Chapter 5, Section 5.3.

⁵⁶ See, for instance, IACtHR, Advisory opinion, OC-17/02, p 50 para 20 (describing Resolution 40/33 adopting the UN Standard Minimum Rules for Non-Custodial Measures and Resolution 45/112 adopting the UN Guidelines for the Prevention of Juvenile Delinquency as international standards); IACtHR, Advisory opinion, OC-21/14, 19 August 2014, p 92 para 244 (qualifying Resolution 52/132 as establishing standards in the field of human rights and mass exoduses).

legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly'.⁵⁷

An alternative explanation is that states rely on standard-setting resolutions to generate or formalize expectations as to the existence of a duty under international law. The similarity of fields covered by both standard-setting and duty-framing resolutions⁵⁸ supports this conclusion. The caveat is that any assessment of the legal significance of standard-setting resolutions is context-dependent and requires an examination of the interpretation placed by states upon individual resolutions.⁵⁹

On a more general level, states have advanced the argument that the incorporation of nonbinding law into state practice is a form of standard-setting. For example, Sri Lanka invoked resolution 62/177 urging states to exercise 'effective control' over vessels flying their flag in order to prevent and deter illegal, unreported and unregulated fishing. In doing so, it indirectly qualified the resolution's provision as a standard of state conduct.⁶⁰ Another example is the exhortation for states to avoid youth detention as much as possible, as indicated in Resolution 64/142, as well as Resolution 40/33 adopting the UN Minimum Rules on Juvenile Justice.⁶¹

Taken together, the considerations above suggest that states rely on standard-setting resolutions as a form of persuasion as to the existence of a certain behavioural requirement and accompanying expectations of compliance.⁶² Factors triggering the decision to refer to resolutions (or resist their applications) consist of legal considerations, both on part of states and judges alike. At the same time, it is difficult to determine whether states cite resolutions because of the legal principles contained therein or because they are decisions of the representative organ of the United Nations. Arguably, given the nonbinding nature of resolutions, extra-legal considerations are at play when citing resolutions. Arguments based on persuasion, and accompanying expectations of compliance, possess a subjective dimension. The latter marks the difference between the standard-setting and the duty-framing function of resolutions.

6.2.2 Distinctive functions

Certain functions served by resolutions in international practice do not find a counterpart in domestic law. They can be grouped into four categories – namely, making legal determinations

⁵⁷ ICJ, *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, 7 June 1955, separate opinion of Judge Lauterpacht, p 120; *ibid*, separate opinion of Judge Klaestad, p 88 (arguing that states have a duty 'to consider in good faith a recommendation adopted by the General Assembly').

⁵⁸ As discussed in Section 6.2.1.1 above.

⁵⁹ Eka (n 44) 129; Ellis (n 21) 679 (arguing that 'the interpretation given to a resolution while not conclusive as to its effectiveness has considerable probative value of the obligations arising under the resolution').

⁶⁰ ITLOS, *Request for an Advisory Opinion Submitted by the Subregional Fisheries Commission*, Case No 21, written statement by Sri Lanka, 18 December 2013, p 6 para 17.

⁶¹ IACtHR, *Request for an Advisory Opinion* (n 20), pp 29 and 32.

⁶² Joyner (n 42) 478 (arguing that 'formal recommendations by the General Assembly embody persuasive authority as indicators of the world community's legal desires at a particular time'). See also SP Ng'ambi, 'Permanent Sovereignty over Natural Resources and the Sanctity of Contracts, from the Angle of *lucrum cessans*' (2015) 12 Loyola Univ Chicago Int'l Rev 153, 157 ('it would be insubstantial, erroneous and ultimately dogmatic to completely disregard the principles espoused in General Assembly resolutions').

(subsection 6.2.2.1), clarifying the normative value of resolutions (sub-section 6.2.2.2), explaining the significance of voting patterns (sub-section 6.2.2.3) and supporting political claims (sub-section 6.2.2.4). This section shows that both states and judges attribute different degrees of legal significance to resolutions in relation to the different functions they serve. While this precludes any generalization, it appears that reliance on normative language in the text of resolutions does not play a central part in attributing legal significance to resolutions.

6.2.2.1 Making determinations

Referring to resolutions with a view to making legal determinations is a practice distinctive of state submissions in contentious cases. In relation to the observed sample, it appears that judges sitting in international courts and tribunals do not cite resolutions for the purpose of making legal determinations.⁶³

In general, states invoke resolutions to make legal determinations about the conduct of specific states. Such determinations are context-specific and not amenable to generalization.⁶⁴ For example, in *Croatia v Serbia*, Croatia argued that the conduct attributed to Serbia constituted genocide, as recognized by Resolution 47/121 on the human rights situation in Bosnia and Herzegovina.⁶⁵ Similarly, in *Costa Rica v Nicaragua*, Costa Rica argued that Nicaragua's military actions amounted to an act of aggression, even in the absence of armed hostilities. In support of its argument, Costa Rica referred to the provisions of Resolution 3314(XXIX) elaborating on the definition of aggression.⁶⁶

Legal determinations often address UN law matters. For instance, Croatia invoked Resolution 47/1 recognizing that Serbia and Montenegro could not automatically continue the membership of the Socialist Federal Republic of Yugoslavia but had to apply for membership in the UN.⁶⁷ Likewise, in the *Construction of a Wall* advisory opinion, Israel stated that it was clear from the resolutions of the General Assembly dealing with the occupied territories that Palestine had only observer status. Hence, it could not be regarded as a state entitled to appear before the ICJ.⁶⁸

Despite being context-specific and not amenable to generalization, determinations are not neutral or objective. For example, in the dispute between Ukraine and the Russian Federation over Crimea, Ukraine objected to the annexation of Crimea by invoking Resolution 68/262, which states that the referendum on Crimea's independence has 'no legal validity'.⁶⁹ Conversely, the Russian Federation maintained that Resolution 68/262 had not been adopted unanimously, hence

⁶³ Cf MD Öberg, 'The Legal Effects of the Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 EJIL 879, 882 (referring to causative determinations as the effects ensuing from resolutions creating obligations, rights and powers).

⁶⁴ J Castañeda, *Legal Effects of United Nations Resolutions* (Columbia University Press 1969), 120-129.

⁶⁵ *Croatia v Serbia* (n 7), application instituting proceedings, 2 July 1999, p 10 para 19.

⁶⁶ ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, memorial of Costa Rica, 5 December 2011, p 179 para 4.65.

⁶⁷ *Croatia v Serbia* (n 7), written statement of the Republic of Croatia, 29 April 2003, p 8 para 210.

⁶⁸ *Wall* (n 9), written statement of Israel, 30 January 2004, p 13 para 2.15.

⁶⁹ *Ukraine v The Russian Federation*, PCA case No 2017-06, award concerning the preliminary observations of the Russian Federation, 21 February 2020, p 2 para 6.

it was not binding.⁷⁰ Eventually, the PCA arbitral tribunal held that the resolutions on Crimea are framed in hortatory language and that, in any case, it had the power to interpret the text of resolutions adopted by the General Assembly.⁷¹ It therefore rejected Ukraine's claim.

There are exceptions to the context-specific character of legal determinations made through reference to resolutions. For example, within the law of the sea disputes, states often refer to Resolution 2749(XXV) qualifying the legal status of the deep seabed and the ocean floor as the common heritage of mankind.⁷² Consequently, Argentina argued that the exploitation of the natural resources of the area must be carried out for the benefit of mankind as a whole.⁷³ The exceptional character of this type of determination appears to derive from the status of global commons of the deep seabed and the ocean floor rather than country-specific issues. This simply confirms that, in making determinations, states use resolutions as a means to clarify the legal repercussions generated by factual situations, such as military interventions or the exploitation of shared resources. It also shows that states cite resolutions to make legal determinations despite their nonbinding character.⁷⁴ As a result, they attribute legal significance to resolutions depending on context and circumstances.

6.2.2.2 Clarifying the normative value of resolutions

States submissions before international courts and tribunals are replete with statements aimed at clarifying the normative value of the resolutions invoked by states in support of their claims.⁷⁵ Such statements reveal a consolidated pattern of degrees of normative intensity – that is to say, legal significance – attached to resolutions.

On the one hand, states have referred to resolutions to clarify that they lack legal significance. For instance, in the *Pulp Mills* case, Argentina stated that the principle of sovereignty over natural resources contained in Resolution 2995(XVII) on state cooperation in the environmental field is 'devoid of substance'. The statement is context-specific, since Argentina clarified that the provisions of paragraph 3 of the resolution cannot be used to interpret the provisions of a piece of national legislation where there is an international treaty in place between the parties to the dispute governing the same subject matter.⁷⁶ In other words, the provisions of a bilateral treaty prevail over the principles of a resolution.⁷⁷

⁷⁰ *ibid*, pp 28-29 paras 89-90.

⁷¹ *ibid*, p 54 paras 175-176.

⁷² ITLOS, *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, counter-memorial of Myanmar, 1 December 2010, p 183 para A.14; ITLOS, Case No 17, advisory opinion, statement by Germany, 18 August 2010, p 10 para 20.

⁷³ Minutes of the public settings held from 14 to 16 September 2010, ITLOS/PV.2010/Rev.2, E 16, p 17.

⁷⁴ Similarly, in *Kosovo*, the ICJ held that a determination made by the General Assembly to the court as to the authors of the declaration of independence of Kosovo was not binding on the court. *Kosovo* (n 11), advisory opinion, 22 July 2010, pp 444-448 paras 102-109. For a commentary, see MD Öberg, 'The Legal Effects of United Nations Resolutions in the *Kosovo* Advisory Opinion' (2011) 105 AJIL 81, 90.

⁷⁵ Statements addressing the customary status of resolutions or principles contained therein as well as the contribution of resolutions to the development of general principles of law are examined separately in Chapter 7, Section 7.2.2.

⁷⁶ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, memorial of Argentina, 15 January 2007, p 117 para 5.12.

⁷⁷ *ibid*, reply of Argentina, 20 January 2003, p 113.

On the other hand, states have denied the legal force of resolutions as a matter of principle. For example, Pakistan maintained that ‘resolutions of the UN General Assembly have no binding force and cannot be relied on as enforceable obligations against another state’.⁷⁸ Similarly, the UK argued that ‘[a]s a resolution of the General Assembly, resolution 2066(XX) [on the territorial integrity of Mauritius is] not legally binding but recommendatory’.⁷⁹ Likewise, in relation to the resolutions on the use of nuclear weapons, the Russian Federation argued that:

Many states vote for resolutions, or abstain from voting, not voting against, having in mind that, according to the Charter, they do not create new law and *do not signify the recognition of any rules as such*, but they are only of recommendatory nature’.⁸⁰

The argument above finds support in the practice of other states, which have either denied that resolutions on the use of nuclear weapons are a source of law⁸¹ or acknowledged the political, as opposed to legal, significance of those resolutions.⁸²

While recognizing that resolutions are not as such binding, states have also attached a binding character to resolutions reflecting the values of the international community at the time of adoption. However, the practice is not uniform. For instance, Italy maintained that the declaration contained in Resolution 60/147 adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law derives its ‘binding legal value’ from pre-existing legal obligations of states, effectively codifying ‘the rights attributed by international law to victims of international crimes’.⁸³ Conversely, Germany denied any such character to the same resolution arguing that, instead of codifying the law, it reflects trends that have emerged ‘at the earliest in the last two decades’. Hence, Resolution 60/147 is merely declaratory.⁸⁴ Other states have limited themselves to acknowledging that certain resolutions declare widely held beliefs of states without attaching any legal significance to them.⁸⁵

Finally, states have lamented that it is inappropriate for a court to rely on certain resolutions. For example, in the course of advisory proceedings before the IACtHR, the United States argued that ‘the Court should decline to address the scope of obligations under instruments that are not relevant to its functions, such as the Universal Declaration of Human Rights’.⁸⁶

⁷⁸ ICJ, *Obligations Concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)*, counter-memorial of Pakistan, 1 December 2015, p 38 para 7.96.

⁷⁹ *Mauritius v United Kingdom*, PCA Case No 2011-03, counter-memorial of the United Kingdom, 15 July 2013, p 33 para 2.74.

⁸⁰ *Legality of the Threat* (n 2), written comments of the Russian Federation, 19 June 1995, p 16 (emphasis added).

⁸¹ *Legality of the Use* (n 8), written statement of the Solomon Islands, 9 September 1994, p 41 para 3.31.

⁸² *ibid*, written statement of France, 20 June 1994, p 32; *ibid*, written statement of the United States, 10 June 1994, pp 24-25 (arguing that resolutions declaring the use of nuclear weapons contrary to the UN Charter ‘do not create legal obligations’).

⁸³ *Jurisdictional Immunities of the State* (n 5), counter-memorial of Italy, 22 December 2009, p 103 para 5.42. See also *Legality of the Threat* (n 2), written statement of the Solomon Islands, 19 June 1995, p 43 para 3.42 (pointing out that the rules contained in Resolution 1653 do not create new law, since they endorse ‘classical prohibitions embodied in the law of armed conflict’).

⁸⁴ *ibid*, reply of the Federal Republic of Germany, 5 October 2010, p 24 para 41.

⁸⁵ *Legality of the Use* (n 8), written statement of Iran, 20 September 1994, p 3 (referring to resolutions on nuclear weapons).

⁸⁶ IACtHR, advisory opinion OC-26/20, 20 November 2020, statement by the United States, p 3.

Overall, the considerations above suggest that states tend to attribute legal significance to resolutions having regard to the context in which the resolution was adopted or applied. This is in contrast with the attitude of judges sitting in international courts and tribunals, which have detailed the conditions under which resolutions acquire significance.⁸⁷ However, there appears to be no agreement among judges about the legal significance of restated resolutions. For instance, in his dissenting opinion in *Legality of the Threat or Use of Nuclear Weapons*, Judge Weeramantry stated that resolutions ‘may not themselves make law, but when repeated in a stream of resolutions... [they] provide important reinforcement to the view that recourse to nuclear weapons is prohibited under customary international law’.⁸⁸ Conversely, in his dissenting opinion Judge Oda noted that ‘the cumulation of resolutions have not produced any noticeable effect’.⁸⁹ Similarly, Schwebel writes that the restatement of resolutions is in itself devoid of any legal significance.⁹⁰ Other scholars appear to support neither position. For example, Higgins and Higashi argue that restated resolutions may attain the status of law, provided that they are supported by a large number of states.⁹¹

In general, the empirical findings show that judges tend to attribute normative character to resolutions by resorting to assertion. For example, in *Chagos*, the ICJ stated that ‘the wording used in Resolution 1514(XV) has a normative character, in so far as it affirms that “[a]ll peoples have the right to self-determination”’.⁹² Judge Salam also added that the fact that Resolution 1514(XV) ‘was clearly endorsed by the Security Council [in several resolutions] attests to its binding nature’.⁹³ Similarly, in the same case Judge Cançado Trindade stated that both Resolution 1514(XV) and Resolution 2625(XXV) adopting the Declaration on Friendly Relations among States are ‘authentic interpretations of the UN Charter’.⁹⁴

Such statements are based on the textual reading of resolutions. They also reveal another aspect of the legal significance of resolutions – namely, that states treat resolutions as the expression of the collective practice of states whereas judges appear to put emphasis on resolutions as acts of the General Assembly adopted on behalf of the UN. For example, Judge Cançado Trindade describes resolutions of the General Assembly as ‘resolutions of the United Nations Organization itself, addressing a matter of common concern of humankind as a whole’.⁹⁵ Yet recourse to

⁸⁷ See, for instance, the passage from the *Legality of the Threat* advisory opinion (n 2).

⁸⁸ *ibid*, dissenting opinion of judge Weeramantry, p 532.

⁸⁹ *ibid*, dissenting opinion of Judge Oda, 8 July 1996, p 350 para 24.

⁹⁰ SM Schwebel, ‘The Effect of Resolutions of the U.N. General Assembly on Customary International Law’ (1979) 73 ASIL Proc 301, 302. See also Öberg (n 61) 902 (arguing that the meaning of repetition is unclear).

⁹¹ Higgins (n 26) 2; Higashi (n 18) 14.

⁹² *Chagos* (n 15), advisory opinion, 25 February 2019, p 132 para 153.

⁹³ *ibid*, declaration of Judge Salam, 25 February 2019, p 339 para 5.

⁹⁴ *ibid*, separate opinion of Judge Cançado Trindade, 25 February 2019, p 173 para 50. Cf Öberg (n 63) 882 (arguing that ‘a resolution which merely interprets the Charter does not, in theory, have any legal effect of its own’).

⁹⁵ *Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, dissenting opinion of Judge Cançado Trindade, 5 October 2016, p 353 para 85. See also *Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, dissenting opinion of Judge Cançado Trindade, 5 October 2016, p 192 para 306 and *Obligations concerning negotiations (Marshall Islands v Pakistan)* (n 78), dissenting opinion of Judge Cançado Trindade, 5 October 2016, p 731 para 318 (arguing that General Assembly resolutions ‘are adopted on behalf not of the states which voted in favour of them, but more precisely on behalf of the United Nations Organization itself... being thus *valid for all UN member states*’. Emphasis original).

assertion on part of the judges reduces the distance between the two positions to a nominal-only difference, since assertion does not necessarily acknowledge resolutions as the expression of a separate will of the General Assembly. As a result, it is difficult to discern the factual or normative basis of the legal significance attributed to the resolutions cited and the extent to which the process of attribution is generalizable. As Castles writes, probably it is simply impossible to generalize on the legal significance of resolutions.⁹⁶

6.2.2.3 Explaining the significance of voting patterns

Invoking the relevance of voting patterns to ascertain the legal significance of resolutions is a characteristic of state submissions before the ICJ in both the contentious and the advisory jurisdiction.⁹⁷ In general, referring to voting patterns serves a variety of purposes.

In relation to positive votes, the empirical findings show that states refer to their own voting patterns to emphasise the vital contribution they have made to the development of specific rules. For example, Colombia pointed out its role in having the concept of collective or shared responsibility for the eradication of trafficking in narcotic drugs recognized in Resolutions 39/142 and 41/127.⁹⁸ States have also referred to voting patterns as evidence of their acceptance of obligations through voting in favour of those resolutions. For instance, the Marshall Islands argued that ‘in voting over many years since 1996 for General Assembly resolutions on follow-up to the Court’s opinion [on the legality of the threat or use of nuclear weapons], Pakistan appears to have accepted the universality of that obligation’.⁹⁹ Similarly, India pointed out its role as co-sponsor of the resolutions on nuclear weapons as a way of voluntarily endorsing their content.¹⁰⁰

In addition to the above, it is not infrequent for states to mention resolutions adopted unanimously as signifying uncontroversial agreement of the international community on the subject matter of the resolutions cited, such as Resolution 96(I) defining the crime of genocide.¹⁰¹ Equally, they often describe resolutions adopted by consensus as representing the law in force at the time of adoption. An example is Resolution 2625(XXV) adopting the Declaration on Friendly Relations among States.¹⁰² This position is supported by scholars arguing that resolutions adopted unanimously, without a negative vote or by consensus ‘constitute binding interpretations of the [UN] Charter’.¹⁰³

⁹⁶ AC Castles, ‘Legal Status of U.N. Resolutions’ (1967) 3 Adelaide LR 68, 70.

⁹⁷ A rare exception is a statement by the UK before the PCA, where it argued that the claimant ‘cited[d] selectively from numerous UNGA resolutions, without explaining their context or even indicating the votes by which they were adopted or the statements that were made in committee or plenary at the time’. *Mauritius v United Kingdom* (n 79), rejoinder submitted by the United Kingdom, 17 March 2014, p 96 para 5.15.

⁹⁸ ICJ, *Aerial Herbicide Spraying (Ecuador v Colombia)*, counter-memorial of Colombia, 29 March 2010, p 83 para 3.40.

⁹⁹ *Obligations Concerning Negotiations (Marshall Islands v Pakistan)* (n 78), application instituting proceedings, 24 April 2014, p 28 para 40.

¹⁰⁰ ICJ, *Obligations Concerning Negotiations (Marshall Islands v India)* (n 95), counter-memorial of India, 16 September 2015 (several references throughout the document). See also *ibid*, declaration of Vice-President Yusuf, 5 October 2016, p 289 para 28 (‘In view of the consistent pattern of voting [of] India in favour of a series of resolutions which call for the same type of action, there is no doubt that such a voting record has an evidentiary value with regard to the course of conduct of India on the matter at issue in this case’).

¹⁰¹ See, for instance, *Croatia v Serbia* (n 7), memorial of Croatia, 1 March 2001, p 328 para 7.10.

¹⁰² *Immunities and Criminal Proceedings* (n 54), memorial of Equatorial Guinea, 3 January 2017, p 57 para 6.9.

¹⁰³ LB Sohn, ‘The Shaping of International Law’ (1978) 8 Ga J Int’l & Comp L 1, 14 (citing the Declaration on Friendly Relations as an example). *Contra* see Joyner (n 42) 461 (arguing that a unanimous vote does not change the legal nature of resolutions as recommendations).

Conversely, resolutions adopted by majority vote are not perceived as rules of international law. A statement by the Netherlands is exemplificative:

a general prohibition on the use of nuclear weapons *de lege lata* cannot be deduced from UNGA Resolution 1653(XVI) [adopting the Declaration on the prohibition of the use of nuclear and thermo-nuclear weapons]. The very fact that the resolution was adopted with 55 votes for, 20 against (including nuclear weapons states – the United States, Great Britain and France) and 26 abstentions *proved the absence of a general opinio juris on part of the States* that the use of nuclear weapons is unlawful *per se*.

[In relation to General Assembly Resolution 2936(XXVII) on permanent prohibition of the use of nuclear weapons, which was adopted with 73 votes for, 4 against (including China) and 46 abstentions (including France, the UK and the US), it is] very difficult to conclude that the resolution *codified or gave rise to a generally recognized rule or principle of international law*.¹⁰⁴

The scholarly literature takes a partly different view on the meaning of majority voting. For example, Bollecker-Stern argues that resolutions adopted by a majority representing all groups of countries are likely to have legal significance.¹⁰⁵ In general, Brownlie argues that resolutions concerned with declaring norms of international law are evidence of the opinion of governments,¹⁰⁶ thus implying that the legal significance of resolutions is a manifestation of state practice rather than the autonomous will of the General Assembly. On point of attribution, Higgins reaches the opposite conclusion. For example, in relation to Resolution 1514(XV) adopting the Declaration on the Granting of Independence to Colonial Countries and Peoples, she writes that, since it was adopted with no negative votes and only a limited number of abstentions, the resolution ‘must be taken to represent the wishes and beliefs *of the full membership of the United Nations*’.¹⁰⁷

Occasionally, states have clarified that there is a direct relationship between votes cast and the development of rules of international law. However, the practice is not uniform on this issue. For instance, Brazil argued that ‘[t]he General Assembly recognized the normative force of self-determination on several occasions, most importantly through Resolution 1514(XV)... [which] was adopted without dissenting votes’.¹⁰⁸ Conversely, the United States maintained that the absence of negative votes by itself does not demonstrate ‘a general recognition among states that [Resolution 1514(XV)] or particular paragraphs [thereof] reflect customary international law’.¹⁰⁹

In addition, scholars tend to consider the lack of negative votes as a form of acquiescence to the content of the resolutions, which does not necessarily mean support for those resolutions. For instance, Arangio-Ruiz writes that states acquiesce in resolutions containing abstract rules or

¹⁰⁴ *Legality of the Threat* (n 2), written statement of the Netherlands, 16 June 1995, p 9 para 15 (emphasis added). See also *ibid*, written comments by the United Kingdom, 16 June 1995, p 32 para 3.25; *ibid*, written statement of Italy, 19 June 1995, pp 4-5; *ibid*, written statement of the United States, 20 June 1995, p 19 (arguing that the resolutions were not accepted by the majority of nuclear weapons states).

¹⁰⁵ B Bollecker-Stern, ‘The Legal Character of Emerging Norms relating to the New International Economic Order: Some Comments’ in K Hossain (ed), *Legal Aspects of the New International Economic Order* (Frances Printer 1980) 68, 71.

¹⁰⁶ I Brownlie, *Principles of Public International Law* (Clarendon Press 1973), 14.

¹⁰⁷ Higgins (n 26) 101 (emphasis added).

¹⁰⁸ *Chagos* (n 15), written statement of Brazil, 28 February 2018, p 17.

¹⁰⁹ *ibid*, written comments of the United States, 15 May 2018, p 24 para 3.28.

principles like the Declaration on Friendly Relations among States, since they are ‘general enough to allow for argument against [their] application in any concrete instance’.¹¹⁰ Higgins also notes that abstention is a form of lack of support to the resolution¹¹¹ while Schwebel takes the more radical position of describing lack of support for a resolution as potential ‘false’ or ‘fake consensus’.¹¹²

A different issue is the absence of a positive vote, which has been regarded as indicative of the legal significance of resolutions. For instance, India stated that ‘the lack of unanimity and the abstention or negative vote of states whose interests are specifically affected cast doubt on the normative value of the UNGA resolutions [on nuclear weapons] and on the existence of *opinio juris*’.¹¹³ This argument finds support in the decision of some international courts and tribunals. For example, in *Yaung Chi Oo*, the ICSID tribunal held that the abstention of ASEAN countries on Resolution 3281(XXIX) adopting the Charter of Economic Rights and Duties of States ‘effectively denies the existence of any international standard of foreign compensation’ applicable to them.¹¹⁴

Finally, in relation to negative votes, states often rely on voting patterns as a proxy to infer a lack of commitment to the protection of internationally recognized human rights on part of those states casting a negative vote. For example, Georgia lamented that, by voting against Resolution 62/249, the Russian Federation disregarded the right of refugees and internally displaced persons to return to Abkhazia.¹¹⁵ Similarly, a series of negative votes has been considered sufficient to create a dispute with the states voting in favour of the same resolutions. For instance, the Marshall Islands argued that the negative vote cast by the United Kingdom on the resolutions on nuclear weapons ‘stands in opposition to the Marshall Islands’ support for [those] resolutions and its consistent statements’.¹¹⁶ The assertion has been rejected by the United Kingdom on the basis that the negative votes cast are ‘an indication of the United Kingdom’s view on the package of statements and provisions addressed in the resolution taken as a whole’, not an indication of the UK’s interpretation of Article VI of the Non-Proliferation Treaty underpinning those resolutions.¹¹⁷ The latter argument finds support in the case law of the ICJ.¹¹⁸

¹¹⁰ Arangio-Ruiz (n 18) 28.

¹¹¹ Higgins (n 26) 101.

¹¹² Schwebel (n 90) 302 and 309-309.

¹¹³ *Obligations Concerning Negotiations (Marshall Islands v India)* (n 95), written reply of India to the question put by Judge Cançado Trindade, 23 March 2016, p 5 para 14.

¹¹⁴ *Yaung Chi Oo Trading PTE LTD v Myanmar*, ICSID Case No ARB/01/1, award, 31 March 2003, 42 ILM 540 (2003), 543-544.

¹¹⁵ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, memorial of Georgia, 2 September 2009, p 314 para 8.49. See also ICJ, *Obligations Concerning Negotiations (Marshall Islands v United Kingdom)* (n 95), memorial of the Marshall Islands, 16 March 2015, p 91 para 210 (arguing that the UK is in breach of the obligation to pursue in good faith negotiations on nuclear disarmament by *inter alia* opposing the adoption of resolutions calling for negotiations, such as Resolution 68/72).

¹¹⁶ *ibid*, comments of the Marshall Islands, 30 May 2016, p 2 para 2.

¹¹⁷ *ibid*, comments of the United Kingdom, 30 March 2016, p 2 para 4.

¹¹⁸ *ibid*, judgment, 5 October 2016, p 24 para 53 (‘some resolutions contain a large number of different propositions; a state’s vote on such resolutions cannot by itself be taken as indicative of the position of that state on each and every proposition within that resolution’).

Taken together, the considerations above suggest that it is difficult to find a clear correlation between votes and legal significance of resolutions. Given the recommendatory character of resolutions, any assessment remains unavoidably context-dependent. State submissions and scholarly opinion suggest that generalizations on the legal significance of resolutions belong to the realm of theoretical speculation and any attempt to identify objective criteria for the determination of legal significance are by necessity bound to assertion. This leads to the further conclusion that, as Garibaldi writes, ‘it is not the resolution which bears a certain relation to the binding norm, but the whole situation, including the circumstances of voting and the intentions of those actors’.¹¹⁹

6.2.2.4 Supporting political claims

Using resolutions as a means to justify political claims before international courts and tribunals is a characteristic trait of statements made by states before the ICJ, especially in advisory proceedings. For instance, states have cited Resolution 41/86 addressing the climatic effects of nuclear war to warn the international community of the devastating environmental effects of nuclear explosions.¹²⁰ Similarly, states have referred to Resolution 2398(XXIII) elaborating on the relationship between human activities and the environment to reiterate their concerns for the constant deterioration of the quality of life caused by environmental degradation.¹²¹

Such reference to resolutions often serves the purpose of condemning actions by individual states. Examples include the creation of a wall to separate Israel and Palestine,¹²² armed attacks against civilians¹²³ or armed invasion of the territory of a state.¹²⁴

Reliance on resolutions also serves the purpose of elucidating the position of the General Assembly on pressing political issues, rather than the position of individual states on those issues. For instance, a statement by Saudi Arabia in relation to the occupied Palestinian territories reads:

¹¹⁹ OM Garibaldi, ‘The Legal Status of General Assembly Resolutions: Some Conceptual Observations’ (1979) ASIL Proc 324, 327.

¹²⁰ *Legality of the Use* (n 8), written statement of Sri Lanka, 20 September 1994, p 1.

¹²¹ IACtHR, *Request for an Advisory Opinion Submitted by Colombia*, E.086, 14 March 2016, p 16 para 111. Occasionally, judges have made similar use of resolutions. See, for instance, IACtHR, Advisory opinion, OC-23/17, 15 November 2017, p 32 para 67 (referring to Resolutions 65/255 and 66/288 recognizing the effects of environmental degradation on vulnerable people and communities); *Legality of the Use* (n 8), dissenting opinion of Judge Koroma, 8 July 1996, p 196 (arguing that Resolution 47/168 expresses the General Assembly’s deep concern about the suffering of victims of disasters and emergency situations).

¹²² *Wall* (n 9), memorandum of Syria, 30 January 2004, p 7 para 11 (arguing that the construction of the wall by Israel violates the fundamental rights of the Palestinian people, including those recognized by the UDHR). See also *ibid*, written statement of Lebanon, 30 January 2004, p 8 para 37 and *ibid*, statement of Yemen, 30 January 2004, p 2 (arguing that the construction of the wall violates provisions of the UDHR).

¹²³ *Application of the International Convention* (n 115), application instituting proceedings, 12 August 2008, p 16 para 6 (referring to Resolution 62/249 condemning the attacks against the civilian population in Abkhazia as amounting to ethnic cleansing by the Russian Federation). See also *Croatia v Serbia* (n 7), additional pleading of Croatia, 30 August 2012, p 26 para 2.17 (recalling Resolutions 49/43 and 49/196 condemning the actions of the paramilitary forces of Serbia in Croatia).

¹²⁴ *Questions relating to the Seizure* (n 24), memorial of Timor Leste, 28 April 2014, p 6 para 2.8 (referring to resolution 3485(XXX) deploring Indonesia’s armed invasion of Timor Leste).

For more than 30 years the General Assembly has regularly passed resolutions regarding the fact that these settlements are illegal and an obstacle to peace and to economic and social development.¹²⁵

In a similar vein, states have invoked resolutions adopted by consensus as manifesting the condemnation by the international community (as represented within the General Assembly) of actions by individual states. For example, states have cited Resolution 48/153 on the situation of human rights in the territory of the former Yugoslavia to either substantiate their condemnation of discriminatory practices against Albanians in Kosovo¹²⁶ or express concern about the humanitarian situation in the region.¹²⁷

The empirical findings suggest that, when states rely on resolutions to substantiate political claims, they attach a limited degree of legal significance to resolutions. In doing so, they do not claim any normative character of resolutions. Nor do they refer to resolutions as evidence of existing rules and principles of international law.¹²⁸ They simply invoke resolutions as authoritative statements of the General Assembly. This marks the difference with the standard-setting function of resolutions.¹²⁹

6.3 Conceptualising the legal significance of resolutions

The analysis of the selected sample of international practice shows that any attempt at generalizing about the legal significance of resolutions raises deep theoretical questions as to the legal nature of resolutions and the General Assembly as an institution. I argue that the theoretical conundrum originates from a discrepancy between the practice of states (and, to a lesser extent, international courts and tribunals) and theoretical speculation. Specifically, there appear to be two different types of dichotomies at play.

The first dichotomy relates to the means for establishing the legal significance of resolutions. As Table 6.1 shows, the position of states and judges diverge in relation to the value of assertion as the determining factor of the legal significance of resolutions. Three different patterns are discernible.

Table 6.1

Type of function	Assertion	Attribution	Generic function	Distinctive function
------------------	-----------	-------------	------------------	----------------------

¹²⁵ *Wall* (n 9), written statement of Saudi Arabia, 30 January 2004, p 8 para 14 (citing several resolutions on the occupied Palestinian territories).

¹²⁶ *Kosovo* (n 11), written statement of Switzerland, 17 April 2009, p 21 para 82; *ibid*, statement of Ireland, 17 April 2009, p 11 para 33(ii).

¹²⁷ *ibid*, written statement of Poland, 17 April 2009, p 8 para 3.14; *ibid*, written statement of Luxembourg, 17 April 2009, p 1 para 6; *ibid*, written statement of Albania, 17 April 2009, p 9 para 12; *ibid*, written statement of the United States, 17 April 2009, p 11.

¹²⁸ Conversely, judges have condemned state actions as violating international law. See, for example, *Mauritius v United Kingdom* (n 79), 18 March 2015, dissenting and concurring opinion of judges Kateka and Wolfrum, p 14 para 72 (arguing that Resolution 1514(XV) adopting the Declaration on the Granting of Independence to Colonial Countries and Peoples clearly states that the detachment of a part of a colony – as in the case of the detachment of the Chagos archipelago from Mauritius by the UK – is contrary to international law).

¹²⁹ As discussed in Section 6.2.1.3 above.

Framing duties	States: yes Judges: yes	Will of the international community	✓	
Establishing rights	States: no Judges: yes	Will of the General Assembly	✓	
Standard-setting	States: not clear Judges: not clear	Not clear	✓	
Making determinations	States: no Judges: N/A	Not clear		✓
Elucidating the normative value of resolutions	States: no Judges: yes	States: collective practice of states Judges: General Assembly on behalf of the United Nations		✓
Clarifying the meaning of voting patterns	States: no Judges: not clear	States: state practice Judges: not clear		✓
Making political claims	States: not clear Judges: N/A	Will of the international community		✓

Comparison between the attitude of states and judges over the legal significance of assertion and attribution in relation to generic and distinctive functions.

Firstly, there is a clear difference in the attitude of states and judges towards assertion in relation to the generic function of establishing rights and the distinctive function of clarifying the normative value of resolutions cited in state submissions. On the one hand, states appear to be partly driven by extra-legal considerations for the inclusion of resolutions in their submissions and tend to provide a factual explanation for their reference to resolutions. For example, the statement by France denying that Resolution 2625(XXV) allows a unilateral right to secession of Kosovo is grounded on considerations related to the endorsement of a previous decision of the international community to establish an international administration regime under the aegis of the United Nations.¹³⁰ On the other hand, judges tend to adhere to a textual reading of resolutions, eventually downplaying the role of the context in which resolutions are adopted and subsequently invoked. An example is the qualification of Resolution 2625(XXV) as an authentic interpretation of the UN Charter.¹³¹

Secondly, both states and judges resort to assertion in relation to the generic function of framing duties. Resolutions are presented as an evidentiary source of pre-existing legal obligations, as in the case of the statement by Egypt maintaining that acts of aggression, as defined in Resolution 3314(XXIX), are prohibited under international law.¹³² There are also instances in which neither states nor judges rely on assumptions. This is clear in relation to the distinctive function of clarifying the meaning of voting patterns and, to a lesser degree, the standard-setting function. Within this diverse framework of practices, it is impossible to identify any generalizable pattern about the legal significance of resolutions.

The second dichotomy relates to the identification of the source of legal significance of resolutions in either the will of the General Assembly or state practice. There appears to be a wide convergence of attitudes of states and judges only in relation to the generic function of establishing rights, where they both indirectly refer to the will of the General Assembly (Table 6.1). Examples include the

¹³⁰ *Kosovo* (n 11), written comments of Spain, 17 July 2009, p 5 para 8.

¹³¹ *Chagos* (n 15) separate opinion of Judge Cançado Trindade, 25 February 2019, p 173 para 50.

¹³² *Wall* (n 9) memorandum submitted by Egypt, 28 January 2004, p 39.

several references to the rights recognized in the UDHR.¹³³ In relation to the generic standard-setting function, the position of states and judges is not clear on this point. However, given the persuasive function that resolutions setting standards serve, presumably the source of the legal significance of resolutions lies in the will of the General Assembly rather than state practice.

Finally, the position of states and judges remains scattered in relation to the other functions. With regard to the distinctive function assigning normative value to resolutions, states tend to qualify resolutions as a manifestation of state practice whereas judges refer to them as acts of the General Assembly adopted on behalf of the United Nations. The statements by the Russian Federation in *Legality of the Threat or Use of Nuclear Weapons* arguing that states vote or abstain on resolutions knowing that they are of a recommendatory character¹³⁴ and the statements by Judge Cançado Trindade arguing that resolutions are adopted on behalf of the United Nations are illustrative.¹³⁵ In addition, states have referred to resolutions as evidence of state practice in relation to the distinctive function of clarifying the meaning of voting patterns while presenting them as the will of the international community in relation to the generic function of framing duties. Examples include the statement by India maintaining that only a positive vote can confer normative value to resolutions¹³⁶ and several state submissions before the IACtHR,¹³⁷ respectively.

Taken together, the considerations above about the two dichotomies suggest that it is extremely difficult to draw generalizations about the legal significance of resolutions on point of both assertion and attribution. Moreover, the analysis shows that there is no causal correlation between the considerations underpinning states and judges' attitudes about assertion and attribution (Table 6.1). A possible explanation lies in the fact that both types of dichotomy largely neglect the character of international polyarchy of the General Assembly – that is to say, its character as an inclusive but not fully democratic institution.¹³⁸ Yet there are indirect hints in the statements by states about the polyarchic character of the General Assembly. For instance, states have referred to the will of the international community (as represented in the General Assembly) both in relation to the generic function of framing duties¹³⁹ and the distinctive function of making political claims.¹⁴⁰ They have also referred to resolutions as a manifestation of individual or collective state

¹³³ See, for instance, IACtHR, Advisory opinion, OC-16/99, 1 October 1999, partly dissenting opinion of Judge Jackman, p 1 para 5 (referring to UDHR, Article 11 to affirm the right to a fair trial) and IACtHR, Advisory opinion, OC-22/16, 26 February 2016, concurrent opinion of Judge Caldas, p 2 para 4 (referring to UDHR, Article 17 to affirm the right to private property).

¹³⁴ *Legality of the Threat* (n 2), written comments of the Russian Federation, 19 June 1995, p 16 (emphasis added).

¹³⁵ *Marshall Islands v India* (n 95), dissenting opinion of Judge Cançado Trindade, 5 October 2016, p 353 para 85; *Marshall Islands v United Kingdom* (n 95), dissenting opinion of Judge Cançado Trindade, 5 October 2016, p 192 para 306; *Marshall Islands v Pakistan* (n 78), dissenting opinion of Judge Cançado Trindade, 5 October 2016, p 731 para 318.

¹³⁶ *Marshall Islands v India* (n 95), written reply of India to the question put by Judge Cançado Trindade, 23 March 2016, p 5 para 14.

¹³⁷ IACtHR, request for an advisory opinion submitted by Argentina, Uruguay, Brazil and Paraguay, 6 April 2011, p 39; Advisory Opinion OC-26/20, 9 November 2020, statement by Panama, p 7; Advisory Opinion, OC-24/17, statement by Bolivia, 7 December 2016, p 3 (affirming that the UDHR establishes obligations for states).

¹³⁸ As discussed in Chapter 4, Section 4.3.1.

¹³⁹ See, for example, the statement by Belgium acknowledging that the duty of states to prosecute crimes against humanity derives from resolutions of the General Assembly (n 6).

¹⁴⁰ See, for instance, the statement by Saudi Arabia condemning the presence of illegal settlements in the occupied Palestinian territories (n 125).

practice in relation to the distinctive functions of clarifying the legal significance of resolutions¹⁴¹ and the meaning of voting patterns.¹⁴² The findings thus reveal an aspect of the degree of autonomy of the General Assembly from its member states.

Specifically, it transpires from states submissions before international courts and tribunals that the General Assembly does not possess a distinctive will of its own. Nor is it a simple platform for states. In this respect, while recognizing the layered nature of resolutions,¹⁴³ the findings confirm the mainstream position within the academic literature maintaining that the will of international organizations (and organs thereof) is an elusive concept. For instance, Brölmann writes that '[t]he *volonté distincte* is admittedly of a somewhat metaphysical character, and how it should be identified is not generally elaborated upon by writers'.¹⁴⁴ Similarly, Higashi argues that the General Assembly 'presents its will through resolutions' without further qualifying the statement and its implications.¹⁴⁵

The findings also suggest that the autonomy of the General Assembly turns out to be a matter of degree of the will of the majority of states represented there.¹⁴⁶ Yet the representative character of the General Assembly does not translate into the power to adopt binding decisions, irrespective of the language (normative or prescriptive) used in the text of resolutions. A foremost example is the fate of the resolutions on the New International Economic Order (NIEO). Adopted in the 1970s with a view to influencing the development of international economic law and relations, they have remained an aspirational goal for the developing countries. The overwhelming majority of developing countries has not succeeded in securing compliance with resolutions written in normative language from the minority of wealthy countries. A laconic statement by Gruhn summarizes the combined effects of law and politics at the General Assembly:

the agenda of NIEO has not merely failed to produce a new international economic order but has not even materialised in a restructuring of the UN's economic development decision-making process.¹⁴⁷

¹⁴¹ See, for example, the statement by Iran arguing that the resolutions on nuclear weapons reflect the opinion of individual states (n 85).

¹⁴² See, for instance, the statement by Croatia arguing that the unanimous passing of Resolution 96(I) on the crime of genocide is evidence of the collective agreement of the international community on the subject matter of the resolution (n 101).

¹⁴³ Rosner Lande (n 18) 83 (arguing that 'Member States of the United Nations system constitute both subject and organ').

¹⁴⁴ C Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007), 21.

¹⁴⁵ Higashi (n 18) 14.

¹⁴⁶ This, in essence, is Schwebel's argument. See Schwebel (n 90).

¹⁴⁷ IV Gruhn, 'The New International Economic Order and the United Nations', in RI Onwuka and O Aluko (eds), *The Future of Africa and the New International Economic Order* (MacMillan 1986) 42, 55. See also RI Onwuka, 'The Illusions of the New International Economic Order' in *ibid* 1 ('arguing that the politics of the NIEO have become 'the politics of decline and illusion'); A Labra et al, 'The Sovereignty of States' in E Laszlo and J Kurtzman (eds), *Political and Institutional Issues of the New International Economic Order* (Pergamon 1981) 3, 11 ('a great deal has been said to date about NIEO, but almost nothing has been done').

The considerations above are in stark contrast with the position of scholars arguing that majority voting at the General Assembly has law-creating effects. For example, Bedjaoui writes that ‘the Third World possesses...a right to the creation of law *thanks to the strength of its members*’.¹⁴⁸

It follows from the preceding that the degrees of autonomy of the General Assembly from its member states appear to be a manifestation of state consensus, not state consent. However, in practice it remains extremely difficult to discern genuine from false consensus.¹⁴⁹ This generates the grey interpretative areas surrounding both attribution and assertion about the legal significance of resolutions.¹⁵⁰ This is not to say that resolutions do not contribute to the development of international law. Quite the contrary, they do so,¹⁵¹ but only when supported by states both at the adoption stage and after.¹⁵² No intrinsic characteristic of either resolutions or the General Assembly constitutes an objective indicator of the legal significance of resolutions. It is the polyarchic character of the General Assembly that determines the conditions under which individual resolutions acquire legal significance at any given point in time.¹⁵³

6.4 Conclusion

State practice in relation to the use of resolutions is rich and diverse. References to resolutions in international practice serve a variety of functions. To that end, sometimes states rely on assertion to qualify the legal significance of resolutions while on other occasions they put the legal significance of resolutions in a wider factual context. The latter is apparent when the function served by resolutions is to recognize the existence of rights under international law or clarify the normative value of the cited resolutions. Conversely, states tend to rely on assertion when framing duties which they consider applicable to other states involved in a dispute. In such instances, states describe resolutions as evidentiary sources of pre-existing obligations. This trait arguably justifies both the recourse to assertion and the expectations that such obligations can be opposed to any state in similar circumstances.

There are also instances in which states evince the legal significance of resolutions from the consensus surrounding the adoption of resolutions and instances in which they attribute the legal significance of resolutions to the separate will of the General Assembly. The empirical findings show that there is a tendency among states to derive the legal significance of resolutions recognizing the existence of rights under international law from the status of resolutions as decisions of the General Assembly. The same considerations apply to resolutions setting international standards, although the empirical evidence on this point is not as conclusive as in

¹⁴⁸ M Bedjaoui, *Towards a New International Economic Order* (UNESCO 1979), 142 (emphasis added).

¹⁴⁹ Schwebel (n 90) 308-309. See also R Gregg, ‘UN Decision-Making Structures and the Implementation of NIEO’ in Laszlo and Kurtzman (n 147) 103, 122 (referring to the existence of ‘artificial consensus’ at the General Assembly).

¹⁵⁰ Joyner (n 42) 461 (‘General Assembly resolutions do not always reflect accurately the genuine opinion of individual states voting on an issue’).

¹⁵¹ Higgins (n 26) 124 (‘it cannot properly be supposed that the Assembly is to have the right to talk but not to do anything more conclusive’).

¹⁵² Eka (n 44) 129.

¹⁵³ See also G Rosner Lande, ‘The Changing Effectiveness of General Assembly Resolutions’ (1964) ASIL Proc 162 (arguing that the minority in the General Assembly cannot be compelled to conform to the decisions of the majority); Ellis (n 21) 703 (‘Even though the developing nations hold the majority voting position in the General Assembly, they will be unable to force radical changes in international law on an unwilling minority of developed nations’).

relation to resolutions recognizing rights. The opposite trend is discernible with regard to resolutions framing duties as well as those clarifying the meaning of voting patterns, where states derive the legal significance of resolutions from the status of resolutions as instances of state practice supported by the consensus – not necessarily unanimity – of UN members.

The analysis conducted in this chapter eventually suggests that it is not possible to draw generalizations about the legal significance of resolutions. Nor is it useful to create tests and taxonomies of relevant factors and conditions which could be considered as signposts of legal significance. As recommendations to states, resolutions are devoid of any binding character. Yet they influence states' positions in international practice, effectively acquiring legal significance through use. More importantly, the findings of the analysis suggest that the concept of legal significance of resolutions is a multi-faceted one requiring deeper theoretical probing. Chapter 7 elaborates on this issue. By comparing the empirical findings of the analysis of the legal significance of resolutions at the adoption stage, within domestic law and in international practice with the theories of legal significance of resolutions in the scholarly literature, it shows that the concept of legal significance of resolutions is not a unitary one. Quite the contrary, it acquires content depending on context and circumstances, thus making difficult to elaborate *a priori* signposts of legal significance.

CHAPTER 7

REVISITING THE CONCEPT OF THE LEGAL SIGNIFICANCE OF RESOLUTIONS

7.1 Introduction

Attitudes of states toward General Assembly resolutions as a source of legal significance turn out to be different in the three contexts examined in the previous chapters – namely, at the adoption stage, within domestic law and in international practice. When negotiating the text of resolutions at the General Assembly, states often rely on normative language to determine the content of a resolution's recommendations. Resolutions are subsequently adopted by majority voting or consensus. However, neither the use of normative language nor the voting patterns are reliable indicators of legal significance. As Chapter 4 showed, political and legal considerations inform the decision of states to support resolutions. For example, it is not infrequent for states to cast significant reservations on the text of resolutions that they either formally support or do not oppose.¹ As a result, the most reliable indicator of the degree of legal significance that states attach to resolutions is the combined assessment of the votes cast and statements in explanation of vote made in relation to individual resolutions.

When incorporating resolutions into domestic law states tend to focus on resolutions adopted by consensus and addressing human rights issues. At the same time, the act of incorporation of resolutions takes place within the constitutional and normative boundaries of each state, thus making arguments about generalizations on state practice in relation to resolutions and their legal significance difficult to sustain.² Similarly, when states refer to resolutions before international courts and tribunals, they often rely on assertion to attribute legal significance to resolutions. There are also instances in which states provide an explanation for attaching legal significance to resolutions. In doing so, they refer to a variety of factors as signposts of legal significance. The end result is that several patterns of state practice are discernible at once.³

It stems from the considerations above that the concept of legal significance of resolutions is a multi-faceted one. Conversely, the scholarly literature treats it as a unitary, mono-dimensional concept. This raises a series of theoretical questions: is it possible to detect the presence of legal significance of resolutions *a priori*, without examining actual state practice? Does the attribution of legal significance to resolutions by states affect the development of international law? At which point do resolutions become a legal constraint to state conduct?

Taking stock of the previous analysis⁴ and inspired by the tenets of New Legal Realism as the selected methodology of research,⁵ this chapter provides an innovative analysis of the concept of legal significance of resolutions by focusing on the characteristics of state practice on resolutions instead of the characteristics of resolutions as documents emanating from the General Assembly. To that end, Section 7.2 evaluates the common traits of state practice related to the attribution of

¹ As discussed in Chapter 4, Section 4.2.

² As discussed in Chapter 5.

³ As discussed in Chapter 6.

⁴ The sources consulted for this chapter are the same used in Chapters 4, 5 and 6.

⁵ As discussed in Chapter 1, Section 1.4.2.

legal significance of resolutions in relation to the three examined contexts – at the adoption stage, within domestic law and in international practice. Subsequently, it examines whether it is possible to predict the presence of legal significance of resolutions by providing a critique of the existing tests of legal significance devised by scholars. Section 7.3 examines the extent to which, if any, reliance by states on resolutions may affect the development of international law through the process of creation of customary rules and general principles of law. Section 7.4 evaluates the conditions under which reliance on resolutions by states may create legally binding rules. This includes the consensus of the international community of states on specific resolutions. Section 7.5 concludes by arguing that there is a significant discrepancy between the findings of this study and scholarly positions on the normative value of resolutions. The latter tend to focus on the legal significance at the adoption stage, thus underplaying the relevance of state practice as a signpost of legal significance at the implementation stage – both domestic and international.

7.2 Legal significance as a multi-dimensional concept

As shown in Chapters 2, 3 and 4, states cite resolutions in different settings with a view to achieving different purposes. In doing so, they attach different degrees of legal significance to resolutions. This suggests that the concept of legal significance is a multi-faceted one, as it operates on a multi-level basis – domestic and international. In addition, the source of authority of the legal significance of resolutions oscillates between persuasive and conclusive authority, as well as political commitment at the adoption stage.⁶ This begs the question of whether it is possible to identify a common reason for states to attach specific degrees of legal significance to resolutions. As the analysis in the previous chapters shows, the background of state practice – that is to say, the circumstances surrounding the decision to cite resolutions – directly influences the attribution of legal significance. A comparative assessment of the findings relating to the three contexts examined in this study shows that the circumstances surrounding the citation of resolutions present both similarities and differences (Table 7.1), which eventually determine the degree of legal significance that states attach to resolutions (Table 7.2).

Table 7.1 – Circumstances affecting the attribution of legal significance by context of adoption of resolutions

Circumstances	Adoption stage	Domestic law	International practice
Protecting the national interest	✓	✓	✓
Pursuing policy objectives	✓	✓	✓
Affecting existent rights and duties	✓	✓	✓
Political propaganda	✓	-	-
Redressing economic imbalances	✓	-	-
Resolutions possessing constitutional status	-	✓	-
Litigation strategy	-	-	✓

Table 7.2 – Relationship between circumstances affecting the citation of resolutions and degree of legal significance by context of adoption of resolutions

Circumstances	Adoption stage	Domestic law	International practice
Protecting the national interest	Mostly low	Low	Low
Pursuing policy objectives	Difficult to ascertain	High	Mostly low
Affecting existent rights and duties	High	High	Mostly high
Political propaganda	High	-	-

⁶ As discussed in Chapters 4 (adoption stage), 5 (domestic law) and 6 (international practice).

Redressing economic imbalances	Split	-	-
Resolutions possessing constitutional status	-	Practice not uniform	-
Litigation strategy	-	-	Various degrees

The findings of my research show that there are three common traits – namely, protecting states’ national interests (sub-section 7.2.1), pursuing policy-objectives (sub-section 7.2.2) and citing resolutions with a view to affecting existent rights and duties (sub-section 7.2.3).

7.2.1 Protecting states’ national interests

At the adoption stage, states’ attempts to protect their national interests are most visible in those instances where states have objected that the simple citation of previously adopted resolutions does not amount to an endorsement of those resolutions. For example, France unequivocally stated that its vote in favour of Resolution 2131(XX) adopting the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty does not entail an endorsement of Resolution 1514(XV) adopting the Declaration on the Granting of Independence to Colonial Countries and Peoples, which it did not support at the time of adoption.⁷ More recently, the United States clarified that ‘any reaffirmation of documents’ contained in Resolution 72/111 on Activities of Foreign Economic Actors in Developing Countries applies ‘only to those states that ha[ve] affirmed them initially’.⁸

The United States has also invoked resolutions to protect its national interest at the domestic implementation stage. For instance, Section 6912 of the US Annotated Code states that the Congressional-Executive Commission on the People’s Republic of China ‘shall monitor acts of the People’s Republic of China which reflect compliance with or violations of human rights, in particular, those contained in... the Universal Declaration of Human Rights’.⁹ In such and similar circumstances, the incorporation of resolutions into domestic law amounts to a unilateral declaration by the incorporating state.¹⁰ In international practice, an example of citation of resolutions aimed at protecting national interests is represented by a couple of statements by Serbia before the International Court of Justice (ICJ): in *Kosovo*, it argued that Resolution 2625(XXV) adopting the Declaration on Friendly Relations among Nations does not recognize the right to self-determination of a minority suffering from human rights violations.¹¹ At the same time, it has consistently supported the right to self-determination of colonial countries and peoples, as set forth in Resolution 1514(XV).¹²

What the observations above reveal about the legal significance of resolutions is that, generally, states attach a rather low degree of legal significance to resolutions affecting national interests. A possible explanation is that resolutions are often seen as political, rather than legal, documents

⁷ A/C.1/SR.1422 p 432 para 35.

⁸ A/C.4/72/SR.9 p 10 para 68.

⁹ 22 U.S.C.A., Ch. 77, Section 6912(a).

¹⁰ As discussed in Chapter 5, Section 5.3.3.

¹¹ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, written statement of Serbia, 17 April 2009, p 215 para 589.

¹² ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius*, written comments by Serbia, 14 May 2018, p 5 para 16.

from the time of their adoption.¹³ Assigning little, if any, legal significance to resolutions thus represents an act of discretion on the part of states. An alternative explanation is that reliance on normative language or voting patterns is not *per se* indicative of any degree of legal significance. Nor does a low perception of legal significance necessarily correlate with low rates of (state commitment to) compliance with resolutions. Quite the contrary, as the example above about Section 6912 of the US Annotated Code shows, states may attach a low degree of legal significance to resolutions, but take a firm position on their commitment to take action on them – whatever the reason may be, including mere convenience. Although generalizations about the legal significance of resolutions are difficult to sustain across and within the three contexts examined, these findings are not consistent with the scholarly literature.

Some scholars mainly focus on the conditions of adoption of resolutions. In particular, the language used in resolutions and majority vote representing all groups of countries at the General Assembly appear to be indicators of legal significance. For instance, Bollecker-Stern writes that the more precise the wording (hence, the content) of a resolution, the more likely it is that the resolution has legal significance.¹⁴ Likewise, the more representative the vote is of all groups of countries, the higher the likelihood of a resolution possessing legal significance. In this respect, Resolution 1803(XVII) adopting the Declaration on Permanent Sovereignty over Natural Resources is presented as an example of resolution endowed with legal significance while Resolution 3281(XXIX) adopting the Charter of Economic Rights and Duties of States is not, due to the lack of support of Western, developed countries.¹⁵ Similarly, Sloan argues that '[r]esolutions that are adopted unanimously, or near unanimously, or by a true consensus... carry considerable weight as interpretations of the [UN] Charter, statements of law, or quasi-judicial determinations'.¹⁶

Such a scholarly attitude resembles the tendency of international courts and tribunals to rely on formal criteria as the means for ascertaining the binding character of resolutions. For example, in *Texaco*, the sole arbitrator devised a two-pronged test, applied it and concluded that Article 2 of the Charter of Economic Rights and Duties failed the test.¹⁷ The test consists of two main criteria – namely, voting patterns and the content of the resolution. The voting criterion is further qualified by the need to be representative of all geographic areas and economic systems of the world,¹⁸ and includes the consideration of 'the various circumstances of the vote', such as statements in explanation of vote.¹⁹ The content criterion aims at identifying any references to widely accepted international law rules or principles in the text of the resolution.²⁰ The combination of the two criteria is deemed sufficient to signal that the resolution is accepted by states and, consequently, is

¹³ As discussed in Chapter 4, Section 4.2.1.

¹⁴ B Bollecker-Stern, 'The Legal Character of Emerging Norms relating to the New International Economic Order: Some Comments' in Hossain (ed), *Legal Aspects of the New International Economic Order* (Frances Printer 1980) 68, 71. See also R Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966)60 AJIL 782, 786 (arguing that the language of a resolution must be carefully analysed).

¹⁵ Bollecker-Stern (n 14) 71.

¹⁶ B Sloan, *United Nations General Assembly Resolutions in Our Changing World* (Transnational Publishers 1991), 109.

¹⁷ *Texaco Overseas Petroleum Co. v. Libya* 17 ILM (1978) 1.

¹⁸ *ibid* 28, para 84.

¹⁹ *ibid* 29, para 86.

²⁰ *ibid* 28, paras 84-85.

legally binding.²¹ An assessment of subsequent state practice does not feature as an indicator of legal significance.

Rosner-Lande provides a middle position between the findings of this study and the position of the abovementioned scholars by arguing that the language of resolutions and the votes cast are not the only indicators of legal significance. Other indicators include the time of adoption of the resolution, the issues lying at the root of its adoption and the expectations of member states.²² Yet this scholarly position, like the others mentioned, concerns itself exclusively with the legal significance of resolutions at the adoption stage, thus overlooking subsequent state practice. As a result, it makes the concept of legal significance static and unidimensional whereas the findings of this study show that states attach different degrees of legal significance to resolutions depending on context and circumstances, especially when they affect national interests.

7.2.2 Pursuing policy objectives

Examples of citations aimed at pursuing policy objectives abound at the adoption stage, where it is not infrequent for states to cast identical votes on a resolution while contesting it on different grounds.²³ Equally, there are several instances in which states cast different votes while providing identical reasons for doing so in their statements in explanation of their votes.²⁴ There are also clusters of thematic resolutions which get adopted yearly, such as the resolutions aimed at reducing the illicit trade of small arms and light weapons. However, as the Mexican delegate pointed out, such resolutions are adopted without voting on the basis of a text which is so diluted that it represents ‘the lowest common denominator’ of consensus.²⁵ Such and similar observations question the validity of relying on voting patterns as a signpost of legal significance at the adoption stage, thus accentuating the discrepancy between the findings of this study and established scholarly positions.²⁶

States have also contributed to the realization of policy objectives through the incorporation of resolutions in domestic law. For example, Canada passed the Canadian Indigenous Languages Act (2019) in order to implement Resolution 61/295 adopting the Declaration on the Rights of Indigenous Peoples.²⁷ In statements before international courts and tribunals, states have cited resolutions to advance a variety of policy goals. For example, Argentina cited Resolution 2749(XXV) proclaiming the deep seabed and the ocean floor as the common heritage of mankind in order to remind states that the exploitation of the natural resources of that area must be carried out for the benefit of all peoples.²⁸ Similarly, Sri Lanka cited Resolution 41/86 addressing the

²¹ *ibid* 30, para 86.

²² G Rosner-Lande, ‘The Changing Effectiveness of General Assembly Resolutions’ (1964) ASIL Proc 162, 165-166. See also Sloan (n 16) 107 (referring to ‘the international climate in which the resolution is adopted’).

²³ As discussed in Chapter 4, Section 4.2.2.

²⁴ As discussed *ibid*.

²⁵ A/60/PV.61 p 42.

²⁶ As discussed above in relation to resolutions affecting national interests.

²⁷ Indigenous Languages Act, S.C. 2019, c.23 (amended 29 August 2019), Preamble.

²⁸ ITLOS/PV.2010/Rev.2, E 16 p 17.

climatic effects of nuclear explosions with a view to persuading the states possessing nuclear weapons not to use them.²⁹

Overall, the observations above suggest that, like in the case of reliance on resolutions to protect national interests, states treat resolutions pursuing policy objectives as political instruments, which are mostly aspirational in nature. As a result, the provisions of resolutions pursuing policy objectives aim at persuasion and compromise. Hence the generally low degree of legal significance attached to resolutions. Yet this does not preclude any strong commitment to act on resolutions by individual states, as the example of the Canadian Indigenous Act (2019) shows. It is also noteworthy that the Canadian example is an instance of unilateral commitment, as such not generalizable as evidence of a trend of state practice.

7.2.3 Affecting existing rights and duties

The foremost example of citing resolutions with a view to affecting existent rights and duties at the adoption stage is the explicit endorsement of armed struggle against former colonial powers, as set forth in Resolution 36/103 elaborating on the Declaration on Non-Interference in the Internal Affairs of States. The endorsement of armed struggle appears to be at variance with the provision of Article 51 of the UN Charter establishing the right of states to self-defence, thus going beyond the letter of an international treaty. At the domestic implementation stage, state practice affecting established rights and duties takes the form of relying on resolutions to supplement domestic laws. For instance, New Zealand accepted the competence of the UN Office for the Coordination of Humanitarian Affairs to redeploy resources to New Zealand in case of a state of national emergency, as defined in resolutions 46/182 and 57/150.³⁰ In international practice, the resolutions cited are presented as an integral part of the process of the creation of rights and corresponding duties. For example, several states argued that Resolution 1514(XV) has played a cardinal role in the development of the right to self-determination.³¹ Similarly, Greece recognized the duty of states to promote the right to reparation of victims of gross violations of human rights, as set forth in Resolution 60/147.³²

The examples above unequivocally suggest that states attach a high degree of legal significance to the resolutions they cite. At the same time, those resolutions may be highly divisive, in the sense that a strong recognition of legal significance by a group of states may be met by an equally strong resistance by another group of states, as in the case of the resolutions endorsing the call for armed struggle against former colonial powers. In addition, several resolutions recognizing rights are of a declaratory nature, as it is most visible in the resolutions cited before international courts and tribunals.³³ This further strengthens the considerations made above in relation to the second common trait that there is no correlation between the degree of legal significance attached to

²⁹ ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, written statement of Sri Lanka, 20 September 1994, p 1.

³⁰ National Civil Defence Emergency Management Plan Order 2005, SR 2005/295 (4 November 2005), para 82(3).

³¹ *Chagos* (n 12), written statement of the Netherlands, 27 February 2018, p 6 para 3.3; *ibid*, written statement of the Republic of Korea, 28 February 2018, p 3 para 6; *ibid*, written statement of Mauritius, 1 March 2018, p 199 para 6.22.

³² ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, written statement of Greece, 3 August 2011, p 12 para 47.

³³ As discussed in Chapter 6, Section 6.2.1.1.

resolutions and the level of state commitment to act on resolutions. However, the fact that states often rely on assertion to attach legal significance to resolutions invites caution about advancing generalizations relating to the factual characteristics of the background circumstances surrounding state practice on resolutions.³⁴

The only trait that clearly emerges from the empirical findings of this research is that consensus (and voting patterns in general) does not appear to be a signpost of the legal significance of resolutions affecting rights and duties of states. This runs against a position in the scholarly literature according to which resolutions adopted without a negative vote, such as the Universal Declaration of Human Rights, ‘constitute binding interpretations of the [UN] Charter’.³⁵

Overall, it transpires from the considerations above that the legal significance of resolutions is not a unidimensional concept: it is context-dependent and manifests itself in several degrees of intensity depending on the use states intend to make of a given resolution at a specific point in time. This leads to the further conclusion that it is possible to determine the legal significance of resolutions *a priori*, but only to a certain extent: namely, only by looking at the characteristics of state practice on resolutions (instead of the characteristics of the text of resolutions) as general trends, bearing in mind the limitations related to the process of generalization. In this respect, the findings of this study do not support the academic position acknowledging that ‘the mere assessment by the organ that drafts or applies the resolution... can, in effect, constitute the decisive element for this resolution to have, or acquire, a mandatory nature’.³⁶

7.3 Legal significance and legal effects distinguished

The common characteristic of the various manifestations of legal significance is that the mere invocation of a resolution by states does not transform it into a binding document. However, repeated reliance on resolutions possessing legal significance may affect the process of development of international law in the form of both customary rules and general principles of law. The invocation of resolutions with the aim of affecting the development of international law may well produce legal effects, as it makes the body of international law receptive to changes. Accordingly, it may be argued that the legal effects of resolutions represent the consequence of state reliance on resolutions endowed with legal significance. Effectively, the concept of legal effects amounts to the initiation of the process of identification of customary rules and general principles of law.

The analysis in previous chapters shows that attaching legal significance to resolutions is not without consequences. Examples abound from both the use of resolutions within domestic law and in international practice.

In relation to the practice of domestic courts, the contribution of resolutions to the process of identification of rules of customary international law is most evident in the field of international

³⁴ As discussed *ibid*.

³⁵ LB Sohn, ‘The Shaping of International Law’ (1978) 8 Ga J Int’l & Comp L 1, 14.

³⁶ J Castañeda, *Legal Effects of United Nations Resolutions* (Columbia University Press 1969), 16.

criminal law and, to a lesser extent, human rights law. In general, courts often declare the existence of a customary rule without delving into the analysis of either state practice or the acceptance of that practice as law (*opinio juris*). For instance, the courts in Chile and Australia held that Resolution 95(I)³⁷ has acquired the status of both customary international law and *jus cogens* in relation to the prohibition of crimes against humanity³⁸ and genocide³⁹ without providing evidence in support of their conclusion. They simply established the customary status of resolutions through assertion. The Court of First Instance of Belgium went even further by equating the adoption of General Assembly Resolution 3074 (XXVIII)⁴⁰ with state practice in order to establish the existence of a customary rule authorizing the exercise of universal jurisdiction for crimes against humanity. The relevant passage reads:

To the extent that this Resolution, whose formulation is in obligatory terms (“must”), reflects a practice by which the States concerned demonstrate that they wish to conform to what is equivalent to a legal rule, it is expression of a customary rule. [...]

Having regard to the above considerations, this Court considers that there is a rule of customary international law, even *jus cogens*, recognizing universal jurisdiction and authorizing national authorities to pursue and prosecute, in all circumstances, persons suspected of crimes against humanity.⁴¹

The field of extradition provides further insight into the way in which courts construe the relationship between the adoption of resolutions and evidence of state practice for the purposes of identifying a customary rule. For example, faced with the question of whether statutory limitations applied to offences with which a former commander of the Nazi police forces was charged – namely, the execution of the Fosse Ardeatine massacre in Italy during World War II – the Supreme Court of Argentina held that, although Argentina abstained from voting on Resolution 3074 (XXVIII), it never carried out any measure or policy contrary to the progressive development of the customary rule of non-application of statutory limitations to offences warranting extradition.⁴² As a result, in order to find evidence of custom, the court attached a degree of legal significance to the resolution which is different from the legal significance attached to it at the adoption stage. At the same time, it did not provide any evidence of relevant state practice and attendant *opinio juris*. It simply relied on assertion to find evidence of custom, effectively contributing to the process of identification of customary international law.

In the Supreme Court of Argentina, Judge Boggiano pushed the boundaries of assertion even further in another case concerning extradition for acts of terrorism. While the majority held that there exists no customary rule defining terrorism as a crime against humanity,⁴³ he objected that not only terrorism falls within the scope of the definition of crimes against humanity as per the

³⁷ UN Doc A/RES/95(I), Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal (11 December 1046).

³⁸ *Re Víctor Raúl Pinto v Relatives of Tomás Rojas*, decision on annulment, case n. 3125-04, ILDC 1093 (CL 2007), para 29.

³⁹ *Nulyarimma v Thompson*, appeal, ILDC 2773 (AU 1999), para 18.

⁴⁰ UN Doc A/RES/3074(XXVIII) (3 December 1973), adopting the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

⁴¹ *Re Pinochet*, Court of First Instance of Brussels, 119 ILR 345, 347.

⁴² *Office of the Prosecutor v Priebke*, appeal, request of extradition, P.457.XXXI, ILDC 1599 (AR 1995), paras 88-91.

⁴³ *Office of the Public Prosecutor v Lariz Iriondo*, appeal, L.845.XL, ILDC 125 (AR 2005), para 30.

provisions of Resolution 95(I),⁴⁴ but that several international instruments show an increased determination of the international community to condemn all forms of terrorism. He then concluded that such condemnation has evolved into a rule of customary international law, listing an entire cluster of restated General Assembly resolutions on terrorism as evidence of relevant state practice and *opinio juris*.⁴⁵

There are also instances in which courts have denied the customary status of resolutions. For instance, in *Flores*, the US Court of Appeals rejected the plaintiffs' argument that the UDHR and the World Charter of Nature⁴⁶ are evidence of customary international law. According to the court, those General Assembly resolutions 'are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member states of the United Nations'.⁴⁷ The Supreme Court of South Africa addressed the same issue in relation to resolutions as a general category of international legal instruments rather than focusing on specific resolutions. It held that 'it is doubtful whether resolutions passed by the United Nations General Assembly qualify as state practice at all'.⁴⁸ It then elaborated on the implications of considering resolutions, including the UDHR, as evidence of customary international law. The relevant passage from the judgment reads:

It is dangerous to denature the practice-oriented character of customary law by making it comprise methods of law-making which are not practice-based at all. This undermines the certainty and clarity which the sources of international law have to provide. The Universal Declaration on Human Rights may be taken as an example in this respect. It has been asserted that in the course of time its provisions have grown into rules of customary international law. This view is often substantiated by citing abstract statements by States supporting the Declaration or references to the Declaration in subsequent resolutions or treaties. Sometimes it is pointed out that its provisions have been incorporated in national constitutions. *But what if States making statements like these or drawing up their constitutions in conformity with the Universal Declaration at the same time treat their nationals in a manner which constitutes a flagrant violation of its very provisions, for instance, by not combating large-scale disappearances, by practising torture or by imprisoning people for long periods of time without a fair trial?* Even if abstract statements or formal provisions in a constitution are considered a State practice, they have at any rate to be weighed against concrete acts like the ones mentioned.⁴⁹

The stance taken by the South African Supreme Court is in stark contrast with the position of other states such as the Philippines, which have incorporated the UDHR into domestic law by virtue of its perceived customary status.⁵⁰ However, it also raises the question of whether verbal

⁴⁴ *ibid* para 13.

⁴⁵ *ibid* paras 21 and 23.

⁴⁶ UN Doc A/RES/37/7 (28 October 1982).

⁴⁷ *Flores v Sothorn Peru Copper Corporation*, US Court of Appeal (Second Circuit), 414 F.3d 233, p. 72.

⁴⁸ *State v Petane*, ILDC 1348 (ZA 1987), para 42.

⁴⁹ *ibid* para 43 (emphasis added). It is noteworthy that the case predates the adoption of the 1996 constitution. For an assessment of the South African constitution (1996) and its relationship with international law, see L du Plessis, 'International Law and the Evolution of (Domestic) Human Rights Law in Post-1994 South Africa' in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP 2007), 309.

⁵⁰ *Barrios Altos v Attorney General*, Exp. N. AV 19-2001, ILDC 1516 (PE 2009), para 24 ('the principles contained in the [UDHR] are now recognized as customarily binding upon the members of the international community.' Therefore, they are part of 'the law of the land').

acts amount to practice relevant for the formation of customary international law. Scholars disagree as to the inclusion of verbal practice in the category of state practice.⁵¹ From the point of view of the sources of international law, it appears that there is no qualitative difference between physical or verbal state practice.⁵² Indeed, the statement by the South African Supreme Court does not challenge this view. It rather questions the relationship between physical and verbal state practice, maintaining that a systematic discrepancy between the two types of act effectively prevents the formation of a customary rule. As a result, the verbal commitment to uphold a resolution framed in normative language like the UDHR cannot be taken as a shorthand for state conduct without placing it in the wider context of actual state practice.

Similarly, state submissions before international courts and tribunals often refer to resolutions to both affirm and deny their evidentiary value in relation to customary international law. At the same time, states tend to place more emphasis on the requirement of *opinio juris* rather than state practice.⁵³ For example, a statement by Belgium reads:

There is various evidence to show that states consider themselves bound by a customary obligation to prosecute or extradite a person suspected of a war crime or a crime against humanity. *The idea that states have to “feel” that they are conforming to what amounts to a legal obligation can be found in the resolutions of the General Assembly.* [...] The idea of a “feeling” can also be seen in the speeches made by states during the work of the Sixth Committee of the United Nations General Assembly on the scope and application of the principle of universal jurisdiction.⁵⁴

In addition, states often resort to assertion to determine or deny the customary status of resolutions. For instance, Colombia argued that the UDHR ‘without any doubt’ possesses customary status.⁵⁵ Likewise, in the field of investments, the United States maintained that Resolution 67/1 adopting the Declaration on the Rule of Law at the National and International Levels is not customary international law despite supporting it within the General Assembly at the

⁵¹ In favour of the recognition of verbal acts as a type of state practice, see Mark E Villiger, *Customary International Law and Treaties* (2nd ed, Kluwer Law International 1997), 19-20; Michael Akehurst, ‘Custom as a Source of International Law’ 47 (1997) BYIL 1, 53. Against the inclusion of verbal acts, see Anthony D’Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 88; Id, ‘Custom and Treaty: A Response to Professor Weisburd’ 21 (1988) Vanderbilt J Transn’l L 459, 465.

⁵² International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000), 14 (‘For voluntarists [those who treat the will of states as the source of customary obligation], this must necessarily be so: both forms of conduct are manifestations of State will. For those who stress the importance of belief (*opinio juris*), verbal acts are probably more likely to embody the beliefs of the State (or what it says it believes) than physical acts, from which belief may be to be inferred by others’).

⁵³ *Legality of the Use* (n 29), written statement of Nauru, 20 September 1994, pp 61-64; *ibid*, written statement of the Solomon Islands, 19 June 1995, pp 54-55 para 4.60; *Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, written reply of the Marshall Islands, 23 March 2016, p 2 para 3 (‘The General Assembly resolutions on nuclear disarmament adopted after the 1996 Advisory Opinion and the resolutions following up on the Advisory Opinion are clear on the obligation to pursue negotiations leading to nuclear disarmament and on its customary status’).

⁵⁴ ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, supplementary replies from Belgium to the question put by Judge Greenwood, 28 March 2012, p 13 para 22 (emphasis added).

⁵⁵ IACtHR, Request for an advisory opinion submitted by Colombia, 3 May 2019, ECR-204, p 13 para 43. See also IACtHR, Request for an advisory opinion submitted by Ecuador, n 4-3-21/2016, 18 August 2016, p 3 Section IIA.

time of adoption.⁵⁶ In doing so, it did not elaborate on the reasons or factual circumstances leading to this conclusion.

However, resort to assertion is not a rigid rule. For example, states have denied that resolutions are evidence of customary international law, the reason being the lack of unanimity at the time of the adoption. Thus, in *Chagos*, the United Kingdom argued that:

The so called right to territorial integrity for non-self-governing territories in the period leading up to independence is not supported by widespread and virtually uniform State practice. *A close reading of Resolution 1514(XV) and the circumstances of its drafting and adoption reveal that it did not reflect rules of customary international law.*⁵⁷

As a result, the United Kingdom concluded that Resolution 1514(XV) is only ‘an aspirational document’.⁵⁸ The United States concurred with this interpretation. Noting that resolution 1514(XV) is not mentioned in the text of Resolution 2625(XXV), it argued that the resolution does not represent *opinio juris* ‘about the existence of an international right to self-determination’.⁵⁹

Taken together, the considerations above show that the legal significance of resolutions in relation to the formation and identification of customary rules is context-specific and mostly confined to the area of human rights protection. This leads to the further conclusion that, although the legal significance of resolutions remains weak and contradictory in relation to resolutions as evidence of customary rules, the practice of courts in relation to the customary status of resolutions produces legal effects by making the international legal system receptive of change, which may or may not lead to the crystallization of customary rules.

In relation to general principles of law, occasionally domestic courts have found evidence of them in resolutions. The techniques relied upon to identify the presence of general principles of law can be classified into two types.

The first technique, which is shared with the process of identification of customary international law, is assertion. For example, in 2006, the Constitutional Court of Slovenia held that the condemnation of fascist regimes and the prosecution of war criminals is a general principle recognized by the international community, as confirmed in Resolutions 95(I) and 3(I) affirming the principles of international law recognized by the Charter of the Nurnberg Tribunal and extradition of war criminals, respectively.⁶⁰ It did not elaborate any further on this point. Similarly, the Canadian Supreme Court held that the right of peoples to self-determination is now recognized

⁵⁶ *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID case No ARB(AF)/12/1, Rejoinder on merits and reply on objections to jurisdiction of respondent, p 159 para 310.

⁵⁷ *Chagos* (n 12), written statement of the United Kingdom, 27 February 2018, p 130 para 8.31 (emphasis added). Other states have qualified Resolution 1514(XV) as *jus cogens*. See *ibid* written statement of Serbia, 27 February 2018, para 30; *ibid*, written statement of South Africa, 1 March 2018, p 4 para 6.

⁵⁸ *ibid*, para 8.33. See also *Questions Relating to the Obligation* (n 54), written comments of Senegal, 5 April 2012, p 1 (qualifying the resolutions on extradition as ‘moral ideals and in any event not intended to create legal obligations’).

⁵⁹ *Chagos* (n 12), written statement of the United States, p 34 para 4.64. See also *ibid*, p 24 para 4.31 ([‘Resolution 1514(XV)] itself did not reflect customary international law either at the time it was adopted or through the end of the 1960s’).

⁶⁰ *Dolenc and Petan*, constitutional compliant, U-I-266/04, ILDC 570 (SI 2006), paras 14 and 20.

as a general principle of international law, as evidenced by Articles 1 and 55 of the UN Charter⁶¹ as well as ‘so many U.N. conventions and resolutions’,⁶² including the Declaration on Friendly Relations among Nations.⁶³ No elaboration on the reception of those instruments into Canadian domestic law or other legal systems followed.

Resort to assertion to find evidence of general principles recognized by the community of nations appears to conform to the International Law Commission (ILC) Special Rapporteur on General Principles of Law’s recommended method of identification.⁶⁴ While explicitly recognizing that General Assembly resolutions are a source of evidence of general principles of law formed within the international legal system,⁶⁵ the ILC Special Rapporteur mentions the Nurnberg principles as an example of general principles of law recognized by the community of nations.⁶⁶

The second technique consists of the courts’ own elaboration about the circumstances leading to the recognition of general principles of law. For instance, in the *Kemali* case, the Italian Court of Cassation recognized that, by virtue of Article 15 of the UDHR, statelessness constitutes an exceptional status under Italian and international law. The court held that:

[The UDHR] is more than a mere declaration of intent from the point of view of the Italian municipal law. [...] it is a general principle of law which must be held to have become part of our law not only by virtue of Article 10 of the Constitution... but also by virtue of the express, though also indirect recognition accorded to it in Law No. 848 of 4 August 1955.⁶⁷

The passage above shows that the Court of Cassation fully justified the existence of a general principle of law by explaining the process of reception of a specific provision of the UDHR into domestic law.

Similarly, in a case concerning a request for extradition of six people (all prominent supporters of the ex Perón regime), the Supreme Court of Chile held that extradition for political offences could not be granted.⁶⁸ In the absence of an international agreement between Chile and Argentina, the court relied on general principles of international law to decide the case. It found that ‘[i]n Chilean practice, preference is given to those principles which, having been *approved* by the government, constitute the law of the land’.⁶⁹ It cited Article 14 of the UDHR among other instruments potentially relevant to clarify the concept of extradition for political offences. Specifically, it clarified that Article 14 of the UDHR has a narrower scope than Articles 3 and 4 of the Caracas Convention on Territorial Asylum, which prohibit extradition for politically motivated common crimes. The court argued that, since the Caracas Convention had not been ratified by either Chile or Argentina, its provisions did not enjoy the status of general principles of international law in

⁶¹ *Secession of Quebec, Re*, Reference to Supreme Court, ILDC 184 (CA 1998), paras 115-116.

⁶² *ibid* para 117.

⁶³ *ibid* paras 119-120.

⁶⁴ UN Doc A/CN.4/471, p. 38 para 121.

⁶⁵ *ibid*, p. 39 para 122.

⁶⁶ *ibid*, p. 39 para 123.

⁶⁷ *Ministry of Home Affairs v Kemali*, 40 ILR 191, 195.

⁶⁸ *Re Campora et al*, 25 ILR 518, 519.

⁶⁹ *ibid* (emphasis added).

Chilean law.⁷⁰ Hence, it concluded that the provisions of Article 14 of the UDHR could not, indirectly, be regarded as general principles of international law under Chilean law.

The decisions of both the Italian Court of Cassation and the Chilean Supreme Court do not appear to comply with the methodology devised by the ILC Special Rapporteur for the identification of general principles formed within the international legal system. On the one hand, by putting emphasis on the requirement of formal incorporation of general principles in domestic law, the decision of the Italian Court of Cassation relies on an established method of identification of a general principle of law derived from national legal systems without engaging in any comparative analysis of national legal systems.⁷¹ On the other hand, the Chilean Supreme Court refers to acceptance by the state as the method of incorporation of general principles formed within the international legal system, thus blurring the lines between general principles of law and customary international law. A passage from the Chilean case reads:

[Given] the fact that the Caracas Convention has been ratified by only six States, not including Chile or Argentina, it must be concluded that this Convention lacks that universality or general acceptance among States which is necessary before its provisions can be accepted as *principles of international law* which have the force to change principles established in our positive law and in our treaties and conventions dealing with this subject-matter.⁷²

The immediate consequence of the mismatch between proclamation and method of identification of a general principle is that the appreciation of the legal effects of resolutions is devalued. In the absence of objective criteria against which to assess the contribution of resolutions to the formation and identification of general principles of law, the findings of the courts are not easily amenable to generalizations.⁷³

References to resolutions as evidentiary sources of general principles of international law in state submissions before international courts and tribunals also abound. For example, states have acknowledged that certain resolutions simply reaffirm existing principles of international law, such as the principle of permanent sovereignty over natural resources⁷⁴ and the principle of inadmissibility of acquisition of territory through the use of force.⁷⁵ Among the resolutions cited, a special position is occupied by Resolution 2625(XXV) adopting the Declaration on Friendly Relations among Nations, which is generally regarded as an authoritative statement of general principles.⁷⁶ In particular, states have pointed out that it elaborates on the principle of sovereign

⁷⁰ *ibid* 522.

⁷¹ A/CN.4/741 (n 64) p. 7 para 23.

⁷² *Re Campora* (n 68) 523 (emphasis original).

⁷³ J Ellis, 'General Principles and Comparative Law' 22 EJIL (2011) 949, 970 ('the validity of a general principle would have to be grounded in the soundness and persuasiveness of legal argumentation rather than in claims about the objective nature of law or implicit state consent').

⁷⁴ ICJ, *Aerial Herbicide Spraying (Ecuador v Colombia)*, memorial of Ecuador, 28 April 2009, p 264 para 7.14.

⁷⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, reply of Croatia, 20 December 2010, p 351 para 10.28 (referring to Resolution 49/43).

⁷⁶ *Kosovo* (n 11), written comments of Albania, 17 July 2009, p 50 para 96.

equality,⁷⁷ proclaims the principle of pacific settlement of disputes,⁷⁸ recognizes the principle of self-determination⁷⁹ and reaffirms the principle of territorial integrity of the state,⁸⁰ the principle of non-intervention in the internal affairs of states⁸¹ as well as the prohibition of acquisition of territory by force.⁸²

Taken together, the considerations above confirm the stream of scholarly literature describing resolutions as ‘law in transition’,⁸³ meaning that they are capable of starting the process of identification of customary rules or general principles of law. In this respect, the legal effects of resolutions represent the ‘positivization’ of their degree of legal significance: there exist no legal effects without state practice. It follows that the presence of legal effects of resolutions reflects the belief of individual states and cannot be easily generalized.

7.4 From legal significance to legal obligation

Scholars argue that resolutions or parts thereof supported by global consensus as to their legal significance and effects may give rise to binding obligations under international law.⁸⁴ In this context, consensus means the convergence of the will of individual states (as opposed to the will of the General Assembly) as to the legal effects of resolutions.⁸⁵ The analysis in this section builds

⁷⁷ *Aerial Herbicide* (n 74), memorial of Ecuador, 28 April 2009, p 259 para 7.6; ICJ, *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, counter-memorial of Australia, 28 July 2014, p 10 para 2.5; *Kosovo* (n 11), written statement of China, 17 April 2009, p 2 para (2); *ibid*, written statement of Spain, 17 April 2009, p 11 para 13.

⁷⁸ *Questions Relating to the Seizure* (n 77), memorial of Timor Leste, 28 April 2014, p 53 para 6.4.

⁷⁹ *Kosovo* (n 11), written statement of the Russian Federation, 17 April 2009, p 7 para 20; *ibid*, written statement of Romania, 17 April 2009, p 34 para 19; *ibid*, written statement of the Netherlands, 17 April 2009, p 9 para 3.10 (‘In Resolution 2625, the General Assembly recognized that a denial of fundamental human rights constitutes a violation of the principle [of equal rights and self-determination of peoples]’); *Chagos* (n 12), written statement of China, 1 March 2018, p 5 para 8.

⁸⁰ ICJ, *Construction of a Road in Costa Rica along San Juan River (Nicaragua v Costa Rica)*, reply of Nicaragua, 4 August 2014, p 170 para 5.21; *Kosovo* (n 11), written statement of the Czech Republic, 17 April 2009, p 7; *ibid*, written statement of Slovakia, 17 April 2009, p 1 para 4; *ibid*, written statement of the UK, 17 April 2009, p 92 para 5.30; *ibid*, written statement of Estonia, 17 April 2009, p 4 para 2.1; *ibid*, written statement of Iran, 17 April 2009, p 3 para 2.2; *ibid*, written comments of Bolivia, 17 July 2009, p 8 para 26; *ibid*, written comments of Cyprus, 17 July 2009, p 6 para 14.

⁸¹ ICJ, *Appeal Relating to the Jurisdiction of ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and the United Arab Emirates v Qatar)*, memorial of Bahrain, 27 December 2018, p 49 para 2.43; IACtHR, advisory opinion OC-26/20, 9 November 2020, statement by Nicaragua, p 6 para 14.

⁸² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, written statement of France, 30 January 2004, pp 8-9 para 35.

⁸³ See, for instance, Sloan (n 16) 50-51 (referring to resolutions ‘in the process of becoming something more’ than recommendations); L. Gross, ‘The United Nations and the Rule of Law’ (1965) 19 Int’l Org 537, 555 (‘The United Nations is pragmatic about its choice of media, and sometimes “soft law” is only considered as a precursor of “hard law”’).

⁸⁴ DHN Johnson, ‘The Effects of Resolutions of the General Assembly of the United Nations’ (1955-56) 32 BYIL 97, 111 (‘the ordinary meaning of the word “effect” is simply “result” or “consequence”. Conversely, an obligation is ‘something that one is “bound” to do’[...] Obligations encompass the effects of an action’); O Asamoah, ‘The Effect of Resolutions of the General Assembly’ (1963-64) 3 Columbia J Transn’l L 210, 214 (arguing that the concept of legal significance is broader than the concept of legal effects: ‘The binding nature of resolutions is only one aspect of the legal effects’); CC Joyner, ‘U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation’ (1981) 11 California West Int’l LJ 445, 453 (differentiating between legal effects and binding nature of resolutions).

⁸⁵ Formally, consensus procedure at the adoption stage refers to resolutions adopted without voting – that is to say, without formal opposition. For a discussion of voting procedures, see Chapter 3, Sections 3.3 and 3.4.

on the premise that adopting and invoking resolutions is an integral part of the practice of states.⁸⁶ The latter is a position also supported in the academic literature.⁸⁷ Some scholars argue that resolutions are the practice of the General Assembly, hence a manifestation of its separate will.⁸⁸ However, this position is not widely supported and does not form part of the theoretical background of this section.

Consensus does not necessarily require unanimous support by the international community of states. What is crucial is that, in ascertaining the degree of convergence of the will of individual states as to the (legal significance and) legal effects of resolutions, a formalistic approach is avoided. For example, a consensus built on assertions about the legal effects of resolutions bears little or no value in the process of determination of international obligations, since it does not allow to distinguish between states' normative beliefs and citations of resolutions made under convenience.⁸⁹

Formalistic approaches are supported by scholars, institutions and international courts alike. For example, Ellis provides a four-part test for determining which resolutions create international law. The first part consists of ascertaining the degree of support for the resolution – ideally, unanimity or near unanimity.⁹⁰ The second part evaluates the language used in the text of resolutions, as it may reveal the intent of states to create legal obligations.⁹¹ The third part is the analysis of the statements in explanation of vote, which are described as an evidentiary source of states' expectations as to the capability of resolutions to create new legal norms or changing existent ones.⁹² The final part requires an assessment of the degree of implementation of the resolution.⁹³ Overall, the test restricts the inquiry into the normative value of resolutions to an assessment of the extent to which states depart from their initial position on resolutions, as expressed at the adoption stage. As a result, it overlooks the fact that states often decide to adopt and rely on resolutions based on extra-legal (mostly political) considerations. Accordingly, it presents the concept of legal significance of resolutions as a static one.⁹⁴

The International Law Association (ILA) has also identified a number of criteria aimed at detecting the customary status of resolutions. They include the presence of legal pronouncements in the text of resolutions, such as a claim about the reiteration of an existing customary rule⁹⁵ or a statement

⁸⁶ As discussed in Chapter 6, Section 6.3.

⁸⁷ G Arangio-Ruiz, *The Declaration on Friendly Relations and the System of the Sources of International Law* (Sijhoff 1979), 45; O Asamoah, *The Legal Significance of Declarations of the General Assembly of the United Nations* (Nijhoff 1966), 46.

⁸⁸ R Barber, 'Revisiting the Legal Effect of General Assembly Resolutions: Can an Authorizing Competence for the Assembly Be Grounded in the Assembly's "Established Practice", "Subsequent Practice" or Customary International Law?' (2020) 26 J Conflict & Security L 9, 28 (arguing that resolutions are the primary source of evidence of the General Assembly's practice); J Higashi, 'The Role of Resolutions of the United Nations General Assembly in the Formative Process of International Customary Law' (1982) 23 Japanese Ann Int'l L 11 (arguing that international organizations 'present their external will through resolutions and declarations'); Castañeda (n 36) 1 (describing resolutions as 'formal manifestations of opinion' of an international organization).

⁸⁹ As discussed in Chapter 6, Section 6.3.

⁹⁰ Ellis (n 73) 693.

⁹¹ *ibid* 697-698.

⁹² *ibid* 699.

⁹³ *ibid* 701.

⁹⁴ As discussed in Chapter 6, Section 6.3.

⁹⁵ ILA Statement of Principles (n 52) 56.

aimed at contributing to the crystallization or formation of new customary law.⁹⁶ According to the ILA, such legal pronouncements are not opposable to the states voting against the resolution.⁹⁷ In relation to the relevance of statements in explanation of vote and the precise wording of resolutions as evidentiary sources of states' intentions to create legally binding rules, the explanation provided by the ILA mirrors the one provided by Ellis.⁹⁸ Overall, the ILA criteria largely align with the recommendations contained in the Cairo Resolution of the Institute of International Law (1987).⁹⁹ In addition, the ILA fully endorses the claim made by the ICJ in the *Nicaragua* case, according to which:

The effect of consent to the text of such resolutions [as the Declaration on Friendly Relations among Nations] cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, *it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves*.¹⁰⁰

Accordingly, the ILA concludes that resolutions adopted unanimously and which 'evinced a clear intention on part of their supporters to lay down a rule of international law...are capable, very exceptionally, of creating general customary law by the mere fact of their adoption'.¹⁰¹

The ICJ's *Legality of the Threat or Use of Nuclear Weapons* advisory opinion refines the *Nicaragua* criterion about the normative value of resolutions by detailing a four-part test specifically aimed at detecting the presence of *opinio juris*.¹⁰² The ICJ clarifies that, firstly, it is necessary to examine the content of the resolution, in particular the use of normative language in the text of resolutions. In relation to this point, Öberg writes that, although useful, a strict analysis of the wording of resolutions may prove misleading, since 'words taken out of context can be made to say many things'.¹⁰³ Secondly, the ICJ proposes that attention should be directed to the conditions of adoption, in particular the presence of negative votes and abstentions. Thirdly, an analysis of whether states attach legal meaning to their votes should follow. The latter appears to be a crucial step in the process of assessment of the customary status of resolutions. As Schwebel writes, states 'often vote for much with which they actually disagree'.¹⁰⁴

Fourthly, 'a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule'.¹⁰⁵ This final criterion, as formulated by the ICJ, is difficult to interpret.

⁹⁶ *ibid* 56.

⁹⁷ *ibid* 58.

⁹⁸ *ibid*

⁹⁹ Resolution of the Institute of International Law, adopted at its Cairo session, 13-22 September 1987, *Annuaire of the Institute*, vol 62(II) 65, Conclusion 6 (listing as relevant criteria: the intent and expectations of states, the text of the resolution, the extent of support for the resolution and the context in which the resolution was elaborated and adopted, including relevant political factors).

¹⁰⁰ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, merits, 27 June 1986, p. 100 para 188 (emphasis added).

¹⁰¹ ILA Statement of Principles (n 52) 61-62.

¹⁰² ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, 8 July 1996, p 255, para 70.

¹⁰³ MD Öberg, 'The Legal Effects of the Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 EJIL 879, 901.

¹⁰⁴ SM Schwebel, 'The Effect of Resolutions of the U.N. General Assembly on Customary International Law' (1979) 73 ASIL Proc 301, 302.

¹⁰⁵ *Legality of the Threat or Use* (n 102), p 255, para 70.

For example, Öberg writes that it refers to the practice of repetition of resolutions by states.¹⁰⁶ However, this appears to be a restrictive interpretation of the scope of the criterion. An alternative interpretation is that it is possible to evince the presence of *opinio juris* from several resolutions enunciating the same legal principle, provided that they are supported by states. Restatement of a legal principle in several resolutions and recitation of specific resolutions are not necessarily the same thing.

In the light of the observations above, it can be argued that the capability of resolutions to generate binding obligations through usage is, for all practical purposes, limited. Uniformity of approach by states toward individual resolutions is indeed rare. Based on my research, the foremost example of resolution producing legal obligations appears to be Resolution 95(I) adopting the Nurnberg Principles on the prosecution of crimes against humanity, as evidenced by its treatment as both customary international law and general principles of law by courts.¹⁰⁷ Other scholars mention the Declaration on Friendly Relations among Nations and the UDHR as resolutions creating binding obligations, the reason being their adoption by consensus.¹⁰⁸ However, the practice of both domestic and international courts shows that there is no agreement on the legal significance of those resolutions as customary international law. At the same time, the Declaration on Friendly Relations among Nations appears to be widely recognized as a source of legal obligation through general principles of law.¹⁰⁹

What follows from the preceding is that creating international obligations by adopting and using resolutions requires a discernible action by individual states attributing legal significance to individual resolutions. Attempts to focus on concerted efforts of the international community as evidence of the normative value of resolutions, potentially leading to the creation of legally binding obligations, mostly remains an aspirational goal by isolated groups of states. Many resolutions invoked as customary law or general principles of law fail to produce legal – that is to say, binding – effects, since states invoke them to try to impose legal obligations on other states. The resolutions on the New International Economic Order are a clear example of attempts to impose changes in international law by majority. Without reciprocal consent¹¹⁰ – that is to say, bilateral or collective acceptance of resolutions producing legal effects – there can be no binding obligation under international law. As Baxter writes:

in recent years, States have on a number of occasions undertaken the preparation of instruments which deliberately do not create legal obligations but which are intended to create pressures and to influence the conduct of states and to set the development of international law in new courses.¹¹¹

Individual states can only control their own actions in relation to the implementation of resolutions. A state can only manifest its own practice and *opinio juris*. Similarly, it can only take

¹⁰⁶ Öberg (n 103) 902.

¹⁰⁷ As discussed in Section 7.3 above.

¹⁰⁸ Sohn (n 35) 15 and 19; Asamoah (n 87) 51 (arguing that the Declaration on Friendly Relations ‘is not evidence of consensus on the entire text’).

¹⁰⁹ As discussed in Section 7.3 above.

¹¹⁰ Asamoah (n 87) 49 (‘Declarations of legal principles represent the consensus of those who vote for them’).

¹¹¹ RR Baxter, ‘International Law in “Her Infinite Variety”’ (1980) 29 ICLQ 549, 557.

note of the existence of foreign legal materials and practices, domestic legislation and case law that may count as evidentiary sources of general principles of law. A state cannot provide authoritative interpretations of the *opinio juris* of other states. This would have severe repercussions on the international plane, since resolutions giving rise to legal obligations are opposable and, consequently, enforceable by courts. This is not to say that enforcement is the source of obligation in international law.¹¹² Quite the contrary, enforcement finds its justification in the consensus of states on the legal significance and effects of individual resolutions. Any other attribution of legal obligation to resolutions *qua* resolutions would transform the General Assembly into an institution endowed with legislative powers, which are not envisioned in the UN Charter.¹¹³ As Johnson writes, ‘the basis of the “inherent power” of the General Assembly and its right to act as “the agent of the international community” is assumed, not proved’.¹¹⁴

Yet the fact that a resolution may not be enforceable does not prevent states from treating it as binding under international law.¹¹⁵ On this point, scholars have advanced different views. For instance, Bulajic argues that:

A new approach is needed to the theory of obligation in international law. The purpose of this new approach is to make the emerging concept of *consensus* rather than the traditional concept of *consent* as the basis of obligation of the international community.¹¹⁶

Chowdhury fully supports Bulajic’s approach to resolutions as a source of international obligation.¹¹⁷ Similarly, Sohn argues that unanimity has been replaced by consensus,¹¹⁸ effectively endorsing the consensus theory developed by Falk. The latter maintains that resolutions meeting certain criteria – such as the relation between the sponsoring majority, the objectives of the resolution and the distribution of power in international society¹¹⁹ – are a source of obligation, since they represent the consensus of the international community. Building on this premise, Falk concludes that ‘there is a discernible trend from consent to consensus as the basis of international legal obligations’.¹²⁰

The theory of consensus as the basis of obligation has some merit, since it acknowledges consensus as a fully-fledged method of decision making at the General Assembly facilitating dialogue and cooperation among delegations. In this respect, it is both a legal and a political tool for making collective decisions. However, it remains open to a series of objections. In particular, it appears that consensus cannot be taken at face-value as synonymous with agreement. On the one hand,

¹¹² GG Fitzmaurice, ‘The Foundations of the Authority of International Law and the Problem of Enforcement’ (1956) 1 *Modern L. Rev.* 1, 2 (‘The law is not binding because it is enforced: it is enforced because it is already binding’). See also B Sloan, ‘The Binding Force of a “Recommendation” of the General Assembly of the United Nations’ (1948) 25 *BYIL* 1, 2 (arguing that it is a common mistake to confuse the concept of binding obligation with that of enforceability) and 25 (‘in international law the absence of enforcement is not equivalent to the absence of legal obligation’).

¹¹³ As discussed in Chapter 3, Section 3.3.

¹¹⁴ Johnson (n 84) 109.

¹¹⁵ AC Castles, ‘Legal Status of U.N. Resolutions’ (1967) 3 *Adelaide LR* 68, 70.

¹¹⁶ M Bulajic, ‘Legal Aspects of the New International Economic Order’ in Hossain (n 14) 45, 60 (emphasis added).

¹¹⁷ SR Chowdhury, ‘Legal Status of the Charter of Economic Rights and Duties of States’ in Hossain (n 14) 79, 84.

¹¹⁸ Sohn (n 35) 22.

¹¹⁹ Falk (n 14) 790.

¹²⁰ *ibid* 785.

there are instances of states not opposing the adoption of resolutions for various reasons, including convenience.¹²¹ On the other hand, the existence of an overarching community consensus at the General Assembly is not proven. For example, Onus argues that the presence of alliances between groups of states often determines majorities (and related minorities) within the General Assembly, eventually casting doubt on the idea of consensus of the international community.¹²² Likewise, Gross writes that states may support resolutions in a spirit of accommodation and cooperation, but not necessarily ‘out of a sense of legal obligation’.¹²³

Ultimately, the findings of this study suggest that consent, like consensus, is not *per se* the reason why a resolution is perceived as binding by states. As Fitzmaurice notes, ‘the ultimate source of validity [in international law] is and must be extra-legal’.¹²⁴ In the case of the legal significance and effects of resolutions, potentially leading to the creation of legal obligations, the extra-legal factor consists of political considerations surrounding both the adoption of resolutions and state reliance on them on a case-by-case basis, both in domestic and international practice. This observation aligns with the scholarly position arguing that the effects of a resolution vary with the circumstances peculiar to each resolution.¹²⁵

It follows from the preceding that the theory of creation of legal obligations by consensus is not strongly supported by evidence in the form of state practice – either at the adoption stage, within domestic law or in international practice. Taken together, the findings of this research suggest that resolutions fully retain the character of non-binding instruments emanating from a political organ of the United Nations. At the same time, being embedded with persuasive authority,¹²⁶ they represent the most conducive platform for states to advocate and initiate the process of positivization of the principles contained therein in the form of customary international law or general principles of law – which may or may not lead to the creation of shared, binding obligations under international law.¹²⁷ As Kerwin writes:

If General Assembly resolutions can be considered law even though they do not meet the rigorous standards for custom, then there is a risk of binding a state to principles that it has never accepted as law.¹²⁸

¹²¹ Schwebel (n 104).

¹²² N Onuf, ‘Further Thoughts on a New Source of International Law: Professor D’Amato’s “Manifest Intent”’ (1971) 65 AJIL 774, 778.

¹²³ Gross (83) 541.

¹²⁴ Fitzmaurice (n 112) 12.

¹²⁵ Sloan (n 112) 3.

¹²⁶ As discussed in Chapter 5, Section 5.6 and Chapter 6, Section 6.3. See also Sloan (n 16) 102-103.

¹²⁷ G Kerwin, ‘The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts’ (1983) Duke LJ 876, 880 (describing the General Assembly as ‘a forum for international dialogue’).

¹²⁸ *ibid* 896.

This leads to the further conclusion that resolutions are not in themselves sources of law.¹²⁹ They are a source of obligation: moral,¹³⁰ political¹³¹ and potentially legal. The latter presupposes a reciprocal, consensual recognition by states as to its existence.¹³² As a result, resolutions creating legal obligations turn out to be exceedingly rare.

7.5 Conclusion

Attitudes of states about the normative value of resolutions abound both in number and intensity. Building on the analysis in previous chapters, this chapter demonstrated that the concept of legal significance is a multi-dimensional one, which derives its connotations from the context and circumstances surrounding relevant state practice. In particular, it made three claims.

Firstly, to say that states often rely on resolutions to make a variety of claims, thus cautioning about generalizations about the legal significance of resolutions, does not mean that attitudes of states towards resolutions are completely random. Quite the contrary, the analysis shows that state practice on resolutions presents three common traits in each of the three contexts examined – namely, at the adoption stage, within domestic law and in international practice. When support for or reliance on resolutions affects national interests, states tend to refrain from attaching legal significance to resolutions, instead preferring to treat them as political documents. Equally, states treat resolutions as political instruments when the latter aim at establishing policy objectives of the international community. Such resolutions are generally regarded as having little, if any, legal significance. The situation is different in relation to resolutions aimed at affecting existent rights and duties under national and international law. Such resolutions require states to take a clear position about the issues surrounding a specific claim. As a result, the resolutions invoked prove to be highly divisive and so is the perception of their legal significance by different groups of states.

Secondly, the attribution of legal significance to resolutions through state practice has the potential to affect the development of international law, thus producing legal effects. While resolutions retain their recommendatory character, state reliance on resolutions endowed with legal

¹²⁹ Sloan (n 112) 2 (arguing that resolutions are a subsidiary means for the interpretation of rules of law, not a source of international law); Johnson (n 84) 116 (resolutions are not formal sources of international law); Bollecker-Stern (n 14) 70 (resolutions *per se* have no binding force); R Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963), 5 (resolutions are not *per se* binding); M Mendelson, 'The Legal Character of General Assembly Resolutions: Some Considerations of Principle' in Hossain (n 14) 95, 99 and 102 (arguing that resolutions that are evidence of customary international law do not constitute the law themselves. They can influence the development of customary rules); L Condorelli, 'The Role of General Assembly Resolutions' in A Cassese and JHH Weiler (eds), *Change and Stability in International Law-Making* (De Guttryer 1988) 35, 43. For a contrary position arguing that resolutions should be considered an independent source of law, see N White, *The Law of International Organizations* (3rd ed, Manchester University Press 2017) 148-150; Asamoah (n 87) 46 and 57; MY Kadir, 'The United Nations General Assembly Resolution (UNGAR) as a Source of International Law: Toward a Reformulation of Sources of International Law' (2011) 8 Indonesian J Int'l L 275, 288; K Skubiszewski, 'Enactment of Law by International Organizations' (1965-66) 41 BYIL 198, 245 (arguing that, in general, 'law-making acts of international organizations are a distinct source of the law of nations').

¹³⁰ Johnson (n 84) 97

¹³¹ Rosner-Lande (n 22) 163 (arguing that resolutions may produce political effects in a member states or in the relations among nations); Gross (n 83) 556 ('The significance of resolutions is primarily political').

¹³² Asamoah reaches a similar conclusion: 'the consent of a state against whom enforcement of a resolution is sought is also important'. Asamoah (n 84) 229.

significance may start or contribute to the process of identification of customary international law and general principles of law without necessarily leading to the creation of binding rules.

Thirdly, resolutions may produce binding legal obligations when states manifest their consent to be bound by the content of specific resolutions as a matter of customary international law or general principles of law. Conversely, attempts by states to impose legal obligations on other states absent their consent to be bound by the prescriptions of the invoked resolutions fail to produce legal obligations.

In order to formulate the claims above, the analysis draws simultaneously on the findings about the legal significance of resolutions in the three contexts examined. In doing so, it significantly departs from the techniques of analysis adopted by other scholars. The latter largely focus on evaluating a set of criteria designed to capture characteristics of the text of resolutions, such as the use of normative language, and the circumstances surrounding their adoption. As a result, they largely underestimate the role of subsequent state practice in determining the legal significance and effects of resolutions, including the possibility of creating binding legal obligations.

In conclusion, it is submitted that what confers legal significance to resolutions (possibly leading to legal effects and legal obligations) is not the formalities of adoption – by majority voting or consensus – and their surrounding circumstances. Rather, it is the actual use of resolutions in practice by states that determines their specific degree of significance.

CHAPTER 8

CONCLUSIONS

The UN General Assembly is the only primary organ of the United Nations representative of its entire membership.¹ Established as a deliberative body, the UN Charter describes the resolutions of the General Assembly as recommendations.² As such, they do not possess binding character. Yet the power of deliberation is essential to facilitate cooperation and dialogue among states. In this respect, the resolutions of the General Assembly embed the outcome of multilateral discussions, carrying with them a political and moral value. Against this background, states often attach legal significance to resolutions with a view to making an impact on the conduct of states. This thesis examined the circumstances under which resolutions acquire legal significance through state practice. The contention is that, to the extent resolutions make an impact on state conduct, they influence the development of international law in the fields covered by the subject matter of resolutions.

The thesis put forward in this study is not absolute. It focuses on General Assembly resolutions, which are recommendations – that is to say, nonbinding decisions of the United Nations – whose implementation is entirely dependent on the will of states to act on them. As such, the inquiry addresses only on one aspect of the complex issue of the autonomy of international organizations from their member states and ensuing legal implications. As such, it can act as springboard for further research in this field.

There is a vast body of literature on the legal significance of General Assembly resolutions. Scholarly positions greatly diverge as to the normative character of resolutions. Some scholars deny the possibility of resolutions possessing or acquiring legal significance.³ Other scholars describe them as acts of states,⁴ acts of the General Assembly⁵ or full-fledged sources of international law not listed in Article 38 of the Statute of the International Court of Justice.⁶ The common trait of the various scholarly positions is that the elaboration on the legal significance of resolutions is based on the textual analysis of selected resolutions, whose findings are then generalized to the body of resolutions adopted by the General Assembly. For instance, Asamoah and White focus on resolutions declaratory of international law, such as the Universal Declaration of Human Rights (UDHR) or the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁷ Similarly, Sloan and Castañeda group resolutions into categories based on the observation of a small number of handpicked resolutions serving different functions, such as

¹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI Article 9 para 1.

² *ibid.*, Articles 11-12 and 14.

³ A Aust, *Handbook of International Law* (2nd ed, CUP 2010), 44.

⁴ OY Asamoah, 'The Legal Effects of Resolutions of the General Assembly' (1963-64) 3 Columbia J Transn'l L 210, 214.

⁵ J Castañeda, *Legal Effects of United Nations Resolutions* (Columbia University Press 1969).

⁶ N White, *The Law of International Organizations* (3rd ed, Manchester University Press 2017), 148-150.

⁷ Asamoah (n 4), 19-20; N White, 'Lawmaking' in J Katz Kogan, I Hurd and I Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016), 559.

Resolution 2625(XXV) providing an authoritative interpretation of the principles of the UN Charter concerning friendly relations among states or the UDHR starting a new customary rule.⁸

Attributing legal significance to resolutions exclusively through textual interpretation is effective to determine the extent to which the text of resolutions conform with customary international law or treaty law. However, it does not explain the processes through which resolutions acquire various degrees of legal significance. The latter is largely a matter of factual assessment rather than theoretical elaboration. Therefore, in order to provide a contextual analysis, this thesis adopted an empirical research methodology inspired by the New Legal Realism school of thought.⁹ Starting from the observation of instances in which states attribute significance to resolutions, the thesis evaluated the circumstances under which states rely on resolutions within domestic law and before international courts and tribunals, as well as the reasons prompting reliance. In doing so, it discerned the relationship between degrees of legal significance attributed by states to resolutions and the goals that the reliance on resolutions aims to achieve, such as elucidating rights and duties of states under international law. The empirically-grounded methodology is the necessary precondition for expounding a conditional theory of legal significance of resolutions – that is to say, a theory based on the observation of the selected instances of state reliance on resolutions, but open to change subject to further empirical observation.¹⁰

The findings show that states routinely refer to the resolutions of the General Assembly in their domestic and international practice. One reason for such extensive reliance on resolutions is that the General Assembly has a broad mandate, which allows it to adopt resolutions on a wide range of issues spanning across areas as different as human rights protection and economic cooperation. Another reason is that, as decisions of the representative organ of the United Nations, resolutions are endowed with a certain degree of persuasive authority. Therefore, they seem naturally suited to make an impact on state conduct. At the same time, it appears that states rely more heavily on certain resolutions than others. In order to shed light on the normative implications of this observed practice, the analysis addressed three main issues: the concept of autonomy of the General Assembly from its member states, instances of attribution of different degrees of legal significance to resolutions by states in different contexts and the legal implications of such practices for the development of international law.

Chapter 3 provided an overview of the functions and powers of the General Assembly as well as the working methods and internal practices of the plenary session and its six main committees. It presented an original reconstruction of the number of resolutions adopted between 1946 and 2018, including their subject matter and related voting patterns. The empirical findings showed the existence of a gradual shift in the practice of the General Assembly from majority vote – which the international institutional law literature describes as a manifestation of the autonomous will of an international organization – to consensus decision making, which is associated with the idea of international organizations as fora for discussion where states participate in their capacity as independent subjects of international law. However, the fine-grained analysis of the practice of the

⁸ Castañeda (n 5) 193-196.

⁹ As discussed in Chapter 1, Section 1.4.2, and Chapter 2.

¹⁰ As discussed in Chapter 1, Section 1.4.2.

plenary session and its six main committees shows that there are differences determined by their working methods. This warrants against making generalizations about the practice of the General Assembly.

Investigating the nature of the General Assembly's decision making powers with a view to identifying the extent to which the General Assembly is an entity autonomous from its members also suggests that the theory of functionalism is not well suited to explain the degree of autonomy of the General Assembly from its member states. While in theory it is widely accepted that organs of international organizations may possess a degree of autonomy, in practice this is a matter of factual assessment.¹¹ The possible degrees of autonomy range from no autonomy (meaning that states utilise the General Assembly as a traditional diplomatic conference) to full autonomy (meaning that states utilise the General Assembly as a forum for discussion or *agora*). The findings of the analysis show that the General Assembly is not fully autonomous from its member states. Without overlapping, the powers of states and those of the General Assembly coexist under the institutional veil of the General Assembly. This means that they remain distinctively visible on the international plane.

Building on the considerations above, the inquiry examined the concept of legal significance of resolutions in three different contexts. Chapter 4 showed that the degree of legal significance that states attach to resolutions at the adoption stage is determined by the characteristics of the General Assembly as a political system representative of the UN membership, but not fully democratic (international polyarchy). From the perspective of international institutional law, the analysis showed that the legal significance of resolutions at the adoption stage turns out to be a function of the level of autonomy possessed by the General Assembly. Specifically, it showed that in the pursuit of its goals, the General Assembly acts as an organ endowed with a certain degree of political and institutional autonomy, although not a fully independent legal order. While the resolutions adopted are formally not binding on states, they are not devoid of legal significance either.

The Charter-based powers of discussion and recommendation by majority voting make the General Assembly a political system governed by variable majorities. Since the 1960s, the General Assembly majority consists of developing countries. They often adopt resolutions aimed at redistributing access to and use of the world economic resources with a view to influencing the development of selected areas of international law. However, the implementation of those resolutions requires the active participation of developed states, which often remain reluctant to take action. As a result, the adoption of certain resolutions may have a constraining effect to the development of international law and related areas of domestic law. In this sense, the General Assembly possesses a quasi-supranational character.

Once adopted, resolutions take on a life of their own and are not governed anymore by the institutional law of the General Assembly. From a general international law perspective, resolutions

¹¹ I Österdahl, 'International organizations – institutions and organs' in J Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Elgar 2011) 156, 178 (noting that 'it should be possible for organs to develop a relative will of their own... more or less strong depending on how they manage their tug-of-war with the member states').

contain recommendations to states on formal and substantive aspects of international cooperation, ranging from trade relations to human rights issues. As a result, the General Assembly can be viewed as a standard-setting institution.¹² Therefore, the following two chapters examined how resolutions acquire significance through the practice of states (domestic and international) as well as the extent to which they make an impact on state conduct, potentially influencing the development of international law.

Chapter 5 determined that resolutions acquire legal significance within domestic law only to the extent that states voluntarily accept to attribute normative value to resolutions on a case-by-case basis. While pointing out a lack of uniformity both across and within jurisdictions, which warrants against generalizations about the legal significance of resolutions, the analysis showed that the overwhelming majority of resolutions cited fall within the area of human rights. Taking stock of the findings, the chapter investigated the possible source of the legal significance of resolutions and advanced the argument that it is ultimately the will of states, rather than the will of the General Assembly, that determines the legal significance of resolutions through usage. There seem to be no special characteristics of either resolutions or the General Assembly that justify reliance by states on resolutions.

Similarly, Chapter 6 showed that states' reliance on resolutions in international practice serves the purpose of making a legal claim, which often turns out to be a politically motivated decision. The findings reveal that generalizations about the legal significance of resolutions are difficult to sustain, since states cite resolutions to achieve a variety of purposes, based on context and circumstances. The analysis also demonstrates that there are significant differences in the attitudes of states and judges toward the legal significance of resolutions. In particular, while states maintain a pragmatic and largely flexible approach, judges often rely on assertion to find evidence of legal significance.

Chapter 7 elaborated on the concept of legal significance of resolutions. The findings show that the concept of legal significance is a multi-level one and it is largely driven by the attitudes of states about their perception of the normative value of individual resolutions, depending on context and circumstances. Ultimately, the analysis shows that resolutions are capable of affecting the development of international law and on occasion create legally binding obligations, but only when supported by the will of states to be bound by the content of specific resolutions or provisions thereof. At the same time, the empirical findings suggest that resolutions fail to produce legal effects when states try to impose acceptance of the content of resolutions on other states against their will.

In the contexts examined, the use of normative language in the text of resolutions and references to voting patterns do not appear to be *per se* indicative of any particular degree of legal significance. Conversely, the empirical findings suggest that states adopt and cite resolutions with a view to achieving goals other than making legal claims. In other words, states seem to use the General Assembly and the resolutions adopted as a (quasi-legal) means to a (political) end. Yet the invocation of resolutions by states in their domestic and international practice is not without legal

¹² As I argue in Chapter 5, Section 5.3.

repercussions. As Chapter 7 showed, states attribute different degrees of legal significance to resolutions depending on the context and circumstances in which they are invoked.

When several states attach a degree of legal significance to a given resolution or cluster of related resolutions, the combined practice of states may start the process of identification of rules of customary international law or general principles of law. In this sense, certain resolutions may produce legal effects. The caveat in ascertaining legal effects is that the determining factor rests in the attribution of legal significance to resolutions by several states.

Arguments about the characteristics of resolutions, such as the use of normative language or the adoption by consensus,¹³ as the relevant factor for differentiating between resolutions possessing normative value and those without do not find support in the outcomes of my research. Instead, my research shows that only those resolutions producing legal effects in both domestic and international contexts which are also supported by a wide consensus of the international community of states generate legal obligations. Admittedly, the threshold for legal obligation is high and the empirical findings of my research confirm that resolutions creating legal obligations are exceedingly rare compared to the overall number of resolutions adopted by the General Assembly since 1946.

My findings significantly depart from the scholarly literature in relation to the description of resolutions as a source of law.¹⁴ Given their non-binding nature, my research indicates that the source of legal significance of resolutions appears to lie in the persuasive authority of both the General Assembly and the content of individual resolutions, which in turn triggers the use in practice of resolutions by states. The combination of such aspirational and pragmatic considerations suggests that resolutions are a source of obligation – moral, political and legal – that eventually lead states to invoke, rely on, abide by or demand conformity with the provisions of selected resolutions.

The distinction between resolutions as a source of law and resolutions as a source of obligation is often blurred and may overlap in the actual practice of states, as was shown in Chapters 4, 5 and 6. This further invites caution about drawing generalizations as to the legal significance of resolutions. It is nonetheless useful to dispel the myth of resolutions as a source of law in their own capacity.¹⁵ The findings of my research show that it is the will of states, not the purported will of the General Assembly, that confers legal significance to resolutions through usage. To argue otherwise would confer legislative powers to the General Assembly which the UN Charter does not envision.

Taken together, the detailed examinations undertaken suggest that a necessary condition for resolutions to create legally binding obligations is the consent of states to be bound by the

¹³ B Bollecker-Stern, 'The Legal Character of Emerging Norms relating to the New International Economic Order: Some Comments' in Hossain (ed), *Legal Aspects of the New International Economic Order* (Frances Printer 1980) 68, 71; R Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60 AJIL 782, 786 (arguing that the language of a resolution must be carefully analysed); B Sloan, *United Nations General Assembly Resolutions in Our Changing World* (Transnational Publishers 1991), 109.

¹⁴ See, for example, White (n 6).

¹⁵ *ibid*

provisions of resolutions. The immediate implication on the practical level is that attempts by states to demand conformity with resolutions by other states which do not support those resolutions is likely to fail. As the examples discussed in this study show, states often support resolutions with a view to imparting a different direction to the development of selected areas of international law, especially in the area of economic cooperation. In doing so, they invoke resolutions as evidence of the consensus of the international community on the issues covered therein. However, from a theoretical perspective, a state can only manifest its own consent to be bound by resolutions.

For instance, domestic courts often cite resolutions to fill a gap in the domestic legal system. The *Rushan Mondal* case of 2006 is emblematic. In the absence of a piece of legislation incorporating the provisions of the Convention on the Rights of the Child (CRC) ratified by Bangladesh in 1990, the Supreme Court of Bangladesh interpreted and applied the CRC in the light of the resolution providing the Guidelines on Juvenile Justice.¹⁶ Likewise, state submissions before international courts and tribunals are replete with statements aimed at clarifying the normative value of the resolutions cited by states in support of their claims. For example, in *Jurisdictional Immunities of the State*, Italy maintained that the declaration contained in Resolution 60/147 adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law derives its 'binding legal value' from pre-existing legal obligations of states, effectively codifying 'the rights attributed by international law to victims of international crimes'.¹⁷ Conversely, in the same case, Germany denied any such character to the same resolution arguing that, instead of codifying the law, it reflects trends that have emerged 'at the earliest in the last two decades'. Hence, it described Resolution 60/147 as merely declaratory.¹⁸ The lack of uniformity in state practice shows that the invocation of General Assembly resolutions by one state cannot provide conclusive evidence about the willingness of another state to be bound by resolutions.

Overall, the findings of this study show that an empirically-grounded analysis of the use of resolutions by states provides the basis for a conditional, evolutive conceptualisation of the legal significance of resolutions. Inspired by the New Legal Realist approach to international law, the findings show that the concept of legal significance is a multi-faceted one: it acquires content depending on context and circumstances, thus serving different purposes that the states relying on resolutions deem worth pursuing on a case-by-case basis. Thus, the empirically-grounded methodology allows generalizations of the findings about the legal significance of resolutions in terms of broad trends in practice rather than a static frame of reference based on *a priori* assumptions about the legal significance of resolutions. This marks a significant difference from the approach taken in other scholarly works, which focus on resolutions displaying certain characteristics, such as reference to international law rules and principles in the text or adoption by consensus.¹⁹ Trends in practice change over time, thus influencing the degree of legal significance that states attach to resolutions.

¹⁶ *Bangladesh v MD Rushan Mondal*, criminal appeal, 2006 26BLD (HCD) 549.

¹⁷ ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, counter-memorial of Italy, 22 December 2009, p 103 para 5.42.

¹⁸ *ibid*, reply of the Federal Republic of Germany, 5 October 2010, p 24 para 41.

¹⁹ See, for instance, Bollecker-Stern and Falk (n 13).

The findings of my research also show that when acting at the General Assembly, states never lose their character of sovereign entities under international law. As a result, they partake in the General Assembly's decision making process with a view to facilitating dialogue and cooperation on a wide range of areas. The adoption of resolutions fits well with the decentralized and state-centred character of the international legal system, eventually disproving the scholarly argument according to which international law is not well suited to regulate the actions of international organizations. Equally, the analysis conducted in this study suggests that the working methods and practices of the General Assembly, which together operationalize its decision making powers, are determined by state interests and agendas.²⁰ Contrary to an established position in the scholarly literature,²¹ the findings of my research suggest that the General Assembly does not possess a will of its own. As a result, it casts doubt on the explanatory power of theory of functionalism in relation to the dynamics of lawmaking by international organizations.²²

The findings of my study show that consensual and reciprocal acceptance of the legal significance of specific resolutions appears to be the factor triggering the ability of resolutions to produce legal effects, including legally binding obligations. Conversely, resolutions adopted by majority (or not supported by genuine consensus as to their legal significance) with a view to creating new norms of international law fail to achieve their goal and often remain aspirational documents. In this respect, and contrary to the international organizations law literature, the resolutions of the General Assembly turn out to be well suited to the characteristics of international law as a decentralized and consensual system.

To conclude, three lessons can be drawn from the findings of my research. Firstly, states make an instrumental use of resolutions, using them as a means to facilitate the achievement of desired outcomes. As a result, it is not possible to draw generalizations about the legal significance of resolutions *qua* resolutions. Secondly, it is neither possible nor useful to devise a test capable of objectively detecting the presence or intensity of legal significance of resolutions. There exist no *a priori* signposts of legal significance of resolutions. Thirdly, in terms of legal theory, resolutions are acts of the General Assembly aimed at influencing state conduct. As such, they are a source of obligation, not a source of law. They may nonetheless transition from soft law (essentially, political documents) to hard law through usage – that is to say, acts of states. This further indicates that the factor determining the legally binding character of certain resolutions is the intensity of state practice coalescing around those resolutions. Consequently, the basis of obligation in international law remains anchored in state consent, not the consensus expressed by delegations at the General Assembly at the time of adoption of resolution.

²⁰ As discussed in Chapter 3.

²¹ J Klabbbers, 'Theorizing International Organizations' in A Orford and F Hoffmann, *The Oxford Handbook of the Theory of International Law* (OUP 2016), 618; id, 'The Transformation of International Organizations Law' 26 EJIL (2016) 9; id, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' 25 EJIL (2014) 645.

²² *ibid*

BIBLIOGRAPHY

- Acock, AC, *A Gentle Introduction to Stata* (6th ed, Stata Press 2018).
- Ahl, B, 'The Rise of China and International Human Rights Law' 37(3) *Human Rights Quarterly* (2015) 637.
- Akehurst, M, 'Custom as a Source of International Law' 47 (1997) *British YBIL* 1.
- Alger, CF, Lyons, GM and Trent, JE, *The United Nations System: The Policies of Member States* (United Nations University 1995).
- Alker, HR, and Russett, BM, *World Politics in the General Assembly* (Yale University Press 1965).
- Amerasinghe, CF, *Principles of the Institutional Law of International Organizations* (2nd ed, CUP 2005).
- Anderson, G, 'Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects' (2013) 41 *Denver J Int'l L & Pol'y* 345.
- Arangio-Ruiz, G, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (Springer 1979).
- Arsanjani, MH, 'Negotiating the UN Declaration on Human Cloning' (2006) 100 *AJIL* 164.
- Asamoah, OY, 'The Legal Effects of Resolutions of the General Assembly' (1963-64) 3 *Columbia J Transn'l L* 210.
- , *The Legal Significance of the Declarations of the General Assembly of the United Nations* (Nijhoff 1966).
- d'Aspremont, J, 'The multifaceted concept of the autonomy of international organizations and international legal discourse' in Collins, R and White, ND (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011), 63.
- Aust, A, *Handbook of International Law* (2nd ed, CUP 2010).
- Bailey, SD, *The General Assembly of the United Nations: A Study of Procedure and Practice* (rev ed, Greenwood Press 1978).
- Bailey, E and Voeten, E, 'A Two-Dimensional Analysis of Seventy Years of United Nations Voting' 176 *Public Choice* (2018) 33.
- Barber, R, 'Revisiting the Legal Effect of General Assembly Resolutions: Can an Authorizing Competence for the Assembly Be Grounded in the Assembly's "Established Practice", "Subsequent Practice" or Customary International Law?' (2020) 26 *J Conflict & Security Law* 9.
- Baxter, RR, 'International Law in "Her Infinite Variety"' (1980) 29 *ICLQ* 549.
- Bederman, DJ, *International Law Frameworks* (3rd ed, Foundation Press 2010).
- Bedjaoui, M, *Towards a New International Economic Order* (UNESCO 1979).
- Bellia, AJ and Clark, BR, *The Law of Nations and the United States Constitution* (OUP 2017).
- Bleicher, A, 'The Legal Significance of Re-Citation of General Assembly Resolutions' (1969) 63 *AJIL* 444.
- Bollecker-Stern, B, 'The Legal Character of Emerging Norms relating to the New International Economic Order: Some Comments' in Hossain, K (ed), *Legal Aspects of the New International Economic Order* (Frances Printer 1980).
- Boyle, A and Chinkin, C, *The Making of International Law* (OUP 2007).
- Brazys, S and Panke, D, 'Why Do States Change Positions in the United Nations General Assembly?' 38(1) *Int'l Pol Sci Rev* (2017) 70.

- Brölmann, C, 'A Flat Earth? International Organizations in the System of International Law' (2001) 70 *Nordic J Int'l L* 319.
- , *The Institutional Veil in Public International Law* (Hart 2007).
- , 'International organizations and treaties – Contractual freedom and institutional constraint' in Klabbers, J and Wallendahl, Å (eds), *Research Handbook on the Law of International Organizations* (Elgar 2011), 285.
- Brownlie, I, *Principles of Public International Law* (Clarendon Press 1973).
- Bryman, A, *Social Research Methods* (5th ed, OUP 2016).
- Bulajic, M, 'Legal Aspects of the New International Economic Order' in Hossain, K (ed), *Legal Aspects of the New International Economic Order* (Frances Printer 1980), 45.
- Burmester, N and Jankowski, M, 'Reassessing the European Union in the United Nations General Assembly' 21(10) *J Eur Public Pol'y* (2014) 1491.
- Burton, ME, *The Assembly of the League of Nations* (University of Chicago Press 1941).
- Carter, DB, and Stone, RW, 'Democracy and Multilateralism: The Case of Vote Buying in the UN General Assembly' 69 *Int'l Org* (2015) 1.
- Cass, D, *The Constitutionalization of the World Trade Organization* (OUP 2005).
- Cassese, A, *International Law* (2nd ed, 2005).
- Castañeda, J, *Legal Effects of United Nations Resolutions* (Columbia University Press 1969).
- Castles, AC, 'Legal Status of U.N. Resolutions' (1967)3 *Adelaide LR* 68.
- Charney, J, 'Universal International Law' 87 (1993) *AJIL* 529.
- Cheng, T, 'The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?' 41 *Cornell J Int'l L* (2008) 251.
- Church, J and McCaffrey, M, 'International organizations: Available Information and Documentation' in Reinalda, B (ed), *Routledge Handbook of International Organization* (Routledge 2013), 27.
- Chowdhury, SR, 'Legal Status of the Charter of Economic Rights and Duties of States' in Hossain, K (ed), *Legal Aspects of the New International Economic Order* (Frances Printer 1980), 79.
- Condorelli, L, 'The Role of General Assembly Resolutions' in Cassese, A and Weiler, JHH (eds), *Change and Stability in International Law-Making* (De Guttryer 1988), 35.
- D'Amato, A, *The Concept of Custom in International Law* (Cornell University Press 1971) 88.
- , 'Custom and Treaty: A Response to Professor Weisburd' 21 (1988) *Vanderbilt J Transn'l L* 459.
- Dahl, RA, *Polyarchy: Participation and Opposition* (Yale University Press 1971).
- , *A Preface to Economic Democracy* (University of California Press 1985).
- Dahl, RA, and Tufte, EE, *Size and Democracy* (Stanford University Press 1973).
- Davis, J, *Justice Across Borders: The Struggle for Human Rights in U.S. Courts* (CUP 2008).
- Deplano, R, *The Strategic Use of International Law by the United Nations Security Council: An Empirical Study* (Springer 2015).
- , 'Is International Legal Research International?' in Deplano, R and Tsagourias, N (eds), *Research Methods in International Law: A Handbook* (Elgar 2021) 79.
- Dreher, A, Nunnenkamp, P and Thiele, R, 'Does US Aid Buy UN General Assembly Votes? A Disaggregated Data Analysis' 136(1/2) *Public Choice* (2008) 139.
- Dreher, A and Sturm, J, 'Do the IMF and the World Bank Influence Voting in the UN General Assembly?' 151 *Public Choice* (2012) 363.
- Earl of Lytton, Rt Hon, *First Assembly: The Birth of the United Nations Organization* (Hutchinson 1946).

- Eka, BU, 'Decisions *ex aequo et bono* and General Assembly Resolutions as Secondary Sources of International Law' (1970)4 Nigerian LJ 119.
- Elias, TO, 'Modern Sources of International Law' in Friedmann, W, Henkin, L and Lissitzyn, O (eds), *Transnational Law in a Changing Society* (Columbia University Press 1972).
- Elkins, Z, Ginsburg, T and Simmonds, B, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' 54 Harv Int'l LJ (2013) 61.
- Ellis, J, 'General Principles and Comparative Law' 22 EJIL (2011) 949.
- Ellis, ME, 'The New International Economic Order and General Assembly Resolutions: the Debate over the Legal Effects of General Assembly Resolutions Revisited' (1985)15 California Western Int'l LJ 647.
- Engström, V, 'Reasoning on powers of organizations' in Collins, R and White, N (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011), 56.
- Falk, R, 'On the Quasi-Legislative Competence of the General Assembly' (1966)60 AJIL 782.
- Fassbender, B, *The United Nations Charter as the Constitution of the World* (Brill 2009).
- Fasulo, L, *An Insider's Guide to the UN* (3rd ed, Yale University Press 2015).
- Fikfak, V, 'Judicial Strategies and Their Impact on the Development of the International Rule of Law' in Kanetake, M and Nollkaemper, A (eds), *The Rule of Law at the National and International Levels* (Hart 2016) 45.
- Finley, B, *The Structure of the United Nations General Assembly: An Organizational Approach to Its Work, 1974-1980s* (UNIPUB/Kraus International Publications 1988).
- Fitzmaurice, G, 'The Foundations of the Authority of International Law and the Problem of Enforcement' (1956) 19 Modern L Rev 1.
- Flanders, C, 'Toward a Theory of Persuasive Authority' 62 (2009) Oklahoma L Rev 55.
- Franck, TM, *Fairness in International Law and Institutions* (OUP 1995).
- Franck, TM, and Munansangu, MM, *The New International Economic Order: International Law in the Making?*, UNITAR Policy and Efficacy Studies No 6.
- Franck, TM and Weisburd, E, *World Politics: Verbal Strategy among Superpowers* (OUP 1975).
- Frankel, S, and Regan, S, (eds), *The PGA Handbook: A Practical Guide to the United Nations General Assembly* (Permanent Mission of Switzerland to the United Nations, 2011).
- Frotestad Kuehl, H and O'Brien, MA, *International Legal Research in a Global Community* (Carolina Academic Press, Durham, North Carolina, 2018).
- Garibaldi, OM, 'The Legal Status of General Assembly Resolutions: Some Conceptual Observations' (1979) ASIL Proc 324.
- Gartzke, E and Schneider, C, 'Data Sets and Quantitative Research in the Study of Intergovernmental Organizations' in Reinalda, B (ed), *Routledge Handbook of International Organization* (Routledge 2013), 41.
- Gazzini, T, 'The relationship between international legal personality and the autonomy of international organizations' in Collins, R and White, N (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011), 196.
- Ginsburg, T and Shaffer, G, 'How Does International Law Work?' in Cane, P and Kritzer, HM (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010), 753.
- Glendon, AM, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2002).
- Glenn, HP, 'Persuasive Authority' 32 (1987) McGill LJ 261.

- Gregg, R, 'UN Decision-Making Structures and the Implementation of NIEO' in Laszlo, E and Kurtzman, J (eds), *Political and Institutional Issues of the New International Economic Order* (Pergamon 1981), 103.
- Griffin, AJ, 'Dethroning the Hierarchy of Authority' (2018) 97 Oregon L Rev 51.
- Gross, L, 'The United Nations and the Rule of Law' 19(1965) Int'l Org 537.
- Gruhn, IV 'The New International Economic Order and the United Nations', in Onwuka, RI and Aluko, O (eds), *The Future of Africa and the New International Economic Order* (MacMillan 1986).
- Hannum, H, 'The Status of the Universal Declaration of Human Rights in National and International Law' 25 Ga J Int'l Comp L (1995/96) 287.
- Heise, M, 'The Importance of Being Empirical' (1999) 26 Pepp L Rev 807.
- Henkin, L, *How Nations Behave: Law and Foreign Policy* (2nd ed, Columbia University Press).
- Higashi, J, 'The Role of Resolutions of the United Nations General Assembly in the Formative Process of International Customary Law' (1982) 23 Japanese Ann Int'l Law 11.
- Higgins, R, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963).
- Higgins, R, Webb, P, Akande, D, Sivakumaran, S and Sloan, J, *Oppenheim's International Law: United Nations* vol II (OUP 2017).
- Hoffman, MB and Berring, RC, *International Legal Research in a Nutshell* (2nd ed, West Academic Publishing 2017).
- Hoffman, M and Rumsey, M, *International and Foreign Legal Research* (2nd ed, Brill-Nijhoff 2012).
- Hossain, K, 'Introduction', in Hossain, K and Chowdhury, SR (eds), *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice* (Frances Printer Publisher 1984).
- Hovet, T, *Bloc Politics in the United Nations* (Harvard University Press 1960).
- Hwang, W, Sanford, AG and Lee, J, 'Does Membership on the UN Security Council Influence Voting in the UN General Assembly?' 41(2) Int'l Interactions (2015) 256.
- Jacobsen, K, *The General Assembly of the United Nations: A Quantitative Analysis of Conflict, Inequality, and Relevance* (Universitetsforlaget 1978).
- Jennings, RY, 'The Discipline of International Law' ILA 57th Conference, Lord McNair Memorial Lecture, 1976.
- Johnson, DHN, 'The Effects of Resolutions of the General Assembly' (1955-56) 32 BYIL 97.
- Joyner, CC, 'U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation' (1981) 11 California West Int'l LJ 445.
- Kadir, MYA, 'The United Nations General Assembly Resolution (UNGAR) as a Source of International Law: Toward a Reformulation of the Sources of International Law' (2011) 8 Indonesian J Int'l L 275.
- Kanetake, M, 'The Interfaces between the National and the International Rule of Law: A Framework Paper' in Kanetake, M and Nollkaemper, A (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart 2016) 3.
- Karns, MP, 'General Assemblies and Assemblies of States Parties' in Katz Cogan, J, Hurd, I and Johnstone, I, *The Oxford Handbook of International Organizations* (OUP 2016), 757.
- Kaufmann, J, *United Nations Decision Making* (Sijthoff & Nordhoof International Publishers 1980).
- Keohane, RO, 'Political Influence in the General Assembly' (1966) Int'l Conciliation 557.
- Kerwin, G, 'The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts' (1983) Duke LJ 876.
- Klabbers, J, 'Two Concepts of International Organization' 2 Int'l Org L Rev (2005) 277.

- –, ‘Counter-Disciplinarity’ 4(2009) Int’l Pol Soc 308.
- –, ‘Contending approaches to international organizations: between functionalism and constitutionalism’ in Klabbers, J and Wallendahl, Å (eds), *Research Handbook on the Law of International Organizations* (Elgar 2011) 3.
- –, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’ 25 EJIL (2014) 645.
- –, *An Introduction to International Institutional Law* (3rd ed, CUP 2015).
- –, ‘Theorizing International Organizations’ in Orford, A and Hoffmann, F (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016), 618.
- –, ‘The Transformation of International Organizations Law’ 26(1) EJIL (2016) 9.
- Klabbers, J and Ulfstein, G (eds), *The Constitutionalization of International Law* (OUP 2009).
- Kolb, R, *An Introduction to the Law of the United Nations* (Hart 2010).
- Koskeniemi, M, ‘The Politics of International Law – 20 Years Later’ 20 EJIL (2009) 7.
- Kunz, JL, ‘The United Nations Declaration of Human Rights’ 43(2) AJIL (1949) 316.
- Labra, A, et al, ‘The Sovereignty of States’ in Laszlo, E and Kurtzman, J (eds), *Political and Institutional Issues of the New International Economic Order* (Pergamon 1981), 3.
- Lall, A, ‘Some Thoughts on the UN General Assembly as a Forum for Mediation and Negotiation’ 9(1) (1975) J Int’l Affairs 63.
- Lawless, RM, Robbennolt, JK and Ulen, TS, *Empirical Methods in Law* (2nd ed, Kluwer 2016).
- Lawson, RC, ‘The United Nations Third Assembly at Work’, *Current History*, 1 December 1948.
- League of Nations, *Ten Years of World Co-operation* (Hazell 1930).
- Macauley, S, ‘A New Legal Realism: Elegant Models and the Messy Law in Action’ in Mertz, E, Macauley, S and Mitchell, TW (eds), *The New Legal Realism: Translating Law-and-Society for Today’s Legal Practice* vol I (CUP 2016) 29.
- McCorquodale, R, ‘The Rule of Law Internationally’ in Feinäugle, CE (ed), *The Rule of Law and Its Application to the United Nations* (Hart 2016) 51.
- Mendelson, M, ‘The Legal Character of General Assembly Resolutions: Some Considerations of Principle’ in Hossain, K (ed), *Legal Aspects of the New International Economic Order* (Frances Printer 1980), 95.
- Meron, T, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989).
- Mickelson, K, ‘How Universal Is the Universal Declaration?’ 47 Univ New Brunswick LJ (1998) 19.
- Moore, B, *United Nations Second Assembly: New York* (Stanhope Press 1947).
- Murase, S, ‘International Law Making for the New International Economic Order’ (1982)25 Japanese Ann Int’l L 45.
- Newcombe, H et al, *Nations on Record: United Nations General Assembly Roll-Call Votes (1984-1986)* (Peace Research Institute – Dundas 1988).
- Ng’ambi, SP, ‘Permanent Sovereignty over Natural Resources and the Sanctity of Contracts, from the Angle of *lucrum cessans*’ (2015) 12 Loyola Univ Chicago Int’l Rev 153.
- Nicholas, HG, *The UN as a Political Institution* (OUP 1965).
- Nollkaemper, A, *National Courts and the International Rule of Law* (OUP 2012).
- –, ‘Saving the Scarecrow’ 26(1) EJIL (2016) 957.
- Nourse, V and Shaffer, G, ‘Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?’ 95 Cornell L Rev (2009) 61.

- Nourse, V and Shaffer, G, 'Empiricism, Experimentalism, and Conditional Theory' (2014) Southern Methodist Univ L Rev 141.
- Öberg, Marko D, 'The Legal Effects of the Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005)16 EJIL 879.
- , 'The Legal Effects of United Nations Resolutions in the *Kosovo* Advisory Opinion' (2011)105 AJIL 81.
- Ohtsuki, OH, 'Buying the Best Favor: Foreign Aid for Cooperation or Convenience' (2016)16 Int'l Rel Asia-Pacific 175.
- Okafor, OC, 'The Status and Effects of the Right to Development in Contemporary International Law' (1995)7 African J Int'l & Comp L 865.
- Onuf, N, 'Further Thoughts on a New Source of International Law: Professor D'Amato's "Manifest Intent"' (1971)65 AJIL 774.
- Onwuka, 'The Illusions of the New International Economic Order' in Onwuka, RI and Aluko, O (eds), *The Future of Africa and the New International Economic Order* (MacMillan 1986), 1.
- Österdahl, I, 'International organizations – institutions and organs' in Klabbers, J and Wallendahl, Å (eds), *Research Handbook on the Law of International Organizations* (Elgar 2011), 156.
- Panke, D, *Unequal Actors in Equalizing Institutions: Negotiations in the United Nations General Assembly* (Palgrave 2013).
- Peterson, MJ, *The General Assembly in World Politics* (Unwin Hyman 1990).
- , *The UN General Assembly* (Routledge 2006).
- , 'General Assembly' in Weiss, TG and Daws, S (eds), *The Oxford Handbook on the United Nations* (2nd ed, OUP 2018), 119.
- du Plessis, L, 'International Law and the Evolution of (Domestic) Human Rights Law in Post-1994 South Africa' in Nijman, J and Nollkaemper, A (eds), *New Perspectives on the Divide between National and International Law* (OUP 2007), 309.
- Posner, E, *The Twilight of Human Rights* (OUP 2014).
- Reisman, WM, 'International Lawmaking: A Process of Communication' 75 (1981) Am Soc'y Int'l L 101.
- Riggs, RE, *Politics in the United Nations: A Study of United States Influence in the General Assembly* (University of Illinois Press 1958).
- Roberts, A, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011)60 ICLQ 57.
- Roberts, A, Stephan, PB, Verdier, PH and Versteeg, M, 'Comparative International Law: Framing the Field' (2015)109 AJIL 467.
- Robins, G, *Doing Social Network Research: Network-Based Research Design for Social Scientists* (Sage 2015).
- Rosenne, S, 'United Nations Treaty Practice' Recueil des Cours (1954) 310.
- Rosner Lande, G, 'The Changing Effectiveness of General Assembly Resolutions' (1964) ASIL Proc 162.
- , 'The Effect of the Resolutions of the United Nations General Assembly' (1966)19 World Politics 83.
- Sandholtz, W, 'How Domestic Courts Use International Law' 38 Fordham Int'l LJ (2015) 595.
- Sands, P and Klein, P, *Bowett's Law of International Institutions* (6th ed, Sweet & Maxwell 2009).
- Schabas, WA, *The Universal Declaration of Human Rights: The Travaux Préparatoire*, vol I (CUP 2013).
- Schachter, O, 'Towards a Theory of International Obligation' 8(2) Va J Int'l L (1968) 300.
- , 'The Twilight Existence of Nonbinding International Agreements' 71 AJIL (1977) 196.

- , *Sharing the World Resources* (Columbia University Press 1977).
- , ‘Recent Trends in International Lawmaking’ 12 *Australian YIL* (1988-89) 12.
- , *International Law in Theory and Practice* (Kluwer 1995).
- , ‘The Role of Power in International Law’ 93 *ASIL Proc* (1999) 200.
- Schachter, O and Joyner, CC (eds), *United Nations Legal Order*, 2 vols (CUP 1995).
- Schaffer, EH and Snyder, RJ, *Contemporary Practice of Public International Law* (Oceana 1997).
- Schauer, F, ‘Authority and Authorities’ 94 (2008) *Fordham JIL* 1931.
- Schermers, HG and Blokker, NM, *International Institutional Law* (6th rev ed, Brill/Nijhoff 2018).
- Schwebel, SM, ‘The Effect of Resolutions of the U.N. General Assembly on Customary International Law’ (1979) 73 *ASIL Proc* 301.
- Schwelb, E, ‘The Influence of the Universal Declaration of Human Rights on International and National Law’ 53 *ASIL Proc* (1959) 217.
- Shaffer, G, ‘The New Legal Realist Approach to International Law’ (2015) *LJIL* 189.
- , ‘New Legal Realism and International Law’ in Klug, H and Engle Merry, S (eds), *The New Legal Realism: Studying Law Globally* vol II (CUP 2016), 145.
- , ‘Legal Realism in International Law’ in Dunoff, JL and Pollack, MA (eds), *International Legal Theory: Foundations and Frontiers* (CUP, forthcoming) – available as University of California, Irvine, Legal Studies Research Paper Series No 2018-55.
- Shaffer, G and Ginsburg, T, ‘The Empirical Turn in International Legal Scholarship’ 106 *AJIL* (2012) 1.
- Shaw, M, *International Law* (8th ed, 2017).
- Simmons, BA, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009).
- Simmons, BA and Breidenbach, AB, ‘The Empirical Turn in International Economic Law’ (2011) 20 *Minnesota J Int’l L* 198.
- Sinclair, GF, ‘The Original Sin (and Salvation) of Functionalism’ 26(1) *EJIL* (2016) 965.
- Singh, N, *Termination of Membership of International Organisations* (Stevens & Sons 1958).
- Skubiszewski, K, ‘Enactment of Law by International Organizations’ (1965-66) 41 *BYIL* 198.
- Sloan, B, ‘The Binding Force of a “Recommendation” of the General Assembly of the United Nations’ 25 *BYIL* (1948) 1.
- , *United Nations General Assembly Resolutions in Our Changing World* (Transnational Publishers 1991).
- Sohn, LS, ‘The Shaping of International Law’ (1978) 8 *Ga J Int’l & Comp L* 1.
- Suchman, MC and Mertz, E, ‘Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism’ (2010) *Ann Rev Law Soc Sci* 555.
- Telman, DAJ, ‘International Legal Positivism and Legal Realism’ in Kammerhofer, J and d’Aspremont, J (eds), *International Legal Positivism in a Post-Modern World* (CUP 2016), 241.
- Thirlway, H, *The Sources of International Law* (2nd ed, OUP 2019).
- Tingley, D and Tomz, M, ‘How Does the UN Security Council Influence Public Opinion?’ Working paper (2012), available at <https://web.stanford.edu/~tomz/working/TingleyTomz-UNSC-2012-11-04.pdf> (accessed 19 January 2021).
- Tomuschat, C, ‘Article 19’ in Simma, B et al (ed), *The Charter of the United Nations: A Commentary* vol I (3rd ed, OUP 2012), 639.
- Tsagourias, N (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007).
- Villiger, ME, *Customary International Law and Treaties* (2nd ed, Kluwer Law International 1997).

- Viñuales, J (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (CUP 2020).
- Voeten, E, 'Clashes in the Assembly' 54(2) *Int'l Org* (2000) 185.
- –, 'Data and Analyses of Voting in the United Nations General Assembly' in Reinalda, B (ed), *Routledge Handbook of International Organization* (Routledge 2013), 54.
- Voulgaris, N, *Allocating International Responsibility Between Member States and International Organisations* (Hart 2019).
- Webber Gaudiosi, RE, Leiva Roesch, J and Wu, Y, *Negotiating at the United Nations: A Practitioner's Guide* (Routledge 2019).
- White, F, *The United Nations First Assembly: London 1946* (Stanhope 1946).
- White, ND, *The United Nations System: Toward International Justice* (Lynne Rienner 2002).
- –, 'Decision-making' in Klabbers, J and Wallendahl, Å (eds), *Research Handbook on the Law of International Organizations* (Elgar 2011) 225.
- –, 'Lawmaking' in Katz Kogan, J, Hurd, I and Johnstone I (eds), *The Oxford Handbook of International Organizations* (OUP 2016), 559.
- –, *The Law of International Organizations* (3rd ed, Manchester University Press 2017).
- Wilkins, GL, *African Influence in the United Nations, 1967-1975: The Politics and Techniques of Gaining Compliance to U.N. Principles and Resolutions* (University Press of America 1981).
- Wouters, J and De Man, P, 'International organizations as law-makers' in Klabbers, J and Wallendahl, Å (eds), *Research Handbook on the Law of International Organizations* (Elgar 2011), 190.
- Wu, Y and Sauma, J, 'A Practical Guide to Outcome Documents' reprinted in Webber Gaudiosi, RE, Leiva Roesch, J and Wu, Y, *Negotiating at the United Nations: A Practitioner's Guide* (Routledge 2019).
- Yeselson, A, and Gaglione, A, *A Dangerous Place: The United Nations as a Weapon in World Politics* (Grossman 1974).
- Zemanek, K, 'Majority Rule and Consensus Technique in Law-Making Diplomacy' in MacDonald, RSJ and Johnston, M (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Nijhoff 1989) 857.
- Zimmern, A, *The League of Nations and the Rule of Law 1918-1935* (MacMillan 1945).