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The role of the United Nations General Assembly in advancing accountability for atrocity crimes: legal powers and effects

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THE ROLE OF THE UNITED NATIONS GENERAL ASSEMBLY IN ADVANCING ACCOUNTABILITY FOR ATROCITY CRIMES: LEGAL POWERS AND EFFECTS

Michael Ramsden

THE ROLE OF THE UNITED NATIONS GENERAL ASSEMBLY IN ADVANCING ACCOUNTABILITY FOR ATROCITY CRIMES: LEGAL POWERS AND EFFECTS

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Michael Ramsden
Hong Kong, September 2021

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LIST OF ABBREVIATIONS

African Union	AU
American Convention on Human Rights	ACHR
Articles on the Responsibility of States for Internationally Wrongful Acts	ARSIWA
Control Council Law 10	CCL10
Democratic People's Republic of Korea	DPRK
Democratic Republic of the Congo	DRC
European Court of Human Rights	ECtHR
European Union	EU
Extraordinary Chambers in the Courts of Cambodia	ECCC
Inter-American Convention on Forced Disappearance of Persons	IACFDR
Inter-American Court of Human Rights	IACtHR
International Committee of the Red Cross	ICRC
International Court of Justice	ICJ
International Criminal Court	ICC
International Criminal Tribunal for the former Yugoslavia	ICTY
International Criminal Tribunal for Rwanda	ICTR
International, Impartial and Independent Mechanism for Syria	IIIM-Syria
International Law Commission	ILC
International Whaling Commission	IWC
Islamic State of Iraq and Syria	ISIS
Malaysia Airlines Flight 17	MH17
People's Republic of China	PRC
Rome Statute of the International Criminal Court	ICC Statute
Special Court for Sierra Leone	SCSL
Special Tribunal for Lebanon	STL
United Kingdom	UK
Union of Soviet Socialist Republics	USSR
United States	US
Universal Declaration of Human Rights	UDHR
United Nations	UN
United Nations Administrative Tribunal	UNAT
United Nations Human Rights Council	UNHRC
Vienna Convention on the Law of Treaties	VCLT
World Health Organisation	WHO

CHAPTER 1: INTRODUCTION

1. Introduction to the Research

The rise of 'international justice', a field broadly concerned with the imperative of securing accountability for atrocity crimes, has led to much reflection on the role of international institutions in addressing impunity gaps.[1] This literature – now considerable - has included not only international criminal tribunals tasked with interpreting and applying the laws of individual criminal responsibility, but also other courts – including the International Court of Justice (ICJ) and regional human rights mechanisms – in adjudicating upon the responsibility of States in atrocity situations. [2] Similarly, there have also been studies on the impact of political institutions in advancing accountability for atrocities, with scholarship on the United Nations (UN) Security Council's contribution being particularly voluminous.[3] By contrast, at least until recently, there has been little attempt to comprehensively identify, classify and evaluate the contribution of the UN General Assembly (Assembly) to the field of international justice.[4] The Assembly is not only a principal organ of the UN, but also its most representative, comprising the entire UN membership.[5] As Inis Claude once noted, the Assembly provides the most prominent multilateral forum for States to articulate response priorities, mobilise opinion and express its disapprobation.[6] Writing in 1966, Claude noted that the exercise of this 'collective legitimization' function 'is and probably will continue to be, a highly significant part of the

[1] See generally Naomi Roht-Arriaza, 'Institutions of International Justice' (1999) 52(2) J Intl Aff 473, 476; Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law* (OUP 1997); David Wippman, 'The costs of international justice' (2006) 100(4) AJIL 861; Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28(3) Intl Security 5, 5; UNCHR, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, 5 (noting that UN Member States undertook to take 'joint and separate action' to ensure respect for human rights).

[2] See eg Milena Sterio and Michael Scharf (eds), *The Legacy of Ad Hoc Tribunals in International Criminal Law* (CUP 2019); Cenap Çakmak *A Brief History of International Criminal Law and International Criminal Court*: *Historical Evolution of International Criminal Law* (Palgrave 2017); Charles Jalloh, *The Sierra Leone Special Court and its legacy: The impact for Africa and International Criminal Law* (CUP 2014); Claus Kreß, 'The International Court of Justice and the Elements of the Crime of Genocide' (2007) 18(4) EJIL 619; Judith Gardam, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2001) 14(2) LJIL 349; Barbara Yarnold, *International Fugitives: A New Role for the International Court of Justice* (Praeger 1991).

[3] See eg Vincent-Joël Proulx, 'A Postmortem for International Criminal Law? Terrorism, Law and Politics, and the Reaffirmation of State Sovereignty' (2020) 11 Harvard Nat Sec J 151; Jennifer Trahan, 'Revisiting the Role of the Security Council Concerning the International Criminal Court's Crime of Aggression' (2019) 17(3) JICJ 471; David Forsythe, 'The UN Security Council and Response to Atrocities: International Criminal Law and the P-5' (2012) 34 HRQ 840; Marco Roscini, 'The United Nations Security Council and the Enforcement of International Humanitarian Law' (2010) 43 Israel LR 330; Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court' (2002) 78(4) Intl Aff 693; Michael Plachta, 'The Lockerbie Case: the role of the Security Council in enforcing the principle *aut dedere aut judicare*' (2001) 12(1) EJIL 125; Stephen Schwebel, 'The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law' (1995) 27 NYU J Intl Law & Pol 731.

[4] As to discrete studies, see Michael Ramsden, 'The Crime of Genocide in General Assembly Resolutions: Legal Foundations and Effects' (2021) HRL Rev; Rebecca Barber, 'Accountability for Crimes against the Rohingya: Possibilities for the General Assembly where the Security Council Fails' (2019) 17(3) JICJ 557; Alex Whiting, 'An Investigation Mechanism for Syria: The General Assembly Steps into the Breach' (2017) 15(2) *JICJ* 231; Michael Ramsden and Tom Hamilton, 'Uniting against Impunity: The UN General Assembly as a Catalyst for Action at the ICC' (2017) 66 ICLQ 893; Michael Ramsden, 'Uniting for MH17' (2017) 7(2) Asian J Intl L 337.

[5] Being 193 Member States as of 2020, plus two non-member observer states (Holy See and Palestine).

[6] Inis Claude, 'Collective Legitimization as a Political Function of the United Nations' (1966) 20(3) Intl Org 367.

political role of the United Nations'.[7] This political function aside, there has also been considerable debate over the extent to which the Assembly is able to exercise legal powers, or adopt resolutions that otherwise produce legal effects, that go beyond the recommendatory functions envisaged for this body in the UN Charter.[8]

Rooted in this debate, the following study aims to comprehensively examine the foundations and effects of Assembly power as it has developed to address the particular imperative of accountability for atrocity crimes. Assembly 'power', in this regard, is evaluated according to five functions: (1) 'quasi-legislative'; (2) 'quasi-judicial'; (3) 'empowering'; (4) 'recommendatory'; and (5) 'sanctioning'. In turn, this study poses two major questions. First, what is the scope of the Assembly's legal powers? Second, to what extent has the Assembly's exercise of these functions had an 'effect' in advancing accountability for mass atrocity? In addressing these questions, this study not only intends to identify the extent of the Assembly's legal competence but to also inspire more ambitious thinking regarding the possible role that it might play in responding to atrocity situations through the explication of these five functions.

2. Exercise of General Assembly Functions in Advancing Accountability for Atrocity Crimes: Literature Overview

There has been varying degrees of scholarly analysis on the Assembly's five functions outlined above, either as part of an abstract legal analysis or thematically in relation to their specific applications in an area of international affairs. This section will consider the most important scholarly contributions to the debate on the nature and scope of these functions, while also explaining the gap that exists in the literature in evaluating the application of these functions in the field of international justice.

2.1 'Quasi-Legislative'

Neither the text of the UN Charter or its drafting history provides a 'legislative' competence for the Assembly in international law, in the sense of it being able to enact law that binds States.[9] This does not mean, however, that no standard-setting role was envisaged for the Assembly. Article 13 of the UN Charter empowers the Assembly to 'initiate studies and make recommendations' for the purpose of, amongst other things, 'encouraging the progressive development of international law and its codification'.[10] While a role for the Assembly in promoting legal codification is therefore recognised, it is also apparent from practice, as this study will show, that Assembly resolutions have contributed towards the development of international law. There is now established institutional lexicon to signal that a 'recommendation', as formally defined, is, in fact, performing a function of identifying existing international law. As Chapter 2 makes clear, resolutions of this nature are often phrased as 'declarations' or use other language to denote a general recognition as to the existence of international law (such as 'affirmation'). The Assembly, for its part, has also accepted that the

[7] ibid 370.

[8] For general analysis, see Eckart Klein and Stefanie Schmahl, 'Ch. IV The General Assembly, Functions and Powers' in Bruno Simma and others (eds), *The Charter of the United Nations*, vol 1 (OUP 2012); Michael Schmidt, 'UN General Assembly' in Alex Bellamy and Tim Dunner, *Oxford Handbook on the Responsibility to Protect* (OUP 2016); Nigel White, 'Relationship between the Security Council and General Assembly' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015).

[9] See eg 9 UNCIO Docs 316 (1945) (Philippine delegation to vest legislative power in the Assembly rejected 26-1).

[10] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS 16 ('UN Charter'), art 13.

'development of international law may be reflected' in its 'declarations and resolutions'.[11] However, asserting that international law is identified in a resolution is one thing. Whether the resolution has an impact on international actors applying international law is another.

In this regard, the notion that Assembly resolutions are capable of having 'quasi-legislative' effects, as Richard Falk noted in 1966, represents a middle position between a formal recognition of true legislative status and the formal denial of any law-creating role.[12] On the one hand (as noted above), it is clear that a proposal to confer upon the Assembly a power to legislate was rejected by the drafters of the UN Charter. Yet, on the other hand, the nature of the Assembly, as a forum comprising a near universal membership of States, provides scope for a shared legal position to be articulated by the international community. In turn, to treat a subset of Assembly resolutions as 'quasi-legislative' invites analysis on the extent to which they acquire 'normative status in international life', in supporting the interpretive legal claims of States, courts or other actors.[13] In this regard, Falk noted that the formal description of resolutions as 'non-binding' does not properly encapsulate their influence; some international courts, even at the time of his writing in 1966, displayed a tendency to use non-binding instruments in the construction of international law.[14] As to what would make an Assembly resolution more or less persuasive from a quasi-legislative perspective, Falk noted a number of contextual factors, including the use of 'declaratory language' together with 'the expectations governing the extent of permissible behaviour, the extent and quality of the consensus, and the degree to which effective power is mobilized to implement the claims posited in a resolution.'[15] Falk also noted that the degree of authoritativeness that the process of law-creating by Assembly action comes to enjoy depends upon the extent to which particular resolutions 'influence behaviour and gain notoriety in legal circles' and come to be 'incorporated into the developing framework of an evolving system and science of international law.'[16] Accordingly, to Falk, the limits upon the Assembly's quasi-legislative competence are less a reflection of the absence of a formal competence to legislate as they are a consequence of certain political constraints arising from the general requirement to mobilise effective community power in support of legislative claims.[17]

There has been some attempt to measure, as Falk envisaged as necessary, the extent to which communities have mobilised the legislative claims contained in resolutions. Hurst Hannum thus conducted a comprehensive jurisprudential survey of the varied ways in which domestic courts have applied the Assembly's 1948 Universal Declaration of Human Rights (UDHR), noting the instances in which it has been found to constitute or reflect customary international law.[18] The impact of the Assembly's 1974 Definition on Aggression has also been studied, particularly from the perspective of its incorporation into the decision-making of the

[11] ibid. See also UNGA Res 3232 (XXIX) (1974) ('Recognizing that the development of international law may be reflected, inter alia, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice').
[12] Richard Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60(4) AJIL 782.
[13] ibid 784.
[14] ibid 783.
[15] ibid 786.
[16] ibid.
[17] ibid 788.
[18] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 Ga J Intl & Comp L 287; UNGA Res 217 A (III) (1948). See also Krzysztof Skubiszewski, 'Recommendations of the United Nations and Municipal Courts' (1972-1973) (46) BYBIL 353; Egon Schwelb, 'An instance of enforcing the Universal Declaration of Human Rights, action by the Security Council' (1973) 22 ICLQ 161.

Security Council.[19] However, it is equally clear that there is a need for greater scholarly focus on the use of resolutions by legal communities in supporting the development of international law in the field of international justice. In particular, there has been no systematic attempt, so far, to trace the impact of Assembly resolutions on the functioning of courts where concerned with questions of responsibility for atrocity crimes. Given the growing judicial architecture to enforce international justice, including the International Criminal Court (ICC) and *ad hoc* tribunals, as well as regional human rights mechanisms, this dissertation aims to fill this research gap.

To be sure, the evidentiary value of Assembly resolutions to the development of international law (particularly customary international law) has been extensively considered, revealing a range of opinions.[20] Stephen Schwebel once doubted, for instance, that States mean what they say when voting in support of resolutions that purport to declare norms.[21] By contrast, at the other end of the spectrum, Bin Cheng argued that in areas of international legal vacuums an Assembly resolution is able to constitute 'instant custom' in authoritatively explicating the *opinio juris* of the new rule of customary international law.[22] A more moderate position was offered by Samuel Bleicher, who saw merit in Assembly resolutions declaring international law provided that there is persistent recitation of the norm in a series of resolutions.[23] This debate is deserving of fresh consideration both in light of the jurisprudential survey conducted in this dissertation as well as the recent conclusion of the ILC's major study into the processes of identifying customary international law, which includes analysis on the normative weight of Assembly resolutions.[24]

2.2 'Quasi-Judicial'

Although the ICJ is recognised in the UN Charter to be the 'principal judicial organ' of the Organisation with dispute-adjudicative competencies, a role is also envisaged in the Charter for the Assembly to perform some adjudicatory elements.[25] There are numerous provisions in the UN Charter that plainly involve the Assembly in making 'decisions', which, although limited to internal operational matters, might also have a bearing on a wider dispute. For example, whether the Assembly is to accept the credentials of a delegation seeking to represent a Member State might involve an adjudication as to the merits of this delegation according to a legal standard, especially where there are competing claims (of which, see Chapter 4).[26] Yet, even where the Assembly is confined to its recommendatory function, an evaluative judgment as to an underlying dispute will often be necessary for this function to be meaningfully exercised. Under Chapter IV of the UN Charter, the Assembly is to furnish recommendations to Member States or the Security Council as a means to secure the 'peaceful adjustment of any situation',[27]

[19] See eg Nicholaos Strapatsas, 'The Practice of the Security Council Regarding the Concept of Aggression' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2017); UNGA Res 3314 (XXIX) (1974), annex.
[20] See further Chapter 3.
[21] Stephen Schwebel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' (1979) 73 ASIL Proc 301, 308
[22] Bin Cheng, *Studies in International Space Law* (Clarendon 1998), 139-141.
[23] Samuel Bleicher, 'The Legal Significance of Re-Citation of General Assembly Resolutions' (1969) 63 AJIL 444.
[24] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) UN Doc A/73/10.
[25] UN Charter, chapter XIV.
[26] ibid arts 4(2), 6 and 17.
[27] ibid art 14.

or to provide a response to situations that 'endanger international peace and security',[28] and which it 'deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations'.[29] The exercise of these Charter powers thus entails what is described here as involving a 'quasi-judicial' element, in monitoring compliance with a set of norms or making evidence-based factual determinations as a precursor to the Assembly exercising its decisional or recommendatory competencies.[30]

The nature and extent of the Assembly's quasi-judicial function has received some scholarly attention over the years. The earliest, most significant, contribution was provided by Oscar Schachter in 1964 who, in surveying UN practice in the first two decades of its creation, observed there to be some perceptible trends even if such resolutions were 'few in number' at that time (concerned, at that point, with the use of force, decolonisation and racial discrimination).[31] Indeed, this scholarly contribution pre-dates many of the significant advancements in quasi-judicial practice, particularly from the 1970s onwards, that are described in detail in this dissertation. Nonetheless, Schachter did raise a number of points both as to the legal basis for this quasi-judicial function which remains pertinent to any study into the Assembly's exercise of this function. In particular, Schachter raised as problematic the Assembly, as a political organ, passing judgment on State conduct without observing judicial standards of impartiality; the concern here was that the Assembly, as a political organ, produces an environment in which States vote in their self-interest and along partisan lines, which might deprive any determination of the impartial application of a legal standard that is found in judicial processes.[32] Nonetheless, Schachter considered that partisanship would not be the sole determinant of a quasi-judicial resolution; Member States, acting through a multilateral organ, cannot act solely on the basis of their national interest but will be shaped by a common interest and within the bounds of legal norms that will in turn mitigate bias.[33] Schachter also hypothesised that the Assembly's quasi-judicial resolutions are bound to exert meaningful pressure on relevant actors to comply or implement with what was recommended, as evaluations by the Assembly possess a 'degree of authority that generates pressures' towards observance.[34] He also observed the possibility for quasi-judicial resolutions to contribute towards the development of international law; the application of law to a situation is a 'law-creative act, even though the members of the organ maintain (as they often do) that their decision is confined to the specific facts and they do not intend to establish a precedent.'[35]

Since then, numerous scholars have examined the nature of the Assembly's quasi-judicial function, both as to the conditions for them being treated as authoritative and their impact from different vantage points. One important analysis was provided by Christian Tomuschat when examining the Assembly's role in monitoring compliance with international human rights law.[36] Tomuschat acknowledged that political bodies such as the Assembly have

[28] ibid art 11(3).
[29] ibid art 14.
[30] Mara Tignino, 'Quasi-judicial bodies' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Elgar 2016), 242.
[31] Oscar Schachter, 'The Quasi-Judicial Role of the Security Council and the General Assembly' (1964) 58 AJIL 960, 961. See also the earlier contribution of Blaine Sloan, 'The Binding Force of a Recommendation of the General Assembly of the United Nations' (1948) 25 Brit YB Int'l L 1, 28 ('Those resolutions of the General Assembly which are declaratory of international law may be expected to play an important role in judicial and diplomatic proceedings. They would possess considerable persuasive or evidential value in determining existing law, both as restatements of established rules and indications of trends in development.')
[32] ibid 962.
[33] ibid.
[34] ibid 963.
[35] ibid 964.
[36] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2014), 184.

'great difficulties satisfying the requirement to act in a fair and objective manner', but also saw the advantage in collective State involvement as carrying 'more weight than assessments by expert bodies'.[37] While considering Assembly resolutions to be 'no panacea to cure all conceivable ills', Tomuschat noted their 'moral weight' to be considerable; no State 'likes being blamed by the world community for failure to heed generally recognized international standards'.[38] At the same time, according to Tomuschat, the most intensive forms of disapproval of a State's conduct do not free the Assembly 'from the constraints of its competencies'.[39] Continuing the theme that a determination contained in an Assembly recommendation does not carry legal effects, Marko Öberg surveyed the use of quasi-judicial resolutions in the jurisprudence of the ICJ, noting a general acceptance of these instruments in establishing a persuasive narrative of events, but also cautioning that the Court with its 'judicial nature and its careful approach to establishing facts, should not be bound by such determinations'.[40] By contrast, a broader view was taken by Nigel White, who observed that resolutions adopted by consensus or large majorities, and which are clearly based upon international law, are likely to be accepted as 'authoritative' legal determinations.[41] Building upon this proposition, Rebecca Barber also considered the basis for the Assembly to, hypothetically, certify that the legal conditions exist for States, invoking the necessity doctrine, to intervene in another State in order to provide humanitarian assistance to a civilian population.[42] Barber here surveyed a range of Assembly quasi-judicial practice to support the proposition that the Assembly could act robustly in the Syria situation and express on behalf of the international community that the civilian population has an essential interest that faces grave and imminent peril.[43]

The present dissertation seeks to build upon the literature by considering the quasi-judicial function of the Assembly specifically as a means to advance accountability in atrocity situations. As the above literature overview shows, there has been no comprehensive survey on the Assembly's application of international law pertaining to atrocity situationss, comprising the core international crimes (genocide, war crimes, crimes against humanity and aggression) and serious human rights violations; the following dissertation aims to fill this gap. At the same time, it seeks to grapple with two of the important general themes identified in the existing literature; in particular, the general appropriateness of the Assembly engaging in this quasi-judicial function and some of the observable effects of these resolutions. This dissertation considers these issues in the context of international justice and the impact of quasi-judicial resolutions on the activity of the main instituional actors in the field: in particular, the ICC, ICJ, the UN *ad hoc* tribunals, regional human rights mechanisms, and the UN's other principal political organ, the Security Council.[44] Given the important role of courts in enforcing international justice, be that in imposing individual or State responsibulity in atrocity situations, it is therefore interesting to examine the extent to which the Assembly's resolutions have been invoked in a manner that supports the effective exercise of their judicial function.

2.3 'Recommendatory'

[37] ibid.
[38] ibid 198.
[39] ibid 198
[40] Marko Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16 EJIL 879, 892
[41] Nigel White, *The Law of International Organisations* (MUP 2005), 179.
[42] Rebecca Barber, 'How Necessary is Security Council Authorisation for Humanitarian Assistance, in the Absence of Consent by the Host State?' (2021 forthcoming).
[43] ibid.
[44] Michael Ramsden, '"Uniting for Peace" in the Age of International Justice' (2016) 42 Yale J Intl L 1.

Under a trio of provisions in the UN Charter, the Assembly has powers to make 'recommendations' to Member States and the Security Council in relation to matters that fall within the broad ambit of the Organisation. Article 10 of the UN Charter specifically grants power to the Assembly to discuss any matters falling within the ambit of the Charter or 'relating to the powers or functions of any organs provided for' in the Charter, and to make recommendations on such matters to Member States or the Security Council, or both.[45] Article 11 provides greater elaboration on the Assembly's powers in the field of international peace and security. Article 11(2) thus provides that the Assembly may discuss 'any question relating to the maintenance of international peace and security' brought to it by a State or the Security Council and 'may make recommendations with regard to any such questions to the State or States concerned or to the Security Council or to both'. Article 11(3) adds further emphasis to the power of the Assembly to furnish recommendations to the Security Council pertaining 'to situations which are likely to endanger international peace and security'. Finally, Article 14 allows the Assembly to recommend measures 'for the peaceful adjustment of any situation' in which it 'deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.'

Whether an Assembly 'recommendation', specifically to Member States, carries any legal obligation to comply was most prominently analysed by Blaine Sloan in 1948.[46] Sloan rejected the proposition that the normal meaning of 'recommendation' necessarily means that the Assembly was precluded from binding the membership. Sloan argued that 'no single conclusion' can be made on the legal nature of 'recommendations', either based on the text of the UN Charter or the drafting history.[47] Aside from those instances in which the Assembly is authorised to make binding decisions in relation to internal operational matters under the UN Charter, Sloan noted that recommendations might come to bind Member States, particularly by way of an institutional customary rule that recognises such effect.[48] In this regard, Sloan recognised the dual role of the Assembly, as a body with its own legal personality under the UN Charter but also as a congress of individual nations which has 'inherent powers which need not derive from a specific enumeration in the Charter'.[49] Sloan here recognises the role of the membership in developing Assembly powers, by attributing to this body authoritative competencies through institutitonal practice, 'where the intention is to be so bound'.[50] Although Sloan noted that the Assembly has used a variety of phrases in which to convey a legal expectation that a recommendation will be complied with (from 'invites' to 'request'), he also noted that it was necessary to 'approach the realm of *de lege ferenda*' to consider the possibilities for an institutional custom to emerge.[51] Sloan envisaged a possible role for the Assembly in areas that are lacking sufficient international oversight but in which Member States have international obligations; it thus 'might be argued that the protection of human rights falls

[45] See further Klein (n 8), 463.
[46] Sloan, 'Binding Force' (n 31).
[47] ibid, 7 (as Sloan noted in relation to the Philippines proposal to confer upon the Assembly a legislative competence, the 'enacting of legislation is not the only way in which binding decisions are made').
[48] ibid, 15, 19 Sloan also pointed to the possibility that Assembly recommendations become binding via special agreement, where Member States agree in advance to be bound by Assembly recommendations; here the legal effect is not derived from the recommendation but rather from the binding force attributed to it in the special agreement: ibid, 16. See also Louis Sohn, 'The Second Year of United Nations Legislation' (1948) ABAJ 315 ('States can, therefore, agree in advance to be bound by Assembly recommendations; and with respect to States parties to such an agreement, such recommendations will be as effective as if they were laws enacted by an international legislature with powers similar to a national legislative body.')
[49] ibid, 22.
[50] ibid, 22.
[51] ibid, 23.

or will be brought into a sphere of action where binding resolutions may be made'.[52] In such areas, the Assembly, as an agent of the international community, 'may assert the right to enter the legal vacuum and take a binding decision'.[53]

Despite Sloan paving the way for scholarship that assesses the relevance of Assembly practice in the development of a more muscular form of binding recommendation in discrete areas of international law, there has been little scholarly attempt to assess the extent to which any such custom has emerged. The conventional wisdom is often cited in scholarship, to the effect that recommendations are not legally binding.[54] It might be said that this scholarship is merely following the practice, or lack thereof, which has not developed along the lines that Sloan anticipated might happen when penning his article in 1948.[55] Nonetheless, it is instructive to consider whether there has been any attempt by the Assembly to instil in its recommendations a legal impetus for compliance. Even if this has not fully emerged, existing practice might, in this regard, provide a foundation for future arguments to the effect that an institutional custom might crystallise a norm that treats recommendations as binding in the field of international justice. In turn, through a detailed consideration of recommendations practice, the present study will test Sloan's hypothesis that Member States could, through the accretion of an institutional custom, attribute to Assembly recommendations a binding character in specific fields of international law (here, accountability for atrocity crimes). As noted, Sloan anticipated that this role might arise from the Assembly due to a legal enforcement vacuum. Although the mechanisms to enforce and monitor compliance with international justice have advanced considerably in the ensuing decades, a major criticism still remains that there is a lack of sustained institutional leadership in holding States to their international obligations.[56] The extent to which the Assembly has stepped into the breach, to call upon Member States to meet its obligations in relation to the prosecution of atrocity crimes, and done so by injecting into its recommendations a legal impetus that requires compliance, therefore justifies attention.

Aside from debate over the binding force of Assembly recommendations, there is also scholarship that has sought to account for the extra-legal effects of these instruments on State behaviour. Again, Sloan argued that 'recommendations possess moral force and should, as such, exert great influence'.[57] This was so because the Assembly 'represents the will of the majority of nations', with this body enjoying 'an advantage because of the opportunity, which is not always available in the sphere of international law, for full publicity and for a recorded vote'.[58] That Assembly recommendations are not legally binding, on this understanding, is therefore considered to be of no detriment to these instruments influencing State behaviour, having a 'moral and political motivating force which makes it more effective than many a legal norm'.[59] DHN Johnson preferred to characterise recommendations as carrying some 'political effect', in that Member States who do not observe them 'run the risk of losing the political friendship and

[52] ibid 24.
[53] ibid 24. See a narrower view in Hans Kelsen, *The Law of the United Nations* (Stevens 1950), 40, 195-196 (suggesting that Assembly recommendations, where taken in relation to a subject of international peace and security, can be classed as binding; by contrast those concerned with economic and social cooperation, including human rights, have 'no legal effect whatsoever').
[54] Blaine Sloan, *United Nations General Assembly Resolutions in Our Changing World* (Brill 1992), 5 (criticising this misconception).
[55] Similarly, this scholarship has tended to focus on the legal significance of Assembly practice as it has been analysed by the ICJ. See eg Öberg (n 40); DHN Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1955-1956) 32 BYBIL 97.
[56] See in particular the criticisms of Security Council leadership in n 3 above.
[57] Sloan, 'Binding Force' (n 31), 31.
[58] ibid.
[59] Alf Ross, *Constitution of the United Nations: Analysis of Structure and Functions* (Einehart 1950), 60-61.

understanding of their fellow Members who voted for the resolution'.[60] However, these extra-legal effects have been largely assumed without proof. For instance, Gabriella Lande noted there to be 'little doubt' that Member States give 'some attention' to Assembly resolutions given the bargaining that often occurs prior to their adoption.[61] Similarly, other scholars have pointed generally to the factors that might indicate the degree to which recommendations are capable of producing political effects, looking to the 'quality, quantity and intensity of community support behind them'.[62] Accordingly, this dissertation will embrace this literature on effects when examining Assembly's recommendations practice in the field of international justice, an area that remains yet to be analysed in the scholarly literature.

2.4 'Empowering'

Aside from the Assembly being able to act quasi-judicially it is also able to empower judicial or subsidiary entities for an adjudicatory or fact-finding purpose. This empowering function is enshrined in the UN Charter and also, as this dissertation explores, in Assembly practice. Dealing with the textual basis in the Charter, Article 22 empowers the Assembly to 'establish such subsidiary organs as it deems necessary for the performance of its functions'. As Chapter 6 of this dissertation shows, this provision has been interpreted broadly where it has arisen in cases before the ICJ, it being left to the 'Assembly to appreciate the need for any particular organ', with it being contrary to the Charter 'to place a restrictive interpretation' on this power.[63] In addition to being able to establish subsidiary organs that contribute towards the discharge of the Assembly's broad functions, Article 96(1) also envisages a role for the Assembly in requesting an advisory opinion from the ICJ on 'any legal question', which in turn opens up the possibility for Assembly-ICJ dialogue on an atrocity crimes situation.

The extent to which the Assembly has used, and is capable of using, these provisions as a means to advance accountability for atrocity crimes has been considered in the scholarly literature. This has broadly tracked and critiqued Assembly 'empowering' practice but also involved imaginative proposals for how this power might be extended and applied in the future. The Assembly's creation of the International, Impartial and Independent Mechanism for Syria ('IIIM-Syria') in 2016 led numerous scholars to legally justify this mechanism in light of the significant resistance to them by a minority of States in the explanation of vote.[64] The Assembly's power to request advisory opinions has also been analysed in the scholarship, both as to the limits on this power and the propriety of the ICJ so entertaining such requests.[65]

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[60] Johnson (n 55), 121. See also Clyde Eagleton, *International Government* (Ronald Press 1948), 322 (Assembly resolutions carry 'great weight, and desperate parliamentary battles may be fought to avoid unfavourable conclusions').

[61] See eg Gabriella Lande, 'The Effect of the Resolutions of the United Nations General Assembly' (1966) 19(1) World Politics 83, 100 ('little doubt' that Member States give 'some attention' to Assembly resolutions given the bargaining that often occurs prior to their adoption).

[62] Daniel Cheever and Field Haviland, *Organizing for Peace: International Organization in World Affairs* (Hughton Mifflin 1954), 89.

[63] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 66, 172.

[64] Whiting (n 4); Christian Wenaweser and James Cockayne, 'Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice' (2017) 15(2) JICJ 211; Beth van Schaack, 'The General Assembly and Accountability for International Crimes' (*Just Security*, 27 February 2017) <https://www.justsecurity.org/38145/general-assembly-accountability-international-crimes/>. See also Andrew Hudson and Alexandra Taylor, 'A New Model for International Criminal Justice Mechanisms' (2010) 8 JICJ 53.

[65] Martin Lailach, 'The General Assembly's Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1995) 8 LJIL 401; Michla Pomerance, 'The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial' (2005) 99(1) AJIL 26;

Scholars have, in turn, argued for greater use of the advisory mechanism in atrocity situations, be that as a means to clarify the Security Council's responsibilities under the UN Charter, or to offer some judicial scrutiny on the occurrence of crimes and serious human rights violations in country situations.[66] Finally, there has been more imaginative scholarship, in considering the possibility for the Assembly to establish *ad hoc* criminal tribunals in instances where there are no other ways in which to secure accountability for a situation.[67] Rebecca Barber presented this creative solution as a means to secure accountability for crimes against the Rohingya.[68] According to Barber, the Assembly would be able to establish an *ad hoc* tribunal based upon its established practice in creating subsidiary mechanisms in advancing the Charter purpose of maintaining international peace and security.[69]

While these are important perspectives on the powers of the Assembly to empower investigations into atrocity situations, there is also a need for further analysis on the nature and extent of these powers. It is now relatively uncontroversial to conclude that the Assembly can create commissions of inquiry. However, the recent innovation of subsidiary organs being vested with 'quasi-prosecutorial' powers, in preparing cases so as to support the investigation and prosecution of individual suspects at an international or domestic level, deserves more scholarly analysis. Similarly, while it appears to be conventional wisdom that there is no duty to cooperate with Assembly-established commissions of inquiry, this proposition is worth closer scrutiny, particularly in light of Assembly practice, the text of resolutions and the views of Member States on this issue. This might in turn reveal less uniformity on this proposition than was originally thought and the possibility for a cooperation duty to emerge in the future. In relation to the Assembly's use of its power to request an advisory opinion, this scholarship has tended to focus on the propriety of individual requests; it is instructive to take a more holistic approach in relation to the potential of this mechanism as a means to address gaps in the judicial accountability of atrocity crimes. Finally, beyond Barber's focus on established practice as a foundation for the Assembly to create an *ad hoc* tribunal, there are other potential legal bases that warrant closer attention. One possibility, in this regard, was alluded to in the commission of inquiry report concerning alleged crimes against humanity in the Democratic People's Republic of Korea (DPRK).[70] This report alluded to the possibility that the Assembly could establish an *ad hoc* tribunal, particularly where the Security Council has failed to do so, using the Uniting for Peace mechanism, or the 'combined sovereign powers' of Members States to assert universal jurisdiction.[71] These claims will be considered in greater depth in Chapter 6.

2.5 'Sanctioning'

Andrea Bianchi, 'Dismantling the Wall: The ICJ's Advisory Opinion and Its Likely Impact on International Law' (2004) 47 GYIL 343; Karin Oellers-Frahm, 'Law-making through Advisory Opinions?' (2011) 12(5) German LJ 1033.

[66] Jennifer Trahan, *Existing Legal Limits to Veto Powers in the Face of Atrocity Crimes* (CUP 2020), 254-255; James Goldston, 'We Need an ICJ Ruling on Syria' (*Open Democracy*, 27 June 2015) <https://www.opendemocracy.net/en/north-africa-west-asia/we-need-icj-ruling-on-syria/> (discussing the possibility of an Assembly request for an ICJ advisory opinion on Syria).

[67] The potential for the Assembly to exercise a ICC referral power has also been analysed: Ramsden and Hamilton (n 4).

[68] Barber, 'Accountability' (n 4). See also, in the context of accountability options for the MH17 airline disaster: Michael Ramsden, 'Uniting for MH17' (n 4).

[69] ibid.

[70] UNHRC, 'Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea' (7 February 2014) UN Doc **A/HRC/25/CRP.1**.

[71] ibid, [1201].

Although the UN Charter envisages a role for the Security Council in sanctioning States for their deviant conduct, it is also apparent that the Assembly is able to perform a limited sanctioning function. To be sure, Article 41 of the UN Charter provides the most direct reference to a sanctioning power, in empowering the Security Council to decide upon appropriate non-forceful measures Member States ought to take to address threats to international peace and security, including the 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.[72] Yet, the Assembly might also sanction a Member State in a limited sense of contributing towards a decision that deprives such Member of some or all of its rights of membership. Article 5 of the Charter provides that where the Security Council has taken 'preventive or enforcement action' against a Member State, the Assembly might, 'upon the recommendation of the Security Council', suspend that State 'from the rights and privileges of membership'. Furthermore, Article 6 provides that, 'upon the recommendation of the Security Council', the Assembly can expel a Member State that has 'persistently violated' the principles of the Charter. Although the Assembly is unable to exercise these powers independent of a Security Council recommendation, it might autonomously make a decision concerning the credentials of those delegates seeking to represent Member States.

The extent to which the Assembly is able to sanction a Member State has attracted some attention in the scholarly literature. This scholarship has fallen into three main clusters. The first has been to evaluate the power and practice of the Assembly to deprive an offending State of its UN membership rights, be that under Article 6 or in considering the credentials of a government that purports to represent a State in the Assembly.[73] Another cluster of scholarship has analysed the possibility for the Assembly to contribute towards the lawful imposition of economic sanctions against States that have violated their international obligations.[74] Stefan Talmon considered the possible 'authorising' function of Assembly resolutions and their interaction with numerous doctrines of State responsibility, including countermeasures and 'fundamental change of circumstances'.[75] Finally, scholars have also considered the use of the Uniting for Peace resolution as a means to confer upon the Assembly analogous enforcement powers to those of the Security Council, including to legally authorise sanctions.[76] This has also considered the constitutionality of this mechanism, in purporting to confer upon the Assembly powers that are not so obviously contemplated in the UN Charter, be that in acting where the Security Council is doing so, or in assuming powers comparable to those found in Chapter VII

[72] However, art 41 is not solely confined to sanctioning violations of international law but more broadly is concerned with the maintenance of international peace and security. For a detailed analysis on this provision, see Nico Krisch, 'Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 41' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol II (3rd edn, OUP 2012), 1310.

[73] See eg Farrokh Jhabvala, 'The Credentials Approach to Representation Questions in the U.N. General Assembly' (1977) 7 Cal W Intl LJ 615; Gerhard Erasmus, 'Rejection of Credentials: A Proper Exercise of General Assembly Powers or Suspension by Stealth?' (1981) 7 South African J Intl L 40; Raymond Suttner, 'Has South Africa been Illegally Excluded from the United Nations General Assembly?' (1984) 17 CILSA 279; Malvina Halberstam, 'Excluding Israel from the General Assembly by a Rejection of its Credentials' (1984) 78 AJIL 179, 186-7; Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (CUP 2011).

[74] John Halderman, 'Some Legal Aspects of Sanctions in the Rhodesian Case' (1968) 17(3) ICLQ 672.

[75] Stefan Talmon, 'The Legalizing and Legitimizing Function of UN General Assembly Resolutions' (2014) 108 AJIL Unbound 123.

[76] Andrew Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18(3) JCSL 453; Rebecca Barber, 'Uniting for Peace not Aggression: Responding to Chemical Weapons in Syria Without Breaking the Law' (2019) 24(1) JCSL 71; Christian Tomuschat, 'Uniting for Peace' UN Audiovisual Lib Intl L 3 (2008) <http://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf>.

(including Article 41 above).[77] Given that the use of the Uniting for Peace mechanism has declined considerably, more recent scholarship has also sought to consider whether it still continues to serve a useful purpose as a basis for Assembly action.[78]

The following study complements the existing literature by comprehensively analysing the Assembly's use of the sanctions instrument and its potential in the field of international justice. Accordingly, this study aims to contribute to the literature in considering how the sanctions instrument might be used as a means to advance accountability for atrocity crimes. By contrast, it is apparent that much of the literature on the Assembly's sanctioning function have not been specifically focused on how it might be used as an instrument to advance accountability for atrocity crimes. For example, much of the scholarship on Uniting for Peace has been concerned with the scope for the Assembly to authorise the use of force including humanitarian intervention, rather than how this mechanism might support accountability efforts.[79] In considering the latent potential of the Assembly to perform a more prominent role in the field of international justice, it is therefore worthwhile to provide a comprehensive and holistic analysis of the potential for its resolutions to have legal effects that support collective sanctions against those responsible for atrocity crimes.

3. Research Goals and Approaches

As the above literature review indicates, there is a need for a comprehensive analysis of the Assembly's contribution in the field of international justice. This dissertation has three goals in view. Firstly, it seeks to identify the scope of the Assembly's legal powers, according to the five functions above (i.e., quasi-legislative, quasi-judicial, empowering, recommendatory, sanctioning). This exercise aims to enrich the general understanding of the Assembly's powers as a UN principal organ. A full explication of these institutional powers will also usefully serve to highlight the possibility for the Assembly to be used by States and other actors as part of a strategy to obtain accountability in an atrocity situation and, hopefully, to stimulate creative thinking on how the UN plenary body can be used to address impunity gaps. Secondly, the dissertation also seeks to provide a comprehensive survey of Assembly practice in the field of international justice, which includes the adoption of resolutions and decisions, as well as creation of subsidiary organs. By outlining this practice, the dissertation aims to highlight to the reader areas in which the Assembly has been active and to, conversely, identify areas where gaps or inconsistencies exist in responding to atrocity crimes. Thirdly, the dissertation aims to

[77] Juraj Andrassy, 'Uniting for Peace' (1956) 50 AJIL 563, 564; Hans Kelsen, 'Is the Acheson Plan Constitutional?' (1950) 3(4) Western Political Q 512, 516; Leland Goodrich, 'Expanding Role of the General Assembly: The Maintenance of International Peace and Security' (1951) 29 Intl Conciliation 231; LH Woolsey, 'The "Uniting for Peace" Resolution of the United Nations' (1951) 45(1) AJIL 129, 134.

[78] Larry Johnson 'Uniting for Peace: Does it Still Serve any Useful Purpose?' (2014) 108 AJIL Unbound 106; Jean Krasno and Mitushi Das, 'The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008); Harry Reicher, 'The Uniting for Peace Resolution on the Thirtieth Anniversary of its Passage' (1981) 10 Colum J Transnatl L 1, 36-7; Henry Richardson, 'Comment on Larry Johnson, Uniting for Peace' (2014) 108 AJIL Unbound 135; Ramsden, 'Age of International Justice' (n 44).

[79] Carswell (n 76); Dominik Zaum, 'The Security Council, The General Assembly, And War: The Uniting for Peace Resolution' in Vaughan Lowe and others (eds), United Nations *Security Council and War*: The Evolution of Thought and Practice Since 1945 (OUP 2008); Coman Kenny, 'Responsibility to Recommend: The Role of the UN General Assembly in the Maintenance of International Peace and Security' (2016) 3(1) J Use of Force Intl L 3; Barber, 'Uniting for Peace not Aggression' (n 76); Graham Melling and Anne Dennett, 'The Security Council Veto and Syria: Responding to Mass Atrocities through the "Uniting for Peace" Resolution' (2018) 57(3-4) IJIL 285; Michael Ramsden, 'Uniting for Peace and Humanitarian Intervention: The Authorising Function of the UN General Assembly' (2016) 25(2) Wash Intl LJ 267.

advance scholarly understanding on the 'effects' of Assembly resolutions, broadly conceived, using international justice as a case study in which to appreciate these effects.

In this respect, 'effects' will be measured in different ways in this dissertation, which will vary according to the Assembly function under study. The quasi-legislative effects of resolutions will thus turn partly upon an assessment of international jurisprudence to ascertain the extent to which these resolutions have contributed towards the judicial construction of the sources of international law at issue. Similarly, the effects arising from the Assembly's quasi-judicial function will also primarily focus on the extent to which courts have used such resolutions as a means to support their functions, although not exclusively so. As will be developed in Chapter 4, a derivative of quasi-judicial resolutions, particularly those that seek to apply norms to the conduct in country situations, is that it provides Member States with an opportunity to crystallise an interpretive understanding that might in turn contribute towards the development of international law: a quasi-judicial resolution can therefore also have quasi-legislative effects. Yet, while it is possible to appreciate the effects of quasi-legislative and quasi-judicial resolutions on the decision-making of courts, measuring the impact of Assembly's recommendations, be that to Member States or the Security Council, poses greater difficulty. The most direct form is that either of these subjects implement the recommendation; however, such causality is almost impossible to establish directly (these actors are often unlikely to attribute the decisions it makes to anything other than their own considered judgment). Equally problematic is that attempts to secure accountability for atrocity crimes often fail despite multilateral efforts, as some Member States have lamented.[80] Nonetheless, a recommendation might produce certain institutional effects which are worthy of analysis, be that, for example in leading to a stronger response from the Assembly, in mobilising shame against a deviant State, or in calling upon the Security Council to take action. It is instructive therefore to consider whether defiance of Assembly recommendations produced any further effects that contributed towards the crystallisation of a UN position, in shaping an international public attitude towards a situation, which in turn might have led to the eventual implementation of the recommended action in a country situation. Finally, there are effects that remain, at this point, largely hypothetical, as with Assembly resolutions that purport to authorise Member States to take action that would otherwise be inconsistent with international law (see Chapter 7).

In evaluating these various effects, it is also readily acknowledged that a medley of factors will affect the degree to which the Assembly is capable of having impact. The factors noted by Richard Falk in the previous section – including the nature and scale of support for a resolution – are amongst those that are likely to be relevant as to how a resolution is received and used in international life. But it must also be appreciated that there are a panoply of other political mechanisms in international justice that contribute towards efforts at securing accountability for atrocity crimes; these are worthy of major studies in their own right. Within the UN, the Security Council is assigned the most significant role in advancing international justice, best illustrated by its power to refer situations to the ICC Prosecutor; its resolutions, even outside of the context of Chapter VII enforcement action, also command great attention.[81] The UN Human Rights Council (UNHRC) has also assumed the leading position in the UN system for creating commissions of inquiry which have had an observable impact on various processes, including Security Council decision-making.[82] Outside of the UN, the ICC Assembly of States Parties (ICC-ASP) serves comparable plenary functions to those of the Assembly specifically in relation to the ICC, in playing a role in adopting amendments to the

[80] UNGA, Fifty-fourth session, 80th plenary meeting (15 December 1999) UN Doc A/54/PV.80, 17 (Jordan).
[81] See further the discussion in Ramsden and Hamilton (n 4), 879-899.
[82] ibid.

ICC Statute and mobilising shame against deviant States Parties.[83] Regionally, there are various political initiatives to address impunity gaps undertaken by the European Union (EU) and African Union (AU).[84] In short, appreciating Assembly impact in the field also has to take into account the contributions of these other actors and inter-institutional habits of cooperation that have formed in responding to atrocity crimes. For instance, there is a great deal of evidence that the work of the International Committee of the Red Cross (ICRC) and the UNHRC in international justice has influenced Assembly resolutions and other activity; and vice versa.[85] Although it would be impossible in relation to the present study to fully contextualize the influence of all these relevant actors on campaigns for accountability for atrocity crimes, it is nonetheless a broader context that is acknowledged and referenced in this dissertation.

Still, there are some who might regard the role of the UNHRC in advancing international justice as being a more appropriate UN organ in which to focus scholarship. The UNHRC is a creation of the Assembly; technically, its subsidiary organ.[86] The Assembly also retains powers over its membership, being able to suspend a Member of the UNHRC 'that commits gross and systematic violations of human rights'.[87] But at the same time, the UNHRC has been relatively autonomous in defining its agenda and, in many respects, has gone further than its parent organ in advancing international justice. This relationship itself reinforces the importance of the Assembly on human rights matters; to some Member States, the UNHRC would help to revitalise the work of the Assembly.[88] The UNHRC's mandate includes to 'address violations of human rights, including gross and systematic violations', making it very relevant to the advancement of the norms of international justice.[89] Like the Assembly it has engaged in quasi-judicial activity, in condemning conduct within States and establishing commissions of inquiry to undertake investigations.[90] The Assembly has established commissions of inquiry and other fact-finding missions, but the UNHRC has done so to a more significant extent in its short history, accounting for over 60% of those established within the UN system since 2006.[91] The wide ranging coverage of these investigations (including Lebanon, Sudan and DPRK) might in turn make up for accountability blind spots or oversights that have arisen in the principal political organs, including the Assembly. The UNHRC's creation of commissions of inquiry have also been credited as having a catalytic effect in the UN system, most prominently in supporting a referral by the Security Council of the Libya situation to the ICC Prosecutor.[92]

Does this mean that the UNHRC is a more suitable organ than the Assembly to advance international justice? This was the argument of the Algerian delegate during a plenary debate, arguing that the Universal Periodic Mechanism under the auspices of the UNHRC, given that it fosters a spirit of cooperation, 'should be the primary tool for considering human rights issues'

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[83] Ibid; Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).

[84] EU, 'Policy Framework on Support to Transitional Justice' (2015) <http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf>; AU, 'Transitional Justice Policy' (2019) <https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf>.

[85] Ramsden and Hamilton (n 4) 897-899.

[86] UNGA Res 60/251 (2006) [1].

[87] ibid [8].

[88] UNGA, 'Summary of the open-ended informal consultations held by the Commission on Human Rights pursuant to Economic and Social Council decision 2005/217' (21 June 2005) UN Doc A/59/847-E/2005/73, [27]–[28].

[89] UNGA Res 60/251 (2006) [3].

[90] Ramsden and Hamilton (n 4) 898.

[91] Larissa van den Herik and Catherine Harwood, 'Commissions of Inquiry and the Charm of International Criminal Law' in Philip Alston and Sarah Knuckey, *The Transformation of Human Rights Fact-Finding* (OUP 2015), 236.

[92] Compare UNHRC Res S-15/1 (2011) and UNSC Res 1970 (2011).

rather than the Assembly.[93] However, it is erroneous to assume that the Assembly has now been side-lined by its subsidiary organ.[94] For a start, the Assembly has a much richer history in the field of international justice, dating back to 1946; it has in this time adopted wide-ranging resolutions in the field that continue to have impact today, as this study shows. Furthermore, there remains, due to the wider membership and broader remit, a sense within the UN system that a resolution by the Assembly generally carries greater weight than one by the UNHRC.[95] Similarly, a specialism of the UNHRC has been to establish commission of inquiries; but the Assembly also has a rich history in doing so, with a prominent recent example being the creation of the IIIM-Syria in December 2016.[96] Indeed, the model adopted by the Assembly for the IIIM-Syria has been used by the HRC subsequently for Myanmar.[97] Finally, the UNHRC is unable to produce resolutions having the same legal effects as ones by the Assembly in 'authorising' Member States to take action within the framework of the UN Charter or the Uniting for Peace mechanism, as Chapter 7 considers. Furthermore, one of the UNHRC's functions is to 'make recommendations to the [Assembly] for the further development of international law in the field of human rights'.[98] In the enforcement of international justice, the HRC has recognised the important function of the Assembly in making recommendations to the Security Council; for instance, the UNHRC implored the Assembly to recommend the Security Council to refer the Gaza situation to the ICC.[99] The Assembly, as a principal organ of the UN, therefore remains centrally placed to advance the objectives of international justice, with the UNHRC, as its subsidiary organ, supporting these efforts.

While it is necessary to look at how Assembly activity might contribute, in tandem with other actors, towards the advancement of international justice, it must also be acknowledged that a major motive of this dissertation was to consider the ways in which the Assembly is able overcome Security Council failures to take action in response to atrocity crimes. Commentators have made casual references to the world being in a 'new Cold War' and a prediction that such tensions 'will affect nearly every important dimension of the international system.'[100] Member States have often pointed to a Security Council legitimacy deficit and Assembly resolutions have been more pointed in condemning inaction by the permanent members.[101] Member States have called upon the Assembly to take more 'concerted action' to realise its 'responsibilities which should be exercised in regard to the maintenance of international peace and security'.[102] It has followed that the failure of the permanent members to reach accord, for instance, on a referral of the Syria situation to the ICC Prosecutor or the creation of an *ad hoc* tribunal for the Malaysia Airlines Flight 17 (MH17) disaster, has contributed towards an increased reflection

[93] UNGA, Sixty-ninth session, 73rd plenary meeting (18 December 2014) UN Doc A/69/PV.73, 22.
[94] See also UNGA, Sixty-sixth session, 89th plenary meeting (19 December 2011) UN Doc A/66/PV.89, 24 (Iceland) (Assembly 'enrich[es] the international human rights dialogue with their discussion').
[95] UNGA, Seventy-first session, 65th plenary meeting (19 December 2016) UN Doc A/71/PV.65, 34 (Ukraine).
[96] UNGA Res 71/248 (2016).
[97] UNHRC Res 39/2 (2018) [22] (welcomed in UNGA Res 73/264 (2018) preamble).
[98] ibid [5(c)].
[99] UNHRC Res 16/32 (2011), [8]. See also UNHRC Res 39/2 (2018), [6] (inviting the Assembly to consider action on Myanmar).
[100] Robert Legvold, 'Managing the New Cold War' (2014) Foreign Aff 74.
[101] UNGA Res 66/253 B (2012). See also Martin Binder and Monika Heupel, 'The Legitimacy of the UN Security Council: Evidence from Recent General Assembly Debates' (2015) 59(2) Intl Studies Q 238 (negative opinions of the Security Council by UN Member-States outweigh positive ones from a sampling of debates); Matthew Stephen, 'Legitimacy Deficits of International Organizations: design, drift, and decoupling at the UN Security Council' (2018) 31(1) Cambridge Rev Intl Aff 96.
[102] Permanent Mission of Canada to the UN, 'Letter to the President of the Seventy-First Session of the UN General Assembly' (13 October 2016) <https://www.un.org/pga/71/wp-content/uploads/sites/40/2015/08/Informal-briefing-on-the-situation-of-Syria.pdf>. The Assembly has also acknowledged the need for itself to play an active role in dealing with issues pertaining to international peace and security: UNGA Res 64/301 (2010), [4].

on the possibility of creative solutions to overcome Chapter VII deadlock.[103] Proposals for reform have included a 'code of conduct' which would require voluntary veto-use abstention in cases 'involving mass atrocity crimes'.[104] Jennifer Trahan took this a step further and argued that there exists legal limits on the veto power where concerned with atrocity situations which, if true, might be used as a basis to challenge the behaviour of permanent members and subject them to legal standards.[105] By contrast, others have considered the feasibility of solutions outside of the Security Council, including through a revival of the Assembly's Uniting for Peace mechanism.[106] For example, when exploring solutions outside of the Security Council for securing accountability for the crimes committed in the DPRK, the final commission of inquiry report mused that States could use their 'combined sovereign powers…to try perpetrators of crimes against humanity on the basis of the principle of universal jurisdiction', alluding to the Assembly as the forum for such delegation of powers to be established.[107] An important component of this dissertation, therefore, will be to consider these inter-organ dynamics on international justice and the scope for the Assembly to assume more powers within the framework of the UN Charter in instances where the Security Council has failed.

In assessing the legal powers of the Assembly in the field of international justice, its practice is given special emphasis in this dissertation. While the text of the UN Charter is a natural starting point in assessing the scope of the Assembly's powers, there is procedural latitude for the membership to develop these powers. This reflects the principle of treaty interpretation, explored in Chapter 3, that mandates the treaty terms to be read in light of any subsequent practice or subsequent agreement which establishes the agreement of the parties regarding its interpretation (although, as will be shown, the UN has its own customary principle, based upon the 'established practice' evincing 'general agreement' of the membership, in which to evolve an organ's powers under the UN Charter).[108] In turn the practice of the Assembly, evidenced by the adoption of resolutions and the creation of subsidiary organs, in turn help to establish the scope of their existing powers in the field of international justice. All relevant practice was surveyed, from the first session until, at the time of completion of this dissertation, the most recent (1945-2021). Those resolutions and subsidiary organs identified to be concerned broadly with addressing atrocity situations and serious human rights violations were then catalogued and analysed according to the five major themes explored in this work (quasi-legislative; quasi-judicial; empowering; recommendatory; and sanctioning). The language used in resolutions and explanations of vote were also carefully analysed given that they provide a

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[103] Jan Lemnitzer, 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?' (2016) 27(4) EJIL 923.

[104] UNSC, Sixty-eighth session, 7052nd meeting (29 October 2013), 13-14; Bolarinwa Adediran, 'Reforming the Security Council through a Code of Conduct: A Sisyphean Task?' (2018) 32(4) Ethics & Intl Aff 463.

[105] Trahan, 'Existing Legal Limits' (n 66).

[106] Barber, 'Uniting for Peace not Aggression' (n 76); Yasmine Nahlawi, 'Overcoming Russian and Chinese Vetoes on Syria through Uniting for Peace' (2019) 24(1) JCSL 111; White, 'Relationship' (n 8), 293; Carswell (n 76); Zaum (n 79).

[107] DPRK Report (n 70) [1201].

[108] This principle is recognised in multiple sources, including Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 31. See also Certain Expenses of the United Nations (Advisory Opinion) [1962] ICJ Rep 151, 175-79; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 16, 22*; Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136, 149; ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (2018) UN Doc A/73/10, 6. For discussion see Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organisations' (2013) 38 Yale J Intl L 289, 295; Irena Buga, *Modification of Treaties by Subsequent Practice* (OUP 2018) 35-41; Peter Quayle, 'Treaties of a Particular Type: The ICJ's Interpretive Approach to the Constituent Instruments of International Organisations' (2016) 29 LJIL 853.

window into ascertaining the general agreement of the membership as to the scope of the Assembly's powers.

Aside from the Assembly's powers as understood through resolutions and subsidiary organs, court judgments were another major source of material analysed in this dissertation. The jurisprudence from international courts feature in particular when appreciating the quasi-legislative and quasi-judicial effects of Assembly resolutions in the decision-making of other regimes, as explored in Chapters 2 and 4. This focus recognises the important role of courts to the advancement of international justice, in rendering decisions that are capable of finding individuals or States responsible for atrocity crimes. How resolutions have influenced judicial outcomes is therefore a worthwhile study, even if broader conclusions cannot be made on the effect of resolutions on non-judicial actors (although correlates can sometimes be drawn based upon UN materials and secondary literature, as considered in this dissertation). A wide range of courts relevant to the field of international justice were surveyed. In relation to those vested with the power to determine individual criminal responsibility, these included the ICC, International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone, Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). It also covers the jurisprudence from regional human rights mechanisms – particularly the European Court of Human Rights (ECtHR) and Inter-American Court of Human Rights (IACtHR) – and the manner in which they have used Assembly resolutions in the construction of norms pertaining to accountability for atrocity crimes in the context of human rights law.[109]

4. Structure of the Dissertation

Including this Introduction, this dissertation is divided into seven Chapters, structured in a manner that considers the theme of international justice in relation to particular Assembly functions. Chapter two analyses the quasi-legislative effect of Assembly resolutions in the judicial consideration of atrocity situations. Having set out the Assembly's broad quasi-legislative practice in the field of international justice, Chapter three then broadens the analysis to consider the relationship between Assembly resolutions and the development of international law, both institutionally (under the UN Charter) and externally (in relation to other treaty regimes and customary international law). This analysis will in turn allow conclusions to be made as to the scope for the Assembly to shape international norms, including its own powers under the UN Charter, in a manner that advances international justice. Chapter four then shifts focus onto the Assembly's quasi-judicial practice and how their resolutions have been used by institutional actors to support accountability responses to atrocity crimes. This is followed by Chapter five which evaluates the scope and effect of the Assembly's recommendations practice. The following two Chapters consider the possibilities for the Assembly, in building upon some of its practice, to take creative solutions to advance international justice. Chapter six thus considers the scope of the Assembly's capacity to empower judicial or subsidiary organs to address atrocity situations, including to establish commissions of inquiry, request ICJ advisory opinions and to create *ad hoc* criminal tribunals. Chapter seven then rounds off the substantive

[109] In relation to the aim of addressing the impunity gap, relevant State duties contain the duty to prevent human rights violations, the duty to investigate such violations, and the obligation to prosecute and punish them. There is an embryonic literature about the interactions of 'international criminal law by other means', see Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107(1) AJIL 1.

analysis by looking into the legal feasibility of the Assembly assuming a function in coordinating and authorising lawful sanctions as a means to advance accountability in atrocity situations. Chapter 8 concludes.

CHAPTER 2: THE 'QUASI-LEGISLATIVE' INFLUENCE OF LANDMARK GENERAL ASSEMBLY RESOLUTIONS IN INTERNATIONAL JUSTICE

1. Introduction

As the Introduction explained, the Assembly does not enjoy 'legislative' powers in the sense of being able to promulgate norms binding upon UN Member States. However, as this Chapter aims to show, this has not precluded a species of Assembly resolutions from contributing towards the identification and development of international law. Such resolutions, labelled as 'quasi-legislative' here, derive their value from being able to bring to bear the legal view of the community of States and to, in turn, contribute towards the identification and development of international law.[110] As Richard Falk noted, this 'quasi-legislative' characterisation represents a middle position between formal affirmation of true legislative status and a formalistic denial of a law creating role.[111] This approach recognises that the process in which a rule of international law is formed is complex; both international and domestic courts, which have become important norm-forming actors, will often use, interchangeably, binding and non-binding instruments as extrinsic evidence in the construction of a norm.[112] Although Assembly resolutions lack formal binding status this does not therefore preclude them from being influential as a source of evidence in the process of identifying and developing international norms.[113] It is in this sense that the prescriptive effect of Assembly resolutions will be tested here in the particular context of international justice.

The Assembly has produced resolutions in the thousands since 1946, with a considerable number of these expressive of international legal norms, such that any attempt to evaluate quasi-legislative influence will necessarily have to be selective. There has been much scholarly opinion over the years about the quasi-legislative status of particular resolutions, but this scholarship has not, as yet, covered the field of international justice to any significant extent.[114] The purpose of this Chapter will be to survey the influence of a group of Assembly resolutions that articulate norms in the field of international justice. The Assembly has adopted ten rule-prescriptive resolutions of particular note that will be the focus of the study here: the two post-World War II resolutions on the Nuremberg trials and the crime of genocide (Resolutions 95 (I) (1946) and 96 (I) (1946)); the UDHR (Resolution 217 (1948)); two

[110] That said, resolutions are capable of being binding in relation to certain internal operational matters, including budget approval (art 17) and decisions relating to membership (arts 4-6).
[111] Falk (n 11) 782. See also UNGA Res 67/1 (2012) [27] (Assembly recognises its role in 'standard setting' and 'progressive development' of international law).
[112] See eg Mark Weisburd, 'The International Court of Justice and the Concept of State Practice' (2009) 31 U Penn J Intl L 295 (ICJ frequently bases its conclusions on non-binding instruments).
[113] For an early optimistic view: *Reservations to the Convention on the Prevention and Punishment of Genocide* (Advisory Opinion) (Dissenting Op Judge Alvarez) [1951] ICJ Rep 15, 53 (Assembly 'is tending to become an actual legislative power').
[114] See eg Falk (n 12), 789 (on UNGA Res 1803 (XVII) (1962) (sovereignty of natural resources); UNGA Res 1653 (1961) (prohibition on nuclear weapons use) and UNGA Res 1884 (XVIII) (1963) (disarmament); Bleicher (n 23) (general analysis of the most recited resolutions as of 1969, including UNGA Res 217 (III) (UDHR) and UNGA Res 1514 (XV) (colonial independence)); Cheng, 'Studies' (n 22) (on UNGA Res 1721 A (XVI) (1961) and UNGA Res 1962 (XVIII) (1963), both on outer space).

connected resolutions on the protection of civilians in armed conflict (Resolutions 2444 (XXIII) (1968) and 2675 (XXV) (1970)); the 'Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity' (Cooperation Principles) (Resolution 3074 (1973)); the Definition of Aggression (Resolution 3314 (XXIX (1974), annex); the 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (Torture Declaration) (Resolution 3452 (XXX) (1975)); the 'Declaration on the Protection of All Persons from Enforced Disappearance' (Enforced Disappearance Declaration) (Resolution 47/133 (1992)); the 'Declaration on Measures to Eliminate International Terrorism' (International Terrorism Declaration) (Resolution 49/60 (1994); and, finally, 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' (Reparation Principles) (Resolution 60/147 (2005)).

In articulating a range of norms - from those concerned with the criminal responsibility of individuals, to the duties on States to prosecute or extradite suspects, and also the rights of victims – they make up the Assembly's 'landmark' resolutions of a rule-prescriptive nature in international justice. There are other resolutions that should not be discounted, including those that apply a rule in a country-situation, be that in defining a violation of international law or condemning State conduct: these 'quasi-judicial' resolutions have also been used as evidence in the identification and development of international law, as Chapter 4 shows. Similarly, although the resolutions in this Chapter are 'landmark' most did not suddenly emerge; they stand on the shoulders of earlier resolutions. But the point is that in building upon earlier resolutions, they provide the most comprehensive articulation of norms in Assembly resolutions in the field of international justice; it is therefore instructive to consider what influence they have had in the field. Furthermore, in focusing on the most significant quasi-legislative resolutions that the Assembly has produced in the field of international justice, the present study does not purport to make generalised conclusions on the impact of all quasi-legislative resolutions in all fields of international activity. Its conclusions, rather, will be necessarily limited to appreciating the quasi-legislative impact of the resolutions studied here.

The emphasis will be on their influence on the judicial interpretation and development of international law in courts. Where there is evidence of a link, the Chapter considers the impact of resolutions within the Security Council and the political decision-making processes of other regimes, such as the ICC-Assembly of States Parties. However, the primary focus will be on judicial actors including the ICC, ICJ, the UN *ad hoc* tribunals, and regional human rights mechanisms. Given that courts produce published judgments, the quasi-legislative influence of resolutions can be more readily ascertained than other processes or sources of international law (such as, for example, physical acts of State practice). A response might be that greater focus needs to be placed on evaluating the attitude of States to Assembly resolutions rather than that of judicial actors, as it is they who make international law.[115] However, a focus on the quasi-legislative influence of the Assembly's landmark resolutions within judicial regimes remains instructive. First, it is courts that apply norms at the sharp end, in giving interpretive specificity to abstractly defined norms and in assigning responsibility for atrocity crimes; the weight that they place upon resolutions in the construction of norms that affect the parties before it is therefore a useful line of enquiry.[116] Second, the notion that State

[115] Some scholarship has attempted to identify the actual or potential influence of Assembly resolutions on State conduct. See eg Lande (n 61), 100 ('little doubt' that Member States give 'some attention' to Assembly resolutions given the bargaining that often occurs prior to their adoption).

[116] See e.g. Bart De Schutter and Christine Van Den Wyngaert, 'Coping with Non-International Armed Conflicts: The Borderline between National and International Law' (1983) 13 Ga J Intl & Comp L 279, 282 (UDHR 'has

practice should be divorced from judgments of international courts in the construction of international norms creates an artificial divide between the two. Such courts are creatures of State practice; through a process of either consent or acquiescence, these international judges have the authority to render opinions that declare international law, at least in respect of a particular legal regime.[117] This does not discount the possibility that some States reject these judicial pronouncement as law; indeed, some States have pushed back against such forms of judicial activism. Nonetheless, the legal pronouncements particularly of an international court are likely to command considerable general respect and acceptance, although it is beyond the scope of the present study to fully test this point.[118]

Accordingly, the following Chapter analyses the influence of each resolution in turn. It provides an outline of each resolution before turning to look at their use as evidence in the identification and development of international law in courts and other regimes. Having considered the relevance of these resolutions to the construction of norms applicable, in various judicial regimes, including treaties and customary international law, the Chapter will conclude by noting some of the prevalent judicial approaches to the use of these resolutions.

2. Resolution 95 (I) (1946): Affirmation of the Nuremberg Principles

Perhaps the most famous Assembly resolution in the field of international justice is Resolution 95 (I), adopted unanimously on 11 December 1946. For all that has been written on it in the scholarly literature, the resolution is remarkable in its brevity. It started by recognising that the Assembly had an 'obligation' under Article 13(1) of the UN Charter to initiate studies and make recommendations to encourage the progressive development of international law. In noting the establishment of the International Military Tribunal (IMT), it then 'affirms the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal'. Finally, it requested the newly established ILC to treat 'as a matter of primary importance' the general codification 'of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal.'

A primary motive of the sponsors of Resolution 95 (I) (1946) was to assuage doubts concerning the legal basis of the Nuremberg trial.[119] But in the absence of a treaty (or an 'International Criminal Code' that Resolution 95 (I) deemed necessary), various actors would use Resolution 95 (I) to elevate the principles derived from the judgment and Charter of the Nuremberg Tribunal to ones of general prescriptive validity. Thus, in 1947 the Supreme National Tribunal of Poland, in the so-called 'Auschwitz trial', established the legal foundation of a municipal trial based upon the Nuremberg judgment by referring to Resolution 95 (I).[120] The US Military Tribunal III, having handed down its *Justice* decision in 1951, would note that the constitutive instruments which it applied were 'declaratory of the principles of international law *in view of its recognition* as such by the General Assembly of the United Nations'.[121] Over a decade later, the Supreme Court of Israel would rely heavily on Resolution 95 (I) to dismiss

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little practical value because of its lack of precision and the absence of an effective international enforcement system').

[117] Noora Arajärvi, *The Changing Nature of Customary International Law* (Routledge 2014), 22-23; Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' 28(2) EJIL (2017) 357, 383-384.

[118] The role of judicial creativity in the progressive development of international criminal law has been extensively critiqued, of which see Joseph Powderly, *Judges and the Making of International Criminal Law* (Brill 2020).

[119] See the critique of Georg Schwarzenberger, 'The Judgment of Nuremberg' (1947) 21 Tulane L Rev 329.

[120] Re *Liebehenschel* (1947) Siedem wyroków Najwyższego Trybunału Narodoweg (Instytut Zachodni 1962), 137.

[121] *US v Alstötter ('Justice Case')* (Opinion and Judgment) (1951) 3 TWC 954, 968 (emphasis added).

Adolf Eichmann's petition that his trial involved the retroactive application of criminal law in charging him with genocide, crimes against humanity and war crimes committed prior to 1945.[122] Having surveyed the development of international law, the Supreme Court of Israel then noted:

> If there was any doubt as to this appraisal of the Nuremberg Principles as principles that have formed part of customary international law 'since time immemorial,' such doubt *has been removed* by two international documents. We refer to the United Nations Assembly resolution of 11.12.46 which 'affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal, and the judgment of the Tribunal,' and also to the United Nations Assembly resolution of the same date, No. 96 (1) in which the Assembly 'affirms that genocide is a crime under international law.'[123]

To the Israel Supreme Court, 'if fifty-eight nations [i.e., all UN Member States at the time] unanimously agree on a statement of existing law, it would seem that such a declaration would be *all but conclusive evidence* of such a rule, and agreement by a large majority would have great value in determining what is existing law.'[124] This statement would suggest that the Assembly is able to perform a central role in declaring 'existing law', especially in instances where a customary rule had only a 'twilight' existence which was lacking, until that point, the precision of a text that defined the rule (here the notion of individual criminal responsibility for breaches of international law).

Since then, Resolution 95 (I) (1946) has been cited in numerous international and domestic courts in defining the scope of offences and criminal responsibility.[125] While some tribunals placed greater legal significance on what Resolution 95 (I) was affirming (i.e. the Nuremberg judgment and Charter),[126] others have considered the importance of this resolution in its own terms. In *Pinochet*, Lord Browne-Wilkinson noted that, from the passage of Resolution 95 (I), '[a]t least *from that date onwards* the concept of personal liability for a crime in international law must have been part of international law.'[127] One ECtHR decision regarded Resolution 95 (I) as having the effect of elevating the principles applied in the Nuremberg trial to ones of 'universal validity', such that 'responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War'.[128] On this reading, Resolution 95 (I) crystallised the principles contained in the Nuremberg judgment and Charter into customary international law from that moment forward. This reasoning suggests that the value of Resolution 95 (I) was not in declaring existing customary international law but in creating new custom, in supplying the missing element (*opinio juris*) to elevate the principles applied in a specific treaty regime (i.e. the Charter of the Nuremberg Tribunal) to ones of universal validity. If this view is accepted, it would potentially have implications concerning perceptions over the legality of charges in

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[122] *AG v Eichmann* (Israel Sup Ct) 36 *ILR* (1968) 277.
[123] ibid.
[124] ibid.
[125] *Wall* (Advisory Opinion) (n 108), 172; *Kolk and Kislyiy v Estonia* App No 23052/04 & 24018/04 (ECtHR, 17 January 2006), 3 (Assembly 'confirmed' the Nuremberg Principles); *Prosecutor v Tadić* (Judgment) ICTY-94-1-T (7 May 1997), [623]; *Prosecutor v Tadić* (Jurisdiction) ICTY-94-1-T (2 October 1995), [140]; *France v Touvier* (French Court of Cassation) (1992) 100 *ILR* 338; *Prosecutor v Barbie* (French Court of Cassation) (1985) 78 *ILR* 125*,* 139; *Prosecutor v Vrdoljak,* Section I for War Crimes X-KR-08488 (Court of Bosnia and Herzegovina, 10 July 2008), 12.
[126] *Tadić* (Judgment) (n 125), [623]; *Korbely v Hungary* App no 9174/02 (ECtHR, 19 September 2008), [81]; Appeal Judgment, *Duch*, Case No 001/18-07-2007-ECCC/SC (3 February 2012), [110].
[127] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet (No 3)* [2000] 1 AC 147, 197.
[128] *Penart v Estonia* App no 14685/04 (ECtHR, 4 January 2006), 9.

the Nuremberg trial, or at least support the conclusion that these convictions were not grounded in customary international law. Nonetheless, for present purposes, this decision illustrates the influence of Resolution 95 (I), either in declaring pre-existing law or in providing evidence of a newly crystallised *opinio juris*. The basis for the latter is covered in greater detail in Chapter 3.

Precisely what Resolution 95 (I) (1946) was affirming has made it a fertile ground for international litigation. One issue was whether the ILC's subsequent elucidation of these principles in 1950, which were not formally adopted by the Assembly, were faithful to what the plenary had affirmed in 1946 such as to form part of customary international law at that time. This question is not so relevant to contemporary situations; but it has been so with respect to trials with a 'historic' temporal jurisdiction that in turn limits the sources that can be drawn from in the construction of norms, as with the crimes committed during the Democratic Kampuchea (1975-1979). The ECCC Supreme Court Chamber, in seeking to broaden the sources in which it could draw from, held that 'the definition of crimes against humanity found in the 1950 Nuremberg Principles *retrospectively reflects* the state of customary international law on the definition of crimes against humanity as it existed in 1946'.[129] Other judges, on the other hand, have looked to later Assembly resolutions to constitute the formation of the Nuremberg Principles as customary international law. Judge Louaides of the ECtHR appeared to be of the view that their customary status was 'indisputable' once the Assembly in 1973 adopted Resolution 3074 (XXVIII), which proclaimed the need for international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.[130] The relationship between Resolution 95 (I) and later resolutions in the elucidation of principles of individual criminal responsibility was also noted by the House of Lords in *Jones*.[131] In recognising the crime of aggression as being part of customary international law, Lord Bingham traced its lineage to Resolution 95 (I) in affirming the Nuremberg judgment and Charter, with the 'condemnation of aggressive war' finding 'further expression' in Resolutions 2131 (XX) (1965), 2625 (XXV) (1970) and 3314 (XXIX) (1974) (considered below).[132] As Lord Bingham observed, 'the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused.'[133]

Judges have also drawn from Resolution 95(I) when examining the scope of Head of State immunity from prosecution for alleged international crimes.[134] Noting that the resolution was passed 'unanimously' on 11 December 1946, Lord Nicholls in the House of Lords observed that '*[f]rom this time on*, no head of State could have been in any doubt about his potential personal liability if he participated in acts regarded by international law as crimes against humanity.'[135] The first decision at the ICC on this matter, handed down by the Pre-Trial Chamber in 2011, focused on the position of Head of State immunity as a matter of

[129] *Duch* (Appeal) (n 126), [112] (emphasis added). See also ILC, 'Report of the International Law Commission covering its second session' (5 June-29 July 1950) UN Doc A/1316, [96] ('[S]ince the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission...was not to express any appreciation of these principles as principles of international law but merely to formulate them').
[130] *Korbely* (n 126) (Dissenting op Judge Loucaides).
[131] *R v Jones (Margaret)* [2006] UKHL 16.
[132] ibid [15].
[133] ibid [19].
[134] For competing theories of immunity: Michael Ramsden and Isaac Yeung, 'Head of State Immunity and the Rome Statute: A Critique of the PTC's Malawi and DRC Decisions' (2016) 16(4) Intl CLR 703. See also UNSC, 'Letter Dated 1 October 1994 from Secretary-General addressed to the President of the Security Council' (4 October 1994) UN Doc S/1994/1125S, [129] (noting that UNGA Res 96 (I) (1946) 'affirmed that even a Head of State is not free from responsibility under international law for the commission of a crime under international law').
[135] *R v Bartle, ex p Pinochet* [1998] UKHL 41 (Lord Nicholls) (emphasis added).

customary international law, but made no mention of Resolution 95(I).[136] Most recently, in 2016, Judge Eboe-Osuji extensively surveyed historical sources and noted the important role of the Assembly and Resolution 95(I) in relation to the immunity question: 'A *major event* in the history of customary international law as regards…the rejection of immunity for State officials including Heads of State, was the UN's approval [via Resolution 95(I)] of the principles of law distilled from both the Nuremberg Charter and judgment of the Nuremberg Tribunal.'[137] Again, albeit as a separate opinion, this reasoning offers further support behind the proposition that Resolution 95 (I) supplied the missing element (*opinio juris*) so as to elevate the emerging practice from Nuremberg into customary international law (a discussion returned to in Chapter 3).[138] At the very least it demonstrates the influence of Resolution 95(I) in supporting judicial reasoning in a variety of courts and on different legal subject matter.

3. Resolution 96 (I) (1946) Affirmation of the Crime of Genocide

Whereas Resolution 95 (I) was terse in its coverage of the principles applied in the Nuremberg trials, Resolution 96 (I) (1946) went into greater detail in its formulation of the crime of genocide. Adopted unanimously, this resolution noted that genocide 'shocks the conscience of mankind' and is contrary to 'moral law and to the spirit and aims of the United Nations'.[139] In turn, it 'affirms' genocide to be 'a crime under international law' and defined it to mean 'the denial of the right of existence of entire human groups'. It noted that 'principals and accomplices – whether private individuals, public officials or Statesmen' are punishable where they have committed genocide. This offence was noted to 'have occurred' in the past with 'racial, religious, political and other groups' being destroyed 'entirely or in part'. However, Resolution 96 (I) did not seek to impose any form of obligation on its Members: it simply 'invite[d]' them to enact the necessary legislation to prevent and punish this crime, and 'recommend[ed]' international cooperation between States with a view to facilitating its speedy prevention and punishment.[140]

Resolution 96 (I) (1946) has been used by courts in finding genocide to be a crime under international law. In 1947, after quoting Resolution 96 (I) to establish that genocide was a crime against humanity, the US Military Tribunal at Nuremberg noted that the Assembly, while not 'an international legislature' was 'the most authoritative organ in existence for the interpretation of world opinion'; '[i]ts recognition of genocide as an international crime is *persuasive evidence* of the fact'.[141] In 1951 the ICJ noted that the principles that underpinned the Genocide Convention were in fact recognised by States as binding 'even without conventional obligation', referencing Resolution 96(I).[142] A decade later, the Israel Supreme Court in *Eichmann* cited Resolution 96 (I) alongside the ICJ's Advisory Opinion to show that genocide has 'always been forbidden by customary international law' and of a 'universal

[136] *Prosecutor v Al Bashir* (Malawi Cooperation) ICC-02/05-01/09 (13 December 2011). Similarly, the second decision focused on the effect of the Security Council referral: *Prosecutor v Al Bashir* (DRC Cooperation) ICC-02/05-01/09 (9 April 2014).
[137] *Prosecutor v Ruto* (Acquittal) (Reasons of Judge Eboe-Osuji) ICC-01/09-01/11 (5 April 2016), [288].
[138] For further argument on customary international law on the prosecution of Heads of States, see Michael Ramsden, 'Uniting for MH17' (n 4), 356-359.
[139] For a historical analysis: Douglas Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide* (U Penn Press 2017), 157-158.
[140] For a more detailed analysis, see Ramsden, 'The Crime of Genocide' (n 4).
[141] *Justice Case* (n 121), 983 (emphasis added). See also *Rwamakuba v Prosecutor* (Joint Criminal Enterprise) ICTR-98-44-AR72.4 (22 October 2004), [16].
[142] *Reservations* (Advisory Opinion) (n 113), 23.

criminal character'.[143] In more recent times, Resolution 96 (I) established genocide to be inconsistent with the UN Charter, per Judge Cançado Trindade in *Gambia v Myanmar*.[144]

The Assembly adopted the Genocide Convention in 1948, two years after Resolution 96(I).[145] In this regard, the textual differences in the definition of genocide in Resolution 96 (I) and the Genocide Convention have provided a fertile ground for legal argument. Some writers argued that Resolution 96(I), as a 'non-binding' Assembly resolution, was of no legal significance; only the Genocide Convention created and defined the crime of genocide in international law.[146] However, there is a clear textual basis for the contrary view; that the Convention itself did not purport to establish genocide as a crime, at least not exclusively. In this respect, the Preamble acknowledged that the Assembly had previously declared that '[g]enocide is a crime under international law' in Resolution 96 (I); the function of the Genocide Convention was in turn to 'prevent and punish' that crime and to elucidate upon the definition of this crime. As the Federal Court of Australia noted, the genocide proscription 'existed before the commencement' of the Genocide Convention, and can be traced 'probably at least from the time' of Resolution 96 (I) in 1946.[147] Still, it is often unnecessary to draw such a distinction between these two instruments: Resolution 96 (I) and the Genocide Convention are often cited together, with the former seen as part of the drafting history of the latter.[148]

However, this is not to say that there were no noticeable divergences between Resolution 96 (I) (1946) and the Genocide Convention, the effects of which would be debated and litigated in international tribunals. In particular, in the Genocide Convention as finally adopted, 'political' groups referenced in Resolution 96 (I) were not on the list of protected groups. Despite a narrower conventional definition of genocide, scholars have argued that the inclusion of political groups in Resolution 96 (I) was reflective of customary international law and stood independently of the more restrictively formulated Genocide Convention.[149] However, the ECtHR in *Vasiliauskas* did not feel this view to have a sufficiently strong basis when called upon to determine whether political groups were included in the definition of genocide under custom, at least as the law stood at the relevant time in the case (1953).[150] The implication was that Resolution 96 (I) only partially reflected custom; it did not do so in relation to the inclusion of political groups in the definition. By contrast, the narrower definition (political groups not being included) as the ECtHR noted, was articulated in the Genocide Convention and was 'retained in all subsequent international law instruments'.[151] In turn, the lack of any confirmation or corroboration for the broader definition from Resolution 96 (I) in subsequent instruments undermined the suggestion that it was part of customary international law. Still, another possible reading of *Vasiliauskas* is that the Genocide Convention 'updated'

[143] *Eichmann* (n 122).
[144] *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar)* (Provisional Measures) (Separate op Judge Trindade) (ICJ, 23 January 2020), [12].
[145] Convention on the Prevention and Punishment of the Crime of Genocide (adopted as UNGA Res 260 A(III) (1948), entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).
[146] See eg Josef Kunz, 'The United Nations Convention on Genocide' (1949) 43 AJIL 738, 742.
[147] *Nulyarimma v Thompson* (1999) 8 BHRC 135, [18] (Wilcox J).
[148] See eg *Prosecutor v Stakić* (Appeal Judgment) ICTY-97-24-A (22 March 2006), [22].
[149] See Beth Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) 106 Yale LJ 2259, 2262; William Schabas, *Genocide in International Law: The Crime of Crimes* (CUP 2000), 134.
[150] *Vasiliauskas v Lithuania* App no 35343/05 (ECtHR, 20 October 2015), [175]. See also *Diaz v Colombia* (Admissibility) Case 11.227 (IACtHR, 12 March 1997), [24] (noting variance between UNGA Res 96 (I) (1946) and the Genocide Convention on 'political groups', and ICTY jurisprudence which confirms the Genocide Convention's narrower definition).
[151] ibid.

the *opinio juris* so as to narrow the customary rule in a manner that diverged from Resolution 96(I), thereby denying 'political groups' customary protection in the definition of genocide.[152]

Finally, there are also areas in which Resolution 96 (I) has added texture to later instruments dealing with the crime of genocide. When addressing what 'intent to destroy' meant in Article 4 of the ICTY Statute, the Trial Chamber noted that there must be a specific intent to 'destroy the group as a separate and distinct entity', citing Resolution 96 (I).[153] Similarly, Judge de Brichambaut in the ICC in *Al Bashir* also invoked Resolution 96 (I) to show the gravity of the crime and therefore why Head of State immunity would not have been contemplated to apply to prosecutions for it, although the majority in this case regarded immunities to be excluded on a different basis.[154]

4. Resolution 217 (III) (1948): Universal Declaration of Human Rights

The UDHR (1948) ranks as the Assembly's finest accomplishment in the field of international human rights law but its influence does not stop there. It has come to have a persuasive and pervasive influence on the development of both international criminal law and UN law, as this section will demonstrate.[155] These effects were not intended at the outset. When the UDHR was adopted unanimously on 10 December 1948 the expectation was that it would amount to no more than a 'common standard of achievement', devoid of legal authority.[156] In the decades that followed its adoption, the UDHR would become widely acclaimed as not only representing human rights as a set of legal principles under the UN Charter, but also in customary international law.[157] The precise point in which it crossed the threshold into law is not entirely clear, but the accumulated weight of practice making use of the UDHR over many decades now puts this proposition beyond question.

Soon after the UDHR was adopted by the Assembly its implications were considered in the context of a criminal trial. On 11 April 1949, the Special Court at Arnhem in *Beck* was invited to consider the proposition that a war crimes conviction violated the principle against retroactivity in the UDHR.[158] The point was essentially made by the Special Court that the UDHR could not take priority over a hard source of law such as the Nuremberg Charter; the UDHR, on the other hand, was 'not intended as a binding convention', it also being 'very doubtful' whether its contents also formed general principles of international law within the meaning of Article 38(1) of the Statute of the ICJ.[159] In reading resolutions harmoniously, the Special Court also noted that the Assembly in 1946 had affirmed the Nuremberg Principles; it could not therefore be the Assembly's intention to undermine these principles in declaring, via the UDHR, that the Nuremberg trials were unlawful.[160]

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[152] See further on this case: Kai Ambos, 'The Crime of Genocide and the Principle of Legality under Art 7 of the European Convention on Human Rights' (2007) 17(1) HRL Rev 175.

[153] *Prosecutor v Blagojević* (Judgment) ICTY-02-60-T (17 January 2005), [665] (UNGA Res 96(I) (1946) acknowledged that 'Genocide is a denial of the right of existence of entire human groups…').

[154] *Prosecutor v Al Bashir* (Article 87(7) Decision) (Minority op Judge De Brichambaut), ICC-02/05 01/09-302-Anx 06-07-2017-1/60-RH-PT-35 (6 July 2017), [91].

[155] The UDHR received 48 affirmations, 8 abstentions, and 2 Members not voting. The UDHR prohibits many forms of conduct now international crimes: Robert Kolb, 'The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions' (1998) 324 Intl Rev Red Cross 409.

[156] Christopher Roberts, *The Contentious History of the International Bill of Human Rights* (CUP 2015); UNGA, Third session, 183rd plenary meeting (10 December 1948) UN Doc A/PV.183, 934; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1989), 70. But also see Bleicher (n 23) 460.

[157] Myres McDougal, *Human Rights and World Public Order* (Yale UP 1980), 272-4.

[158] *Prosecutor v Beck* (Judgment) (Dutch Special Court of Cassation, 11 April 1949), 6.

[159] ibid.

[160] ibid.

A year later, the UDHR would influence the construction of offences in another war crimes trial, before the Military Court of Brabant.[161] In *Krumkamp*, the accused, a German national, was charged with the torture of Belgian nationals during Germany's occupation of Belgium; he argued that his acts were not prohibited under the laws and customs of war. The Military Court referred to the 'Martens Clause', which allowed it to look to, in the absence of a more complete code, 'usages established between civilized nations, from the laws of humanity and the requirement of public conscience'.[162] On this basis, the Military Court indicated, in 'searching for principles' that it was 'today guided by the [UDHR], adopted without opposition by the General Assembly', and in particular the prohibition on torture appearing in Article 5.[163] In defining the torture prohibition as falling within the laws and customs of wars, it appears that the Military Court regarded the UDHR to reflect 'usages between civilised nations' in addition to considerations of 'humanity' and 'public conscience'; indeed, such was the strength of this imperative that the Military Court noted that 'no difference can be made between times of peace and times of war' in respecting human rights, seemingly so as to bridge the gap between international human rights law and international criminal law.[164]

Krumkamp was an early sign of the UDHR being used as more than an instrument of aspiration; it would be followed by a flood of pronouncements attesting to its authoritativeness.[165] One such important statement came in 1971, the Secretary-General's report to the ILC noting that the UDHR has since acquired a status 'extended beyond that originally intended for it'.[166] Similarly, as the ICTY Appeals Chamber in *Tadić* noted, the 'propagation in the international community of human rights doctrines, *particularly* after the adoption of the [UDHR] in 1948, has brought about *significant changes* in international law'.[167] This can be attributed to three main reasons. Firstly, the UDHR has been used as an institutional yardstick within the UN in which to judge human rights violations; both the Assembly and Security Council have found specific violations of the UDHR in its country-specific resolutions, often tying violation of the UDHR with a violation of the UN Charter.[168] Secondly, the prescriptive influence of the UDHR has risen hand-in-hand with the judicial recognition that Article 56 of the UN Charter, requiring Member States to take joint and separate action to protect human rights, gives rise to legal obligations. In this regard, observance of the UDHR is a means of promoting the observance of human rights under Article 56.[169] Thirdly, the UDHR has been reproduced and reaffirmed in subsequent international and domestic legal instruments.[170] UDHR norms have therefore had a pervasive influence on both the international

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[161] *Prosecutor v Krumkamp* (1950) 17 ILR 388; 1*899 Hague Convention (II) with Respect to the Laws and Customs of War on Land* (adopted 29 July 1899; entry into force, 4 September 1890) 32 Stat 1803, 187 Consol TS 410, preamble.
[162] *Krumkamp* (n 161), 390.
[163] ibid.
[164] ibid.
[165] David Scheffer, 'Realizing the Vision of the Universal Declaration of Human Rights' (1998) 9 Dept of State Dispatch 17; Hannum (n 18); Skubiszewski (n 18).
[166] ILC, 'Survey of international law' (23 April 1971) UN Doc A/CN.4/245, 196-7.
[167] *Tadić* (Jurisdiction) (n 125), [97] (emphasis added).
[168] See further Chapter 3; UNSC Res 473 (1980); UNSC, Thirty-fifth session, 2231st meeting (13 June 1980) UN Doc S/PV-2231, 18 (apartheid is 'incompatible' with the UDHR); Schwelb (n 18).
[169] Reiterated in UNGA Res 1375 (1959) (XIV), [2]; UNGA Res 1248 (XIII) (1958), preamble, [3]; UNGA Res 1178 (XII) (1957), preamble.
[170] Eg Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted as UNGA Res 39/46 (1984), entered into force 26 June 1987) 1465 UNTS 85 ('Torture Convention'), preamble; Convention for the Protection of Human Rights and Fundamental Freedoms (*entered into force* 3 Sept 1953) 213 UNTS 222 ('ECHR'), preamble; International Covenant on Civil and Political Rights (adopted as UNGA Res 2200 A (XXI) (1966), entered into force 23 March 1976) 999 UNTS 171 (ICCPR), preamble.

and domestic planes, thereby accelerating the arrival of the general conclusion that such norms are representative of customary international law.[171]

Despite the UDHR being proceeded by several human rights instruments, it continues to be cited in international and domestic courts, sometimes on its own, other times alongside these later instruments. The UDHR has been used as an aid in the construction of crimes in *ad hoc* and other tribunals applying international criminal law; in the majority of these decisions the authoritative status of the UDHR is assumed.[172] The crime against humanity of 'other inhumane acts' has been interpreted to include infringements of the UDHR where the acts involved forced marriage;[173] forced religious conversion;[174] enforced disappearance and forced transfers.[175] As the ICTY Trial Chamber in *Kupreškić* noted, reference to this and other core human rights instruments allows it to identify 'less broad parameters for the interpretation of "other inhumane acts"'.[176] The US District Court felt confident in drawing from the prohibition against torture in the UDHR because it specified 'with great precision' obligations under international law.[177] The categories of acts that constitute persecution as a crime against humanity has drawn from the UDHR: the ICTY Trial Chamber noted that 'infringements of the elementary and inalienable rights of man' as 'affirmed in Articles 3, 4, 5 and 9 of the [UDHR], *by their very essence* may constitute persecution when committed on discriminatory grounds'.[178] The crime against humanity of persecution has, in turn, been construed using the framework of rights under the UDHR in relation to conduct involving the unlawful appropriation of property; [179] destruction of personal property;[180] forced return of refugees;[181]

[171] See further Chapter 3.
[172] Some tribunals have a preference to cite conventions and their derivative jurisprudence, such as the ECHR and ICCPR, eg: *Blagojević* (n 153), [592].
[173] *Prosecutor v Brima* (Judgment) (Partly dissenting op Justice Doherty), SCSL-04-16-T (20 June 2007), [63]; *Prosecutor v Ongwen* (Confirmation) ICC-02/04-01/15 (23 March 2016), [94] (UDHR right to marry is a 'value' that 'demands protection though the appropriate interpretation of Art 7(1)(k) of the [ICC] Statute').
[174] *Prosecutor v Prodhan* (Judgment) ICT-BD-01-2016 (Bangladesh International Crimes Tribunal, 19 April 2017), [133] (forced religious conversion a 'blatant infringement' of UDHR art 18).
[175] Appeal Judgment, *Chea,* Case No 002/19-09-2007-ECCC/SC (23 November 2016), [583]-[585]; Judgment, *Chea*, Case No 002/19-09-2007-ECCC/TC (7 August 2014), [657].
[176] *Prosecutor v Kupreškić* (Judgment) ICTY-95-16-T (14 January 2000), [566].
[177] *Filartiga v Norberto* 630 F2d 876 (2d Cir 1980) (also referring to the Torture Declaration, discussed below).
[178] *Prosecutor v Blaškić* (Judgment) ICTY-95-14-T (3 March 2000), [220] (emphasis added). See also *Kupreškić* (n 176), [621].
[179] *Prosecutor v Stanišić* (Appeal Judgment) ICTY-08-91 (30 June 2016), [47], fn 57 (with 'unlawful' measured under UDHR art 17 alongside other instruments).
[180] *Prosecutor v Popović* (Judgment) ICTY-05-88-T (10 June 2010), [981] (Art 29, UDHR, alongside other instruments); *Prosecutor v Blaškić* (Appeal Judgment) ICTY-95-14-A (29 July 2004), [145] (UDHR art 17(2)); *Prosecutor v Marques* (Judgment) 09/2000 UNTAET Dili Dist Court SPSC (11 December 2001), 33 (UDHR art 17(1)).
[181] *Prosecutor v Nyiramasuhuko* (Judgment) ICTR-98-42-T (24 June 2011), [6110] (UDHR arts 3, 13-14).

and hate speech.[182] The UDHR has also been used to substantiate, and add definition to, the crimes of rape;[183] deprivation of liberty;[184] torture;[185] and cruel treatment.[186]

The breadth of language used in the UDHR has meant that it has been used as an instrument for both judicial activism and restraint in the construction of crimes. The open textured nature of such rights leaves it open to the challenge that the primary or exclusive reliance placed on this instrument would be at odds with the *nullum crimen* principle, on the basis that any such judicial interpretation would not be foreseeable to the accused.[187] Indeed, the ECCC Supreme Court Chamber thus noted that while the UDHR (and other instruments) declared that there was a prohibition against torture, it did not offer a precise definition, meaning that it was necessary to look to other sources for primary guidance in the construction of a definition of torture.[188] Other tribunals have sought to limit reliance on international human rights law as means to construct offences; the ICTY Trial Chamber in *Stakić* thus noted that there is a lack of consistency in the norms expressed in human rights instruments including the UDHR given that they 'provide somewhat different formulations and definitions of human rights'.[189]

Still, *ad hoc* and internationalised tribunals have drawn from values recognised in the UDHR to support developments in the construction of crimes. The distinction between interstate wars and civil wars was 'losing its value as far as human beings are concerned', thereby supporting the application of customary law to non-international armed conflicts.[190] The ICTY Trial Chamber has also observed that human dignity (a phrase mentioned five times in the UDHR),[191] 'is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law'.[192] Reference to 'dignity' in the UDHR preamble was of decisive importance to the ICTR in *Nahimana* to support the proposition that hate speech targeting a population on the basis of ethnicity violated the right to respect for the dignity of members of the targeted group as human beings, thereby constituting persecution.[193] As Benton Heath noted, *Nahimana* is a unique precedent in directly invoking the broad preambular

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[182] *Nahimana v. Prosecutor* (Appeal Judgment) ICTR-99-52-A (28 November 2007), [986] (hate speech violates UDHR art 3 (right to security)).
[183] *Prosecutor v Furundžija* (Judgment) ICTY-95-17/1-T (10 December 1998), [175], [183].
[184] *Prosecutor v Kordić* (Judgment), ICTY-95-14/2-T (26 February 2001), [30] (drawing from 'arbitrary imprisonment' definition under UDHR art 30). See also *Prosecutor v Nikačević* (Judgment) X-KR-08/500 (Court of Bosnia and Herzgovenia, 19 February 2009), 29-30 (the offence of unlawful imprisonment meant 'arbitrary imprisonment' in line with UDHR art 9, amongst other instruments; *Prosecutor v Perreira* (Judgment) 34/2003 UNTAET Dili Dist Court SPSC (27 April 2005), 28 (UDHR arts 3 and 9); *Prosecutor v Krnojelac* (Judgment) ICTY-97-25-T (15 March 2002), [109].
[185] *Čelebići Case* (Judgment) ICTY-96-21-T (16 November 1998), [452]; *Prosecutor v Soares* (Judgment) 07/2002 UNTAET Dili Dist Court SPSC (9 December 2003), [202] (UDHR art 5).
[186] *Čelebići* (Judgment) ibid [549], [551] ('no international instrument defines this offence [of cruel treatment], although it is specifically prohibited by article 5' of the UDHR).
[187] See generally Luke Marsh and Michael Ramsden, 'Joint Criminal Enterprise: Cambodia's Reply to *Tadić*' (2011) 11(1) Intl CLR 137.
[188] *Duch* (Appeal) (n 126), [195]. For other limitations: *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 10 May 2010), [277] (UDHR, art 4 made no mention of a prohibition against trafficking); *Forti v Suarez-Mason* 694 F Supp 707 (ND Cal 1988), 5 (UDHR fails 'to offer a definition' of cruel, inhuman or degrading treatment).
[189] *Prosecutor v Stakić* (Judgment) ICTY-97-24-T (31 July 2003), [721]. See also *Prosecutor v Nahimana* (Judgment) ICTR-99-52-T (3 December 2003), [983] (art 7 (freedom from discrimination) and art 19 (free expression) may, in certain contexts, conflict with one another, requiring some 'mediation').
[190] ibid.
[191] See UDHR, preamble, arts 1, 22 and 33. See also *Prosecutor v Aleksovski* (Judgment) ICTY-95-14/1-T (25 June 1999), [54] (entire edifice of international human rights law, stemming from the UDHR, rests on importance of 'human personality', which also underpins the offence of committing outrage upon personal dignity).
[192] *Furundžija* (n 183), [183].
[193] *Nahimana* (Appeal Judgment) (n 182), [986], fn 2256.

language of the UDHR to justify a novel legal claim.[194] Other progressive interpretations included the invocation of Article 8 of the UDHR which specifies in general terms the right to an effective remedy. In relation to atrocities committed in Bangladesh during the 1971 conflict, it was argued that the time that had elapsed to prosecute offenders served as a bar (it being 2017 at the time of prosecution).[195] The Bangladeshi International Crimes Tribunal cited Article 8 of the UDHR to support the conclusion that 'in providing effective remedy to the victims and their families, delay itself cannot stand as a bar in prosecuting an individual offender.'[196]

Most of the references to the UDHR above assumed the authoritative status of this instrument with minimal (or any) explanation. However, some judges have offered analysis. In 1966, ICJ Judge Tanaka regarded the UDHR 'although not binding in itself', to constitute 'evidence of the interpretation and application of the relevant Charter provisions'.[197] This interpretation accords with Assembly practice and also the ICJ's decision in *Hostages*, where observance of the UDHR was identified as informing the 'principles' of the UN Charter.[198] The treaty basis for regarding the UDHR as giving rise to obligations was reiterated by the Supreme Iraqi Criminal Tribunal, in applying international criminal law, which noted that the UDHR 'is binding at least on the countries that are members of the United Nations'.[199] Presumably, the Iraqi tribunal meant that the UDHR was binding because it was an authoritative statement of human rights obligations owed under the UN Charter as a source of international law. Conversely, a narrower description was provided by the SCSL Trial Chamber, in noting that the '[UDHR] is not a binding treaty but Member States of the United Nations are called upon to publicise and disseminate it.'[200] It is unclear how the SCSL went from specifying a minimal duty on Sierra Leone to publicise and disseminate the UDHR to then using the instrument in the construction of a crime against humanity. A better understanding is that the UDHR is binding on Sierra Leone given that it reflects substantive obligations under the UN Charter or customary international law.

On the latter, some tribunals have spoken to the customary status of the UDHR, either because it constituted a codification of customary law or because the norms would later find acceptance as a general practice accepted as law.[201] This is further reinforced by the number of occasions in which UDHR rights have been invoked in succeeding international instruments that contain penal proscriptions.[202] The ICC has regarded provisions of the UDHR as falling

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[194] Benton Heath, 'Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law' (2012) 44 Geo Wash Intl LR 317, 320.

[195] *Prosecutor v Shikder* (Charge) ICT-BD-10/2016 (Bangladesh International Crimes Tribunal, 8 March 2017).

[196] ibid 13 (also citing ICCPR art 2(3)). See also *Pueblo Bello Massacre v Colombia* (Judgment) IACtHR Ser C No 140 (31 January 2006), [21] (UDHR gave 'global scope' to the right to an effective remedy this right); *Massacres of El Mozote v El Salvador* (Judgment) IACtHR Ser C No 252 (25 October 2012), [32] (UDHR supports reparations in transitional justice). See also *Prosecutor v Rwamakba* (Appropriate Remedy) ICTR-98-44C-T (31 January 2007), [40] (UDHR effective remedy principle applied at the ICTR); *Prosecutor v Lubanga* (Reparations) ICC-01/04-01/06 (7 August 2012), [185] (right to reparations being 'well-established' in international law, citing instruments including the UDHR).

[197] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (Second Phase Judgment) [1966] ICJ Rep 6, 289-90, 293.

[198] *United States Diplomatic and Consular Staff in Tehran (US v Iran)* (Merits) [1980] ICJ Rep 3, 42. See also UNGA Res 1353 (XIV) (1959), preamble; UNGA Res 1663 (XVI) (1961), [6]; UNGA Res 41/160 (1986), [3].

[199] *Dujail Case*, No 1/C 1/2005 (Supreme Iraqi Criminal Tribunal, 11 May 2006), 34.

[200] *Brima* (n 173).

[201] *Namibia* (Advisory Opinion) (n 108) (Separate Op Vice-President Ammoun), 76; *Prosecutor v Tacaqui* (Judgment) 20/2001 UNTAET Dili Dist Court SPSC (9 December 2004), 23 ('the general agreement…amongst scholars' on the right to liberty in the UDHR); *Filartiga* (n 177) (prohibition against torture 'has become part of customary law, as evidenced and defined by' the UDHR).

[202] M Cherif Bassiouni, 'The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights' (1982) 9 Yale J World Pub Order 193.

within the 'internationally recognized human rights' from which it can interpret the ICC Statute pursuant to Article 21(3).[203] The ICTY Appeals Chamber has also noted that international human rights law (represented by the universal instruments including the UDHR) and international humanitarian law 'share a common "core" of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted'.[204]

That said, it is also necessary to qualify the extent to which the UDHR has been said to have had an independent effect on norm development in different legal regimes. In this regard, the UDHR will often comprise just one of the sources to establish custom, or will simply be used to 'confirm' a definition or legal status of a norm that was already sufficiently demonstrated in other sources of international criminal law.[205] There are instances, however, where tribunals will sometimes prefer to place greater weight on the UDHR over other human rights instruments or international sources, or indeed only cite the UDHR when there are other instruments available to support the same point.[206] In this vein, the ECCC Supreme Court Chamber placed greater reliance on the UDHR given that it was adopted by the Assembly 'almost contemporaneously to the Nuremberg Principles', thereby supporting the formation of the relevant principles as customary law prior to the crimes committed by the Khmer Rouge in 1975.[207] Similarly, the Special Panel for Serious Crimes in East Timor relied on the UDHR as a statement of customary international law instead of the analogous obligations under the ICCPR.[208] This was because the ICCPR had not been ratified by Indonesia and thus was not an enforceable instrument in the Timorese occupied territory. Nonetheless, 'no doubt exist[ed]' about the applicability of the UDHR as a source of customary international law during the relevant period (1999).[209]

5. Resolutions 2444 (XXIII) (1968) and 2675 (XXV) (1970): Protection of Civilians in Armed Conflict

In 1968 and 1970 the Assembly adopted two resolutions, often considered together, that affirm the protection of civilians in armed conflict. Resolution 2444 (XXIII) recognised that the means available to parties to the conflict to injure the enemy are 'not unlimited'; prohibited parties to 'launch attacks' against civilian populations; and required that a distinction 'must be made at all times' between persons taking part in the hostilities and members of the civilian population, to spare the latter as much as possible.[210] In Resolution 2675 (XXV) (1970), the Assembly 'affirm[ed]' a number of principles for the protection of civilians in armed conflict, which was to be without prejudice to any efforts at future elaboration and codification.[211] These principles recognised that 'fundamental human rights, as accepted in international law and laid down in international instruments, *continue to apply fully* in situations of armed conflict.'[212] Likewise, in an echo to Resolution 2444 (XXIII), the Assembly also noted that 'in the conduct of military operations during armed conflicts, a distinction must be made at all times between persons

[203] *Lubanga* (Reparations) (n 196), [184]-[185].
[204] *Čelebići Case* (Appeal Judgment) ICTY-96-21-A (20 February 2001), [149].
[205] *Prosecutor v Kolasinac* (Judgment) C Nr 226/2001(District Court of Prizren (Kosovo), 31 January 2003), 24 ('[o]ther well established instruments' used to establish a forced labour prohibition, including the UDHR).
[206] *Xuncax v Gramajo* 886 F Supp 162 (D Mass (1995)), 12 (the 'universal condemnation of the use of torture was fully established prior to the events on which the instant claims turn' citing UDHR art 5).
[207] *Chea* (Appeal Judgment) (n 175), [584].
[208] *Perreira* (n 184), 28.
[209] ibid.
[210] Only 15 States did not participate in the vote, with 111 voting in favour.
[211] UNGA Res 2675 (XXV) (1970) (109 for; 8 abstentions; 10 did not vote).
[212] ibid, [1] (emphasis added).

actively taking part in the hostilities and the civilian populations.'[213] Resolution 2675 (XXV) also provides that 'dwellings or other installations that are used only by civilian populations should not be the object of military operations.'[214] The importance of these resolutions lay in restating the continued applicability of international human rights law during armed conflict.[215] There had been resolutions that had affirmed this principle on prior occasions, but Resolutions 2444 (XXIII) and 2675 (XXV) served as general affirmations of this legal principle.[216]

In turn, these resolutions have supported judicial interpretation of the laws of armed conflict. In a wide-ranging analysis, the ICTY Appeals Chamber in *Tadić* laid out a number of rules of customary law pertaining to non-international armed conflicts.[217] Resolutions 2444 (XXIII) and 2675 (XXV) 'corroborated' the proposition that the principle of distinction applies to civilian objects generally in non-international armed conflicts (and not just international armed conflicts).[218] Together these resolutions 'were declaratory of the principle of customary international law regarding the protection of civilian populations'. [219] A similar legal characterisation of these resolutions can be found in *Strugar*, where the Trial Chamber noted that Resolution 2444 (XXIII) embodied the *opinio juris* of States and reflected the 'elementary considerations of humanity' applicable under customary law to any armed conflict whether internal or international.[220] The IACtHR has noted that certain 'core guarantees apply in all situations, including situations of armed conflict', citing Resolution 2675 (XXV) alongside Security Council resolutions and ECtHR jurisprudence.[221] On a separate occasion, the IACtHR read Resolutions 2444 (XXIII) and 2675 (XXV) alongside Common Article 3 as 'customary law principles applicable to all armed conflicts' that 'require the contending parties to refrain from directly attacking the civilian population and individual civilians and to distinguish in their targeting between civilians and combatants and other lawful military objectives'.[222] Again the relationship between the two resolutions was noted by the IACtHR: Resolution 2675 (XXV) 'elaborates and strengthens the principles' in Resolution 2444 (XXIII).[223] Although the legal significance of drawing a connection between these two resolutions was not made clear, it seems implicit in the IACtHR's reasoning that recitation will be a factor in favour of treating a principle espoused in multiple resolutions as representative of customary international law.

The resolutions have also been used as an aid in the construction of various crimes. The ICTY Appeals Chamber in *Kordić* noted that the 'declarations of customary international law' in Resolutions 2444 (XXIII) and 2675 (XXV) did not include a requirement of '*actual* injury to civilians or damage to civilian objects' made the object of attack.[224] These resolutions were

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[213] ibid, [2].
[214] ibid, [5].
[215] See also remarks that UNGA Res 2444 (XXIII) reflected customary international law: UNGA Third Committee, Twenty-third session, 1634th meeting (10 December 1968), UN Doc A/C.3/SR.1634, 2 (US); Arthur Rovine, 'Contemporary Practice of the United States Relating to International Law' (1973) 67 AJIL 118, 122, 124.
[216] See further Chapter 4. For early iterations, see eg UNGA Res 32/44 (1977); UNGA Res 31/19 (1976); UNGA Res 3500 (XXX) (1975); UNGA Res 3319 (XXIX) (1974); UNGA Res 3102 (XXVIII) (1973); UNGA Res 3032(XXVII) (1972); UNGA Res 2853 (XXVI) (1971); UNGA Res 2852 (XXVI) (1971); UNGA Res 2674 (XXV) (1970).
[217] *Tadić* (Jurisdiction) (n 125), [111].
[218] ibid [110]. See also Michael Schmidt and others, *The Manual on the Law of Non- International Armed Conflict* (International Institute of Humanitarian Law 2006), 19.
[219] ibid [112].
[220] *Prosecutor v Strugar* (Jurisdiction) ICTY-01-42-PT (7 June 2002), [17]. See also *Prosecutor v Besovic* (Judgment) C/P 136/2001 (District Court of PEC/PEJA (Kosovo), 26 June 2003), [623]; *Prosecutor v Hadžihasanović* (Jurisdiction) ICTY-01-47-PT (27 November 2002), [103].
[221] *Coard v US* (Report No 109/99) Case 10.951 (IACtHR, 29 September 1999), [39], fn 11.
[222] *Abella v Argentina* (Judgment) Case 11.137 (IACtHR, 13 April 1998), [177].
[223] ibid fn 29.
[224] *Prosecutor v Kordić* (Appeal Judgment) ICTY-95-14/2-A (17 December 2004), [59] (emphasis added).

also considered to be particularly useful as they provided the context for understanding the prohibitions in Articles 51 and 52 of Protocol Additional to the Geneva Conventions of 12 August 1949 (Additional Protocol I).[225] This is especially the case given that Additional Protocol I was understood to reflect custom prior to its promulgation in 1977 (the two resolutions, it will be recalled, were adopted in 1968 and 1970 respectively). On this basis, the Assembly resolutions helped establish that the position prior to Additional Protocol I did not require the showing of a serious consequence for attacks on civilian objects to be penalised.[226] In *Hadžihasanović*, the ICTY Trial Chamber drew upon Resolutions 2444 (XXIII) and 2675 (XXV) to support the existence of a crime of wanton destruction or unlawful attack on civilian property.[227] Despite acknowledging that there were no provisions in the various instruments of international humanitarian law specifying this crime in non-international armed conflicts, both of the Assembly resolutions were cited given that they 'affirmed' the 'principle of duplicity' (i.e. that civilian dwellings 'should not be the object of military operations').[228] Accordingly, the Trial Chamber noted that the texts of these resolutions 'seem to show that the principles proclaimed…were already constituted rules of customary international law at the time'.[229]

The implication, therefore, was that Resolutions 2444 (XXIII) and 2675 (XXV) served a valuable codification function in declaring existing law; it was valuable given that the customary prohibitions at issue lacked the precision of a documentary source until these resolutions provided it. The codification value of these resolutions was further reinforced by the Appeals Chamber in *Blaškić*, which cited them to support the proposition that an attack on civilian populations may constitute an act of persecution as a crime against humanity.[230] According to the Appeals Chamber, the resolutions were evidence of *opinio juris* of the general prohibition on attacking civilian objects, which was then used to construct the crime against humanity of persecution.[231] That said, it is also necessary to note that these resolutions have only gone so far in supporting a prohibition on certain means and methods of warfare, particularly when it came to addressing the use of nuclear weapons. In this regard, Resolution 2444 (XXIII) was not even considered by the ICJ to support a customary prohibition on their use.[232] Although the resolution was not addressed by the majority in the ICJ's advisory opinion in *Nuclear Weapons*, Judge Guillaume in a separate opinion observed that Resolution 2444 (XXIII) only supported a customary prohibition on 'blind' weapons incapable of distinguishing between civilian and military targets; nuclear weapons did not necessarily fall into this category.[233]

6. Resolution 3074 (XXVIII) (1973): Cooperation Principles

'[W]herever they are committed', the Cooperation Principles in Resolution 3074 (XXVIII) (1973) 'declares', war crimes and crimes against humanity 'shall be subject to investigation' and suspects 'shall be subject to tracing, arrest, trial, and if found guilty, to punishment'.[234]

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[225] ibid; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3 (Additional Protocol I).
[226] ibid.
[227] *Prosecutor v Hadžihasanović* (Acquittal) ICTY-01-47-T (27 September 2004), [99].
[228] ibid.
[229] ibid, [103]. See also *Prosecutor v Strugar* (Appeal Judgment) ICTY-01-42-A (17 July 2008), [173]-[174].
[230] *Blaškić* (Appeal Judgment) (n 180), [158].
[231] ibid.
[232] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (Separate op Judge Guillaume), 289.
[233] ibid.
[234] UNGA Res 3074 (XXVIII) (1973). Resolution 3074 was supported by 94 Members, with 29 abstentions and 12 not voting.

Within this declaration, States 'shall' cooperate with each other 'on a bilateral and multilateral basis with a view to halting and preventing' these crimes.[235] Conversely, States 'shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.'[236] The Assembly's declaration was underpinned by the 'principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and the maintenance of international peace and security'.[237] The Cooperation Principles were not the first occasion in which the Assembly stated the obligation to punish international crimes (although they are the most cited). In 1946, in its very first session, the Assembly recommended that all States arrest persons responsible for war crimes during World War II and send them for prosecution in the States where the crimes occurred.[238] In 1969, the Assembly noted in Resolution 2583 that a 'thorough investigation' was 'an important element in the prevention of such crimes'.[239] In 1971 the Assembly affirmed in Resolution 2840 'that refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principle of the Charter of the United Nations and to generally recognized norms of international law.'[240] Any assessment as to the normative influence of Resolution 3074 should therefore have regard to this past practice upon which this resolution is building.

Whether the Cooperation Principles developed customary international law, particularly in relation to its statements on the nature of State obligations, has attracted a range of opinion. In the context of enforcement of a national arrest warrant in other States, Judge van den Wyngaert, citing the Cooperation Principles, noted that the international community 'undoubtedly agrees' with the principle that core crimes 'should not remain unpunished', but 'how this should be realised in practice is still the subject of much discussion and debate'.[241] On the other hand, some judges have treated the principles in Resolution 3074 (XXVIII) as evidence of custom, particularly when read alongside other Assembly resolutions and conventions. In the ECtHR, Judge Loucaides found that it reflected custom given that it builds upon a 'sequence of resolutions on the same subject-matter from 1969 to 1972' (i.e. the resolutions mentioned in the paragraph immediately above).[242] Recitation here was thus regarded to be an important factor in supporting the resolution's normative weight. Similarly, Judge Albuquerque accumulated Resolution 2840 (above) and the Cooperation Principles to 'underscore' the customary international law obligation on States to take steps for the arrest, extradition, trial and punishment of those accused of war crimes or crimes against humanity.[243] Other ECtHR judges have established the customary obligation drawing from various treaties alongside the Cooperation Principles.[244] Likewise, Lord Nicholls in *Pinochet* also characterised the Cooperation Principles as the 'necessary nuts and bolts' to Resolution 95 (I) (as covered in Section 2.1 above); both resolutions therefore seemingly supporting the potential

[235] ibid [3]. UNGA Res 3074 builds upon earlier resolutions, eg: UNGA Res 2840 (XXVI) (1971).
[236] ibid [8].
[237] ibid preamble.
[238] UNGA Res 3(I) (1946).
[239] UNGA Res 2583 (XXIV) (1969), preamble.
[240] UNGA Res 2840 (XXVI) (1971), [4].
[241] *Case Concerning the Arrest Warrant of 11 April 2000* (DRC v Belgium) (Provisional Measures) [2000] ICJ Rep 182 (Declaration by Judge van den Wyngaert), 230.
[242] *KHW v Germany* App no 37201/97 (ECtHR, 22 March 2001) (Concurring op Judge Loucaides), 39.
[243] *Sargsyan v Azerbaijan* App no 40167/06 (ECtHR, 16 June 2015) (Dissenting op Judge Pinto De Albuquerque), 133, fn 55.
[244] *Janowiec v Russia* App nos 55508/07 & 29520/09 (ECtHR, 21 October 2013) (Joint partly dissenting op Judges Ziemele, De Gaetano, Laffranque and Keller) (drawing from numerous international humanitarian law instruments and UNGA Res 2583 (XXIV) (1969) and UNGA Res 2712 (XXV) (1970)).

international criminal responsibility of Heads of State for their participation in international crimes.[245] Finally, the ILC, in explaining the legal basis for a cooperation duty in the draft Convention on the Prevention and Punishment of Crimes against Humanity, based this upon the Cooperation Principles and the duties in the UN Charter to achieve amongst its purposes, 'international cooperation'.[246]

The Cooperation Principles have also been considered at length in the construction of cooperation norms in a variety of legal regimes. The Human Rights Committee has used the Cooperation Principles to measure State compliance with the ICCPR: when Colombia promulgated national legislation to criminalise offences against persons and property protected by international humanitarian law, the Human Rights Committee noted that the penal definitions in this legislation 'comply' with a variety of instruments including the Cooperation Principles.[247] Further, they 'reinforced' the ICTY Trial Chamber's view that a State is under an obligation to not 'in any way, including by legislative amendment, alter the nature of the penalty' imposed by the ICTY.[248] They have also been cited to support the proposition that amnesties granted to alleged perpetrators of international crimes do not preclude their prosecution. Citing the Cooperation Principles and other Assembly resolutions, the ECCC Trial Chamber noted the 'emerging international consensus', which establishes a 'duty to prosecute grave international crimes and the incompatibility of amnesties for such crimes with these goals and further reflect the views of the majority of States of the international community'.[249] Similarly, the IACtHR also regarded the adoption of amnesty laws for crimes against humanity as preventing 'compliance of the obligations' that included those in the Cooperation Principles alongside earlier Assembly resolutions, subsequent Security Council resolutions, the Statutes of the ICTY and ICTR, and UN peace agreements.[250] The independent influence of the Cooperation Principles amongst these sources is difficult to ascertain.

The Cooperation Principles have also been used to support the customary status of the criminal norms to which the cooperation duties relate. Thus, Judge Loucaides in the ECtHR regarded the proposition that the ILC's 1950 Nuremberg Principles reflected customary international law to be 'indisputable' after the passage of Resolution 3074 (XXVIII) in 1973.[251] This was presumably because Resolution 3074 (XXVIII) references the core international crimes articulated in the Nuremberg Principles (of war crimes and crimes against humanity) as being subject to cooperation and enforcement. The Cooperation Principles were also cited by the Supreme Iraqi Criminal Tribunal and US District Court respectively to support the conclusions that genocide and crimes against humanity can be committed in times of peace and not only during war time.[252] The assumption in these cases appears to be that the resolution was adopted outside the context of a world war (1973) and therefore that the applicability of these core crimes did not turn upon the existence of an armed conflict.

7. Resolution 3314 (XXIX) (1974): Definition of Aggression

The Assembly in 1974 adopted by consensus Resolution 3314 (XXIX), with its Definition of Aggression annexed to it. The Definition has a long and complex history, considered in greater

[245] *Bartle* (n 135).
[246] ILC, 'Report of the International Law Commission: 69th session' (1 May-2 June 2017 and 3 July-4 August 2017) UN Doc A/72/10, 54 (drawing also from UN Charter arts 1(3), 55 and 56).
[247] HRC, 'Consideration of Reports: Colombia' (18 September 2002) CCPR/C/COL/2002/5, [312].
[248] *Prosecutor v Erdemovic* (Sentencing) ICTY-96-22-T (29 November 1996), [71].
[249] *Ne Bis In Idem* Decision, *Chea,* Case No 002/19-09-2007/ECCC/TC (3 November 2011), [48]-[49].
[250] *Almonacid-Arellano v Chile* (Judgment) IACtHR Ser C No 154 (26 September 2006), [106], [108]. See also *La Cantuta v. Perú* (Judgment) IACtHR Series C No 162 (29 November 2006).
[251] *Korbely* (n 126) (Dissenting op Judge Loucaides), [81].
[252] *Dujail Case* (n 199), 40; *Mehinovic v Vuckovic* 198 F Supp 2d 1322 (ND Ga 2002).

detail elsewhere.[253] The Assembly had earlier affirmed the principles of the Nuremberg judgment and Charter in Resolution 95(I), which included the 'crime against peace', but there was also an acknowledgement that such an offence needed to be comprehensively defined.[254] This reflected a desire, as expressed in 1952 in Resolution 599 (V), 'to define aggression by reference to the elements which constitute it', 'with a view to ensuring international peace and security and to develop international criminal law'.[255] The Definition attempted to achieve these objectives while at the same time offering a compromise between the interests of the competing Cold War blocs on an issue of great sensitivity.[256] It was therefore written with sufficient generality to assuage the different interests; support for the Definition was also accompanied by a multitude of 'declarations of vote', where Members made it clear the interpretation of the resolution they were supporting.[257]

The Definition of Aggression specifies aggression to be 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'.[258] In Article 3, it proceeds to list eight acts that qualify as acts of aggression. These include some of the obvious indicia such as invasion (Article 3(a)), bombardment (Article 3(b)) or blockades (Article 3(c)). But it also includes more controversial elements such as military occupation (Article 3(a)) and the 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the [other acts specified in Article 3], or its substantial involvement therein'(Article3(g)). The Definition highlights as its purpose the 'strengthening international peace and security' and 'deterring a potential aggressor'.[259] In contrast, the role of securing individual accountability for perpetrators as a purpose is underdeveloped; the Definition relegates this to a solitary line in Article 5(2): '[a] war of aggression is a crime against international peace' and 'gives rise to international responsibility'.[260]

In contrast to the 'classic' declarations of the Assembly considered above, the Definition of Aggression has some different features. Instead of the definition being included in the main body of the resolution, it was merely annexed to it. The Assembly did not 'declare' or 'affirm' but rather 'approved' the Definition.[261] The Definition is also primarily a recommendation directed towards the Security Council for it to take into account 'as appropriate' and 'in accordance with the Charter'.[262] In this respect, the Definition does not, as Assembly aspired in 1952, 'define aggression by reference to the elements which constitute it', but rather serves as 'guidance'.[263] That being the case, the Definition did not aim to limit the discretion of the Security Council in making its aggression determinations; nothing in it was to be 'interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs' of the UN.[264] Rather, the Definition allowed ample

[253] Jack Garvey, 'The UN Definition of Aggression: Law and Illusion in the Context of Collective Security' (1976–77) 17(2) Virginia J Intl L 177.
[254] UNGA Res 95 (I) (1946).
[255] UNGA Res 599 (VI) (1952) preamble.
[256] Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression* (Johns Hopkins UP, 1977).
[257] Thomas Bruha, 'The General Assembly's Definition of Aggression' in Kreß and Barriga (n 19), 154.
[258] art 1.
[259] preamble.
[260] For a critique, see Benjamin Ferencz, *Defining International Aggression. The Search for World Peace. A Documentary History and Analysis* (vol 1, Oceana 1975), 555 ('delegates seemed to have forgotten, or chosen to ignore, the mandates of 1946').
[261] UNGA Res 3314 (XXIX) (1974), [1]; Bruha (n 257), 155
[262] ibid, [4].
[263] ibid; UNGA Res 599(VI) (1952), preamble.
[264] Nor could it, given that the Security Council and Assembly are co-equal principal organs.

room for deviation; while armed force constitutes 'prima facie evidence of an act of aggression', the Security Council might also conclude that such a determination 'would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.'[265] The Definition also noted the acts enumerated as qualifying as aggression were 'not exhaustive', with the Security Council having the norm-forming initiative to 'determine that other acts constitute aggression under the provisions of the Charter'.[266]

Despite being its principal addressee, the Security Council has never referred to the Definition of Aggression in any of its resolutions. This is likely due to the interplay of institutional politics between the Assembly and Security Council rather than a rejection of the Definition itself.[267] This also reflects the fact that Security Council practice in this area is sparse, it preferring to characterise uses of force in broader terms, as 'threats' to the peace, or 'breaches' of the peace.[268] All that being said, to date there have been 32 Security Council resolutions in which aggression was adjudged to have occurred; although the Definition has not been cited in any of these it is apparent that there is a correspondence between some of the acts recognised as aggression by the Assembly and those acts condemned in specific instances by the Security Council.[269] There is also some duplication in the language between the text of Security Council resolutions referencing specific acts of aggression and some of those outlined in the Definition, such as 'invasion', 'attack' or 'military occupation'.[270] In this regard, it is apparent that references in Security Council resolutions to 'military intervention', 'military incursion', 'armed invasion' and 'bombing' have covered the same ground as the references to 'invasion or attack' and 'bombardment' in Article 3(a) and (b) of the Definition.[271] These connections would at least offer some support for the proposition that those specific acts referenced in Article 3(a) and (b) of the Definition have been accepted within the Security Council. However, these observations aside, there is a lack of direct evidence that the Definition of Aggression has influenced Security Council decision-making on aggression, as was originally intended by many of Assembly delegates.

Outside of the political realm, judges have cited the Definition of Aggression in the construction of international norms. In *Jones*, Lord Bingham in the House of Lords noted that the 'definition of an act of aggression in contravention of the Charter *was approved'*, thereby carrying the implication that the Definition carried interpretive authority in the construction of Charter norms.[272] In *Nicaragua*, the ICJ noted that the description in Article 3(g) 'may be taken to reflect customary international law'.[273] Although only focusing on Article 3(g), the ICJ's observations have been used to support the corollary argument that the Definition as a whole reflect custom, on the basis that Article 3(g) is its most contentious aspect.[274] Judge Schwebel, in his dissenting opinion, was of the view that the significance of the Definition 'should not be

[265] art 2.
[266] art 4.
[267] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (CUP 2013), 83.
[268] Strapatsas (n 19).
[269] Bruha (n 257), 169.
[270] McDougall (n 267), 83-84, 86.
[271] ibid 87. Compare Art 3(a) and (b) of the Definition of Aggression with, for example, UNSC Res 326 (1973) ('military intervention'); UNSC Res 386 (1976) ('military incursion'); UNSC Res 447 (1978) ('armed invasion'); UNSC Res 546 (1984) ('bombing').
[272] *Jones* (n 131), [15].
[273] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14.
[274] Mohammed Gomaa, 'The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime' in Mauro Politi and Giuseppe Nesi, *The International Criminal Court and the Crime of Aggression* (Routledge 2004), 55, 73–74. But also see McDougall (n 267), 90. There is ambiguity in this point, however, given that the ICJ was using art 3(g) as an indication of an armed attack, rather than aggression *per se*; the two might well be identical.

magnified' given that it defers to the 'supervening authority in matters of Aggression to the Security Council', and had its 'uncertainties', 'flaws' and 'ambiguities'.[275] That said, Judge Schwebel did not believe that the Definition should be 'dismissed' given that it is an interpretation by the Assembly as to the meaning of the provisions of the UN Charter; within those constraints, it did not provide a general definition of aggression as a matter of customary international law, although Article 3(g) was regarded to reflect State practice as being 'consistent rather than inconsistent with customary international law'.[276] The broader point here, then, from both the majority and dissent opinions, is that the description of Article 3(g) is reflective of the prohibition under customary international law; the Assembly cannot be credited, as such, with crystallising new custom upon the adoption of the resolution in 1974 (although, as Chapter 3 observes, the line between clarifying and creating is often a fine one indeed).

The ICJ would revisit the Definition of Aggression in *Armed Activities*, concerning Uganda's incursion and occupation in the Democratic Republic of the Congo (DRC).[277] In disposing of Uganda's self-defence argument, and reaffirming the finding that Article 3(g) reflected custom, a majority of the ICJ found that the attacks by the rebels 'did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 *(g)* of [the Definition of Aggression]'.[278] However, it was the separate opinions that offered a closer analysis of the Definition. Judge Kooijmans noted that the resolution 'does not in all its terms reflect customary international law'; the reference to military occupation as aggression was 'less than felicitous'.[279] Judge Kooijmans drew from scholarly opinion but did not address the significance of a series of prior Assembly resolutions that condemned occupation as aggression.[280] By contrast, Judge Elaraby noted that although the Definition 'is not without its problems' it was 'nonetheless adopted without a vote…and marks a noteworthy success in achieving by consensus a definition of aggression'. [281] While acknowledging that the Definition is not 'completely exhaustive', Judge Elaraby regarded it to offer an invaluable guide to the scope of aggression and an elucidation of the meaning of this term in 'international relations'.[282] Judge Elaraby then used the Definition as a basis for his conclusion that Uganda had engaged in such conduct in contravention of the UN Charter and customary international law.[283]

Judicial references aside, the Definition of Aggression acquired fresh impetus in 2010 when, during the ICC Kampala Conference, the States Parties agreed to substantially incorporate the definition set out in Article 3 of the Definition into the crime of aggression set out in the new Article 8*bis*, ICC Statute.[284] Given that the Definition of Aggression has come in for criticism from different quarters, on both legal and political grounds alike, this might have been surprising. After all, the ILC rejected the Definition of Aggression in the course of drawing up its Draft Code of Crimes Against the Peace and Security of Mankind given that it

[275] *Nicaragua (Merits)* (n 273) (Judge Schwebel) [168].
[276] ibid [263].
[277] *Armed Activities on the Territory of the Congo (DRC* v *Uganda)* (Merits) [2005] ICJ Rep 168.
[278] ibid 223.
[279] ibid (Separate op Judge Kooijmans), 321.
[280] ibid (occupation assumes invasion so is a redundant category). As to Assembly practice condemning occupation as aggression, see Chapter 4.
[281] ibid (Separate op Judge Elaraby), 330.
[282] ibid.
[283] ibid, 331.
[284] However, art 8*bis* did not wholesale incorporate the Definition of Aggression; absent was any reference to art 2 which recognised the Security Council's discretion to determine acts of aggression (the Security Council's role in doing so thus being confined to the exercise of jurisdiction rather than determining responsibility). The crime was activated on 17 July 2018.

was seen as too vague to serve as a basis for prosecution.[285] Yet its partial incorporation two decades later into the ICC Statute speaks both to the durability and adaptability of the Assembly's definition. The fact that the definition was long established meant that many delegates did not see it as necessary to completely 'reinvent the wheel' in positing its own definition of the criminal offence with the uncertainties that this would bring in obtaining consensus.[286] Similarly, delegates did not see any structural impediments in taking a definition that served to guide State and UN institutional conduct to the new arena of imposing criminal responsibility on individuals.[287] Article 8*bis* built upon the Definition with a new threshold clause, that would require such act of aggression to constitute 'by its character, gravity and scale' a 'manifest violation of the Charter of the United Nations'. This clause, in turn, would help achieve the consensus that allowed the transposition of the Definition of Aggression into Article 8*bis*, given that any of its controversial elements could be mitigated by the imposition of a high threshold in the application of this definition. Accordingly, the new threshold clause ensured that only 'very serious and unambiguously illegal instances of a use of force by a State can give rise to individual criminal responsibility of a leader of that State under the Statute.'[288] The Definition of Aggression is therefore a prime example of derivative Assembly norm-making, where norms were developed by the UN plenary for one purpose and adapted by specific legal regimes (here the ICC) to suit new circumstances and forms of accountability.

8. Resolution 3452 (XXX) (1975): Torture Declaration

In 1975, the Assembly adopted by consensus the Torture Declaration.[289] The significance of this instrument was that, while other instruments that preceded it outlined the prohibition, the Declaration was the first to articulate a definition.[290] Comprising 12 articles, the Declaration also outlines a set of specific guarantees for States to meet, including: the criminalisation of torture under its national law, prompt investigations and prosecutions where torture has occurred, and reparations to the victims.[291] The Declaration also reflected an increasing practice in Assembly resolutions to draw from various sources of international obligation: the Preamble thus had 'regard to' the prohibitions on torture in Article 5 of the UDHR and Article 7 of the ICCPR. The Declaration employed weaker language than had been used in earlier norm-forming resolutions; it thus 'adopt[ed]' (rather than 'affirmed') the principles set out in the Declaration, which also appeared in an annex to the resolution rather than the main body. It will become apparent, however, that this subtle terminological difference has not been used to limit its influence in augmenting international norms proscribing torture.

The Torture Declaration represented an important early statement on the prohibition of torture, although whether it constituted sufficient evidence to identify customary international law as of the date of its adopted in 1975 has prompted judicial reflection.[292] As a matter of modern day torture law it will be included in a compendium of instruments all pointing towards

[285] Michael Glennon, 'The blank-prose crime of aggression' (2010) 35 Yale J Intl L 71, 79-80 (and citations there).
[286] ibid.
[287] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression' in Stefan Barriga and Claus Kreß (eds), *The Travaux Preparatoires of the Crime of Aggression* (CUP 2012), 3–57
[288] *Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC* (Liechtenstein Institute on Self-Determination, 2012), 8.
[289] UNGA Res 3452 (XXX) (1975), annex (Torture Declaration).
[290] ibid art 1.
[291] ibid arts 7-11.
[292] One judge at the ECtHR has noted this to be the case: *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) (Partly dissenting op Judge Borrego), 79 (torture definition has been 'internationally accepted' since 9 December 1975 (the date of the Torture Declaration's adoption).

the customary basis of the prohibition.[293] The ICTY Trial Chamber therefore noted that, based upon the Declaration, 'all members of the United Nations concurred in and supported that definition' to use this as a valid source so as to establish, alongside other sources, that the 'main elements' contained in Article 1 of the Torture Convention were customary international law.[294] But earlier caselaw, and more recent situations constrained by a temporal jurisdiction that coincided with the Declaration, provide some indication of its independent legal effect. The United States (US) Court of Appeals in 1980 held that the Declaration, due to it being expressed 'with great precision' and adopted 'without dissent', offered a 'definitive statement' of relevant customary international law.[295] Similarly, the Supreme Court of the Netherlands noted that, at the material time in the case, in the 'late 1980s', torture was an offence under international law, citing the requirement in the Declaration that States should make it a criminal offence and prosecute it.[296] A more tentative position was noted by the Group of Experts for Cambodia, noting that its 'adoption by consensus by the General Assembly offers evidence of an *emerging* norm of international criminality as of 1975.'[297]

But not all jurists have been of one mind, reflecting more broadly a tension over the extent to which Assembly declarations provide sufficient evidence of customary international law. The ECCC Supreme Court Chamber in 2008 expressed its reservations over the Torture Declaration in this respect, given that it is 'a non-binding General Assembly resolution'; thus, '*more evidence* is required to find that the definition of torture found therein reflected customary international law at the relevant time.'[298] Only once the ECCC engaged in a wide ranging analysis of supporting evidence, including jurisprudence from the Nuremberg Military Tribunals, did it feel able to conclude that the elements of torture in the Declaration 'were declaratory of customary international law' in 1975.[299] This represents a more conservative use of Assembly resolutions as statements of law than in some of the previous jurisprudence considered above, in only placing reliance upon it as a source of *opinio juris* which must be corroborated by other evidence of agreement and corresponding State practice. Thus, the ECCC Supreme Court Chamber's suggestion that jurisprudence from Nuremberg is relevant to determining the authoritativeness of the Declaration also seems to be endorsement of the continuing relevance of State practice as an essential element in determining customary international law (assuming, that is, Nuremberg jurisprudence is a manifestation of State practice), unlike the approach taken by the ICTY towards the method of identifying custom above.[300]

Leaving aside the method for establishing custom, it is instructive to note that the Torture Declaration has also been used as an aid to interpret subsequent treaty-based

[293] *Čelebići* (Judgment) (n 185), [459] ('It may, therefore, be said that the definition of torture contained in the Torture Convention includes the definitions contained in both the [Torture Declaration] and the Inter-American Convention and thus reflects a consensus which the Trial Chamber considers to be representative of customary international law.'); *Suresh v Minister of Citizenship and Immigration* [2002] 1 SCR 3 (Supreme Court of Canada), [62].
[294] *Furundžija* (n 183), [160]; *Celebići Case* (Appeal Judgment) (n 204), [459].
[295] *Filartiga* (n 177); *Kadic v Karadzic* 70 F 3d 232 (2d Cir 1995).
[296] *H v Public Prosecutor* No 07/10063(E) Decision No LJN:BG1476 (Supreme Court of the Netherlands, 8 July 2008), [5.4.6].
[297] UNGA, 'Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/125' (18 February 1999) UN Doc A/53/850, [78] (emphasis added).
[298] *Duch* (Appeal) (n 126), [194] (emphasis added). See also *Prosecutor v Kunarac* (Judgment) ICTY-96-23-T & ICTY-96-23/1-T (22 February 2001), [466], [474].
[299] ibid, [196]. See also ICRC, *Commentary to the Additional Protocols of the Geneva Conventions* (1987), [4533] (UNGA Res 3452 (XXX) (1975) as having 'an important moral force' albeit not legally binding).
[300] See Chapter 3.

prohibitions on torture.[301] The Declaration has, notably, been treated as forming part of the drafting history to construe the language in the 1984 Torture Convention, unsurprising given that the two instruments have much in common.[302] Indeed, the ICJ has observed that, upon coming into effect, the Torture Convention *reflected* customary international law, a proposition established by looking to the Declaration.[303] The Supreme Court of Canada also used the Declaration as an example of what were 'acts contrary to the purposes and principles of the United Nations' under Article 1(F) of the Convention Relating to the Status of Refugees (Refugee Convention).[304] Similarly, the Declaration has been used to construe regional human rights prohibitions on torture, as in *Ireland v United Kingdom* in supporting an interpretation of Article 3 of the ECHR that drew a distinction between 'torture' and 'inhuman or degrading treatment'.[305] However, given that the Declaration is dated to 1975 there have been a number of important superseding developments, thereby reducing its precedential value. Indeed, the Declaration has been used to shed light on what the 1984 Convention does not include on the basis that the drafters of the treaty must have intended to materially depart from the Declaration.[306]

9. Resolution 47/133 (1992): Enforced Disappearance Declaration

Alongside the Commission on Human Rights, the Assembly played a leading early role in monitoring the occurrence of 'enforced disappearances', having conducted such monitoring on a regular basis since 1974.[307] This practice would culminate, in 1992, in the passage by consensus of the Enforced Disappearance Declaration.[308] The Assembly 'proclaim[ed]' the Declaration 'as a body of principles for *all* States'.[309] The Declaration defines the offence and requires that States take measures to make the protections against enforced disappearances effective. Notably, it also recognised that enforced disappearances constituted a 'crime against humanity', calling for States to take a variety of measures to prevent and punish the

[301] See also other Assembly resolutions on torture accepted as custom: UNHRC, 'Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea' (5 June 2015) UN Doc A/HRC/29/CRP.1, [859] (that detention in a secret prison may amount to torture, citing UNGA Res 60/148 (2005), art 11).
[302] As acknowledged in Torture Convention (n 170), preamble. See also Evidence Decision (Partially dissenting op Judge Fenz), *Chea*, Case No 002/19-09-2007/ECCC/TC (5 February 2016), [18]; *Kunarac* (Judgment) (n 298), [474]; *Čelebići* (Judgment) (n 185), [474].
[303] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, 457. See also *Prosecutor v Rašević* No X-KR/06/275 (Court of Bosnia and Herzegovina, 28 February 2008), 47.
[304] *Pushpanathan v Canada* [1998] 1 SCR 982, [65]-[66]; 189 UNTS 137 (adopted as UNGA Res 429(V) (1951), entered into force 28 July 1951).
[305] *Ireland v UK* App No 5310/71 (ECtHR, 18 January 1978), [167]. See also *Krnojelac* (n 184), [180] (Declaration supported the proposition that torture was a serious form of mistreatment).
[306] *Chea* (Evidence) (n 302), [55]; Closing Order Appeal, *Duch*, Case No 001/18-07-2007-ECCC/OCIJ (PTC02) (5 December 2008), [65].
[307] See analysis in *Chea* (Judgment) (n 175), [446]. See eg UNGA Res 40/140 (1985), preamble ('enforced and involuntary disappearances' in Guatemala); UNGA Res 38/101 (1983), [9] ('disappearances…of persons' in El Salvador); UNGA Res 37/183 (1982), preamble ('disappeared persons' in Chile); UNGA Res 37/180 (1982) (addressing the question of 'enforced or involuntary disappearances'); UNGA Res 34/179 (1979), preamble (dealing with 'missing and disappeared persons' in Chile); UNGA Res 33/173 (1978), [3] (referring to 'enforced or involuntary disappearances of persons'); UNGA Res 3220 (XXIX) (1974), preamble (referring to those 'missing' in armed conflict).
[308] UNGA Res 47/133 (1992).
[309] ibid, [1] (emphasis added).

commission of such crimes.[310] It is also worth noting that in stating these principles, language that is usually presumed as mandatory is used throughout: 'shall', for example, is used 48 times. Similarly, individuals ordered to participate in an enforced disappearance have the 'duty' not to obey it.[311]

As to the basis for such mandatory language, the references to pre-existing sources of norms may provide some explanation. The Enforced Disappearance Declaration is located in the context of Article 55 of the UN Charter, 'bearing in mind' the 'obligation' on States under the Charter 'to promote universal respect for, and observance of, human rights and fundamental freedoms'.[312] It also had 'regard' to the UDHR, ICCPR, Torture Convention, and recalled the Geneva Conventions and its Additional Protocols.[313] The Declaration was expressly 'without prejudice' to the UDHR in not derogating or restricting these provisions.[314] It also spoke of one previous Assembly resolution using mandatory language: it thus 'affirm[ed]' that in order to prevent enforced disappearances, it is necessary 'to ensure strict compliance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.'[315] Adding emphasis to these norms, the Declaration also proclaimed enforced disappearances as a 'denial of the purposes' of the UN Charter and a 'grave and flagrant violation' of the UDHR.[316]

While there was already numerous other sources that prohibited enforced disappearances, the Assembly regarded it as 'important to 'devise an instrument which characterizes all acts of enforced disappearances of persons as very serious offences and sets forth standards designed to punish and prevent their commission'.[317] These included standards that had not yet been fully articulated in other legal regimes, such as the characterisation of enforced disappearances as a 'continuing crime' and the recognition that the 'victims' of such crimes extend to family members of the disappeared person.[318] The Enforced Disappearance Declaration also contained arguably stricter standards than found in the general derogation clauses of existing human rights instruments, in that it would not permit a State to invoke an internal emergency in any circumstance so as to justify departures from the prohibition on enforced disappearances.[319] The purpose of the Declaration, then, was not only to restate existing sources of obligation but also to explain more precisely the standards applicable in relation to this prohibition.

The Enforced Disappearance Declaration has influenced the development of other legal regimes. It was reproduced substantially in the subsequent Assembly-sponsored treaty that bears the same name 14 years later – the Convention on Enforced Disappearance.[320] Although there are some differences between the Declaration and Convention, the similarities outnumber the differences, including, for instance, in recognising the act of enforced disappearances as,

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[310] ibid, preamble, arts 1, 3-20. However, this was not the first plenary instrument to do so, the Parliamentary Assembly of the Council of Europe ('PACE') declaring 'that the recognition of enforced disappearance as a crime against humanity is essential if it is to be prevented and its authors punished': PACE Res 828 (1984), [2], [13].
[311] UNGA Res 47/133 (1992), art 6.
[312] ibid, preamble.
[313] ibid.
[314] ibid art 21.
[315] ibid preamble. See further UNGA Res 43/173 (1988).
[316] ibid art 1(1).
[317] ibid preamble.
[318] ibid arts 17(1) and 19.
[319] ibid art 7 ('No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.')
[320] International Convention for the Protection of All Persons from Enforced Disappearance 2716 UNTS 3 (adopted as UNGA Res 61/177 (2006), entered in force 23 December 2010) ('Enforced Disappearance Convention').

in certain circumstances, a crime against humanity.[321] Similarly, the 1994 Inter-American Convention on Forced Disappearance of Persons (IACFDR), although not crediting explicitly the Declaration, is evidently inspired by it and contains substantially the same terms.[322] In the judicial context, the ICC Pre-Trial Chamber used the Declaration generously in defining the crime of enforced disappearances under Article 7(1)(i) and 2(i) of the ICC Statute, presumably on the basis that it was amongst the 'established principles of international law' to which the Court should have regard to (under Article 21, ICC Statute).[323] In defining what falls within 'other inhumane acts' as a crime against humanity, the ICTY noted that 'enforced disappearance of persons' was 'prohibited' by the Declaration.[324] The ECtHR, in acknowledging norms on enforced disappearance to be a 'recognised category in international law' as embodied in the Declaration,[325] have used it as a relevant interpretive aid to define the positive obligations on States to investigate.[326] The IACtHR invoked the Declaration on the basis that, while there was no treaty in force (at the time), this instrument embodied 'several principles of international law on the subject'.[327] Accordingly, pursuant to Article 29(d) of the American Convention on Human Rights (ACHR), which allowed the court to take into account general international law, the Declaration was invoked.[328] The effect of 'reading-in' the Declaration supported the conclusion that the practice of enforced disappearances implied the engagement and violation of multiple rights under the ACHR.[329] In a similar manner, the African Court of Human and Peoples' Rights also found that enforced disappearances in Burkina Faso 'constitute a violation of the above-cited texts and principles' (citing the Declaration extensively); the court treated a violation of the Declaration as analogous to a violation of the constitutive instrument it was tasked with applying (i.e. the African Charter on Human and Peoples' Rights).[330] Finally, a commission of inquiry of the UNHRC applied the Declaration as reflective of custom in evaluating conduct in Eritrea.[331]

Still, not all courts have drawn so liberally from the Enforced Disappearances Declaration. The mantra that Assembly resolutions are non-binding was stated by Leggatt J in the English High Court in *Al-Shaadoon*, in contrast to the binding Convention on Enforced

[321] ibid, preamble.
[322] Inter-American Convention on Forced Disappearance of Persons 33 ILM1429 (1994) (entered into force March 28, 1996); ILC, 'Second Report on Crimes Against Humanity' (21 January 2016) UN Doc A/CN.4/690, [189] (Declaration 'influenced the 1994 Inter-American Convention').
[323] *Situation in the Republic of Burundi* (Authorisation) ICC-01/17-X-9-US-Exp (25 October 2017), [118] (being immaterial that a family member lodges a complaint to trigger the duty on the part of the State to investigate); [119] (that internal political instability or any other public emergency cannot excuse offending conduct); [121] (enforced disappearances is a continuous crime).
[324] *Kupreškić* (n 176), [566].
[325] *Çicek v Turkey* App No 25704/94 (ECtHR, 5 September 2001) (Concurring op Judge Maruste), 44. See also *Mocanu v Romania* App no 10865/09 (ECtHR, 17 September 2014) (Concurring op Judge Pinto de Albuquerque, joined by Judge Vučinić), [4], fn 5 (the 'running of a statutory limitation period may evidently be suspended during the period in which accountability is impossible and no effective judicial remedy is available', citing art 17(2) of the Enforced Disappearances Declaration); *Varnava v Turkey* App no 16064/90 (ECtHR, 18 September 2009) (Concurring op Judge Ziemele), [4] (accepting the definition in the Declaration).
[326] *Aydın v Turkey* App no 25660/94 (ECtHR, 24 August 2005), [153] ('regard may be had' to Art 11, Declaration); *Er v Turkey* App no 23016/04 (ECtHR, 31 October 2012), [72].
[327] *Blake v Guatemala* (Judgment) IACtHR Ser C No 36 (2 July 1996), [36].
[328] ibid; American Convention on Human Rights 1144 UNTS 123 (entered into force 18 July 1978).
[329] ibid [39].
[330] *Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (Judgment) No 204/97 (African Court on Human and Peoples' Rights, 23 April-7 May 2001), [44]; African Charter on Human and Peoples' Rights, 1520 UNTS 217 (entered into force 21 October 1986).
[331] UNHRC, 'Detailed findings of the Commission of Inquiry on Human Rights in Eritrea' (8 June 2016) UN Doc A/HRC/32/CRP.1, 27.

Disappearances.[332] Similarly, a court in Bosnia and Herzegovina did not regard it to be amongst the 'primary international sources' on the crime of enforced disappearances; these being the Convention on Enforced Disappearances, the ICC Statute and, at a regional level, the IACFDR.[333] Furthermore, the Convention tends to be cited more frequently and to a greater extent than the Declaration in the jurisprudence considered above, which is perhaps unsurprising given that the treaty post-dates the Declaration and enjoys a large number of ratifications. Given that the international law of enforced disappearances is a burgeoning field, judges now have many instruments to call upon to construct norms within their legal regime: the Declaration in this context will often offer support for a point that is arrived at through the aggregation of international authority.[334] Even so, the influence of the Declaration on the development of a modern law against enforced disappearances in multiple legal regimes is evident from the jurisprudence considered above.

10. Resolution 49/60 (1994), Annex: International Terrorism Declaration

The Assembly in Resolution 49/60 (1994) adopted by consensus the International Terrorism Declaration. Aside from outlining commitments to suppress terrorism, the Declaration noted 'that those responsible for acts of international terrorism must be brought to justice'.[335] It outlined a number of features of international terrorism that are rule-definitional in character: 'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable'.[336] This was irrespective of the motives, be they 'political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them'.[337] However, most of the focus was on the obligations on States to address terrorism and to cooperate towards this end, rather than in postulating a clear definition of the offence as an international crime. The Declaration thus referred to particular international obligations owed: States 'must' refrain from participating in terrorist activities, 'guided by' the purposes and principles of the UN Charter; [338] 'States *must* also fulfil their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism.'[339] In criminal law terms, these obligations included ensuring 'the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law'.[340]

Whether this resolution has contributed to the crystallisation of an international crime of terrorism has been the focus of diplomatic attention. During the Rome Conference, some delegations sought the inclusion of international terrorism as a crime under the ICC Statute, with reference being made to the International Terrorism Declaration to support the formulation of the crime's elements. However, this initiative ultimately failed, the Declaration and other instruments not considered to offer a precise, agreed, definition of this crime.[341]

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[332] *Al-Saadoon v Secretary of State for Defence* [2015] EWHC 715 (Admin), [210] (Leggatt J).
[333] *Rašević* (n 303), 89.
[334] See eg *Rio Negro Massacres v Guatemala* (Judgment), IACtHR Ser C No 250 (4 September 2012), [115].
[335] UNGA Res 49/60 (1994), Annex, preamble.
[336] ibid [3].
[337] ibid.
[338] ibid [4]. See also ibid [2] (terrorist acts 'constitute a grave violation of the purposes and principles of the United Nations').
[339] ibid [5].
[340] ibid. These principles were reaffirmed in UNGA Res 51/210 (1996).
[341] Preparatory Committee on the Establishment of an International Criminal Court, 'Proceedings of the Preparatory Committee During the Period 25 March-12 April 1996' (9 April 1996) A/AC.24 9/CRP.2/Add.4/Rev.1, [3], [4].

Both the ICTY and STL have considered the contribution of the International Terrorism Declaration to the forging of an international crime, albeit in *obiter*. Thus in 2009, Judge Liu in the ICTY Appeals Chamber, citing the International Terrorism Declaration, noted that while there were elements of a definition that were 'generally accepted',[342] he could not 'agree that the offence has been criminalised under customary international law'.[343] The STL Appeals Chamber engaged in a more detailed analysis as to the effects of the Declaration on an international definition of the crime of terrorism.[344] In noting the objection that no accepted definition of terrorism has evolved due to the 'marked difference of views on some issues, closer scrutiny demonstrates that in fact such a definition has gradually emerged', citing from a series of Assembly Resolutions including the Declaration.[345] The STL went on to note that the customary rule contained the elements of being a criminal act, taking place transnationally, and with the intent to spread among the population. The Declaration was used to support the intent element, which focuses on the general public being the object of terror.[346] Similarly, the Appeals Chamber found it 'relatively easy' to establish a duty under international law on States to bring to trial and punish perpetrators of terrorist acts; again, reference was made to a multitude of sources, including the 'passing of robust resolutions by the [Assembly] and Security Council condemning terrorism'.[347] However, it is difficult to assess the independent impact the Declaration, and other Assembly resolutions, had on these findings given the volume of sources cited. It is interesting, though, that when the Declaration was the primary authority cited for a proposition, with limited support from other sources, the Appeals Chamber implicitly doubted that the definition contained within it was enough. This arose in considering whether the element of the crime of international terrorism included a requirement that the prohibited conduct be taken in pursuit of a political or ideological purpose, as the Declaration stipulates.[348] Here, the STL noted that this 'aspect of the crime of terrorism has not yet been so broadly and consistently spelled out and accepted as to rise to the level of customary law'.[349] The Declaration, standing alone on this point, was therefore not enough to establish the customary prohibition.

Similarly, the International Terrorism Declaration has been considered to lack the requisite precision so as to establish conduct that is deemed to be prohibited under, or inconsistent with the 'purposes and principles' of the UN Charter. This has arisen in the refugee context, particularly in ascertaining whether a person is excluded from refugee status due to being 'guilty of acts violating the purpose and principles of the United Nations' under the

[342] *Prosecutor v Milošević* (Appeal Judgment) ICTY-98-29/1-A (12 November 2009) (Partly dissenting op Judge Liu), [27], fn 56 (International Terrorism Declaration cited, alongside numerous other instruments).
[343] ibid [29]. See also *Prosecutor v Milutinović* (Jurisdiction) ICTY-99-37-PT (6 May 2003) (Separate op Judge Robinson), [23].
[344] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging STL-11-01/1 (16 February 2011).
[345] ibid, [83]-[85].
[346] ibid, [88].
[347] ibid, [104].
[348] Ibid, [106] (Assembly 'resolutions have, since 1994, insisted that *'criminal* acts intended or calculated to *provoke a state of terror* in the general public, a group of persons or particular persons for political purposes are *in any circumstance* unjustifiable…', citing in fn136, UNGA Res 49/60 (1994), [3] (emphasis added); UNGA Res 64/118 (2009), [4]; UNGA Res 63/129 (2008), [4]; UNGA Res 62/171 (2007), [4]; UNGA Res 61/40 (2006), [4]; UNGA Res 60/43 (2005), [2]; UNGA Res 59/46 (2004), [2]; UNGA Res 58/81 (2003), [2]; UNGA Res 57/27 (2002), [2]; UNGA Res 56/88 (2001), [2]; UNGA Res 55/158 (2000), [2]; UNGA Res 54/110 (1999), [2]; UNGA Res 53/108 (1998), [2]; UNGA Res 52/165 (1997), [2]; UNGA Res 51/210 (1996), [2]; UNGA Res 50/53 (1995), [2].
[349] ibid, [106].

Refugee Convention.[350] A court might, in this respect, draw from Article 2 of the Declaration, which notes that '[a]cts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations'. However, the United Kingdom (UK) Supreme Court noted that the Declaration was not authoritative in its interpretation of proscribed conduct under the Charter, as there still remained no generally accepted definition of 'terrorism'; that later Assembly resolutions stressed the need for a comprehensive convention on international terrorism underscored the lack of an accepted definition.[351] That Resolution 49/60 (1994) was entitled 'Measures to Eliminate International Terrorism' also reinforced the UK Supreme Court's view that the Declaration was concerned with addressing international terrorism without defining precisely what it was.[352] It seems, therefore, from the UK Supreme Court's perspective, while a Assembly resolution is able to interpret norms under the UN Charter, it must do so in sufficiently precise terms, using prescriptive language, for it to be upheld as authoritative.[353] However, the context in which the UK Supreme Court evaluated the prescriptive force of the International Terrorism Declaration has to be taken into account, which was in interpreting Art 1(f) of the Refugee Convention, rather than norms applicable within the UN legal order as such.[354]

11.Resolution 60/147 (2005): Reparation Principles

In Resolution 60/147 (2005) the Assembly adopted by consensus the Reparation Principles. These principles started life in the UN Human Rights Commission before being adopted by the Assembly without a vote.[355] The Reparation Principles, comprising 27 principles, are concerned with the rights of victims of gross violations of international human rights law and serious violations of international humanitarian law. These principles include both obligations of a general and specific character: from a general obligation to respect international human rights law to more specifically defined obligations to secure access to justice for victims. The principles also recognise and expand upon individual rights under international law, including the right to a remedy.[356] They also include a duty to investigate such violations 'effectively, promptly, thoroughly and impartially'.[357]

The Reparation Principles use more tentative language than other prominent examples of normative resolutions, such as the Enforced Disappearances Declaration considered above. The Preamble notes that victims have a 'right to benefit from remedies and reparation' but then merely '[r]ecommends' that States take the Reparation Principles into account. The Reparation Principles acknowledge that nothing contained in them 'entail new international or domestic obligations' but merely identify 'mechanisms, modalities, procedures and methods for the implementation of existing legal obligations'.[358] The Reparation Principles draws upon a list

[350] Refugee Convention (n 304), art 1F(c) (excluding from refugee status and protection 'any person with respect to whom there are serious reasons for considering that ... he has been guilty of acts contrary to the purposes and principles of the United Nations'.)
[351] *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54 [2013], [29] (Lady Hale and Lord Dyson).
[352] ibid [37].
[353] See also *Pushpanathan* (n 304).
[354] The Supreme Court thus put greater emphasis on the pronouncements of the UNHCR: *Al-Sirri* (n 351), [48]. See also *Federal Republic of Germany v B* (ECJ) [2012] 1 WLR (Joined Cases C-57/09 and C-101/09), [59] ('equating any action contrary to [Assembly or Security Council resolutions] as falling within the scope of article 1F(c) would be inconsistent with the object and purpose of that provision').
[355] For a history, see Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24(4) Netherlands Q Human Rights 641.
[356] UNGA Res 60/147 (2005), annex, [12].
[357] ibid, art 3(b).
[358] ibid, preamble, [12].

of international instruments, further reinforcing the suggestion that it is merely consolidating general principles that derive from such instruments.[359] Where presumptively mandatory language is used, like 'shall', it is also qualified by a clause that only requires the State to perform such action to the extent as is required under existing international obligations. This express qualification arose in particular in relation to the effect of statutes of limitations for international crimes and in the recognition in domestic laws of the principle of universal jurisdiction.[360] Similarly, despite the Assembly purporting to articulate a general duty to prosecute or extradite in previous resolutions, such as the Cooperation Principles above, any such duty was framed in an unspecified and more general way as deriving from 'applicable treaty or other international obligations'.[361]

There are many references in support of the position that the Reparation Principles represent customary international law. In particular, the ICC has equated them without any discussion with 'internationally recognized human rights' under Article 21(3) of the ICC Statute; in this context, the ICC has spoken of the Reparation Principles in the same breath as obligations under supposedly 'harder' sources of law, such as the Convention on the Rights of the Child.[362] At a domestic level, Abella J in the Canadian Supreme Court noted that the Reparation Principles offer 'significant guidance' and 'recognizes a State's obligation to provide access to justice and effective remedies, including reparations, to victims of serious or gross human rights and humanitarian law violations'.[363] 'All of this shows', according to Abella J in referring to provisions in the Reparation Principles, that 'an individual's right to a remedy against a State for violations of his or her human rights is *now* a recognized principle of international law.'[364] Similarly, UNHRC-appointed commissions of inquiry have invoked the Reparation Principles: 'While they are not a binding international instrument', the fact that they were adopted by the Assembly and referred to by multiple international, regional and national bodies 'shows that they enjoy far-reaching support'.[365]

The Reparation Principles have also been used as an aid in the construction of relevant provisions of the ICC Statute. The Trial Chamber in *Lubanga* thus noted that the system of reparations should reflect the values of the Reparation Principles in being inclusive, encouraging participation and recognising the need for effective remedies for victims.[366] The Trial Chamber thus referred to specific norms from the Reparation Principles as being applicable to its decision-making framework on reparations, including norms on proportionate and adequate reparations;[367] access to information;[368] victim's safety;[369] restitution;[370]

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[359] ibid, preamble.
[360] ibid, [5]-[7].
[361] ibid, [5], [6].
[362] Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3; *Prosecutor v Lubanga* (Victims' Participation) ICC-01/04-01/06-2035 (10 July 2009), [24]; *Prosecutor v Kony* (Victims' Participation) ICC-02/04-01/05 (10 August 2007), [88]; *Situation in the State of Palestine* (Victim Outreach) ICC-01/18 (13 July 2018), [9]. See also Civil Party Participation, *Chea*, Case No ECCC-002/19-09-2007-OCIJ(PTC01) (20 March 2008), [30]-[31]; *Duch* (Appeal) (n 129), [413] (Reparation Principles are 'representative of international standards').
[363] *Kazemi Estate v Iran* [2014] 3 SCR 176, [197]-[198] (Abella J).
[364] ibid [199] (emphasis added).
[365] UNHRC, 'Eritrea Report' (n 301), [46]; UNHRC, 'Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Eminent International and Regional Experts' (17 August 2018) A/HRC/39/43, [19].
[366] *Lubanga* (Reparations) (n 196), [177], [185] (Reparation Principles have provided guidance, alongside other instruments).
[367] ibid [242].
[368] ibid [188].
[369] ibid [190].
[370] ibid [224].

compensation;[371] rehabilitation;[372] and to grant reparations on a non-discriminatory basis.[373] The Reparation Principles have since been cited by ICC judges as offering support for the principles enunciated by the Appeals Chamber in *Lubanga*.[374] The ICC Appeals Chamber thus noted that the imposition of liability for reparations on a convicted person 'is also consistent' with the Reparation Principles (having already established this based upon the text of the ICC Statute).[375] The Trial Chamber drew from Principle 11 to support the proposition that reparations have not only to be appropriate and adequate, but also prompt.[376] In 2017, the ICC Trial Chamber also 'relied upon' the Reparation Principles in relation to the question of reparations for crimes against cultural heritage; this supports the notion of 'collective' harm suffered by victims, as covered in Principle 8, being the subject of reparations.[377] While the Reparation Principles have therefore been useful in providing, in consolidated form, a window into relevant customary international law, there are also aspects that have proven more contentious. In this regard, some parts of the Reparation Principles arguably go beyond merely recognising a settled position in international law to developing the right in a particular direction. There are at least three prominent examples of this.

The first is corporate responsibility for human rights violations: Principle 15 of the Reparation Principles noted in general terms that '[i]n cases where a person, a *legal person,* or other entity is found liable for reparation to a victim, such party should provide reparation to the victim'. The STL drew from Principle 15, which represents 'a concrete movement on an international level backed by the United Nations for, *inter alia*, corporate accountability'.[378] Although the STL was wary that the Reparations Principles were 'non-binding', it considered them to be 'evidence of an emerging international consensus regarding what is expected in business activity, where legal persons feature predominantly, in relation to the respect for human rights.'[379] Evidently, though, the Reparation Principles did not suffice to crystallise the necessary consensus, leaving open the question as to what additional evidence will be necessary to establish the requisite international consensus.

A second area of contention concerns the definition of 'victim': Principle 8 of the Reparation Principles constructed a victim in a broad sense to be those who 'suffer either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights.'[380] Principle 8 in turn became a focal point for debate at the ICC as to whether Rule 85 of the ICC Rules would permit victims who suffered 'indirect' harm to participate in the proceedings. The Trial Chamber in *Lubanga* held that they could, noting that Principle 8 'provides appropriate guidance'.[381] Judge Blattmann dissented, that the Reparation Principles were 'not a strong or decisive authority', that a proposal to include them in the ICC Statute was rejected, and that Principle 8 was not amongst the 'internationally recognized human rights' from which the Court could look to for assistance under Article 21(3) of the ICC Statute.[382] The authoritative status of Principle 8 was not resolved in the appeal on this issue given that

[371] ibid [226].
[372] ibid [232].
[373] ibid [191].
[374] *Prosecutor v Lubanga* (Reparations) ICC-01/04-01/06 (3 March 2015), [100].
[375] ibid [100]. See also *Prosecutor v Katanga* (Reparations) ICC-01/04-01/07 (24 March 2017), [267].
[376] *Prosecutor v Bemba* (Reparations) ICC-01/05-01/08 (5 May 2017), [19].
[377] *Prosecutor v Al Mahdi* (Reparations) ICC-01/12-01/15 (17 August 2017), [24]-[26].
[378] *Prosecutor v New TV SAL* (Interlocutory Appeal) STL-14-05/PT/AP/AR126.1 (2 October 2014), [46], fn 89.
[379] ibid.
[380] The PTC had previously applied 'emotional suffering' from Principle 1 of the Reparation Principles: *Situation in the Democratic Republic of the Congo* (Victims' Participation) ICC-01/04-101-tEN-Corr (17 January 2006).
[381] *Prosecutor v Lubanga* (Victims' Participation) ICC-01/04-01/06 (18 January 2008), [92].
[382] ibid [4] (Separate and dissenting op Judge Blattmann).

the Appeals Chamber focused on the Trial Chamber's approach in interpreting Rule 85 in its own terms; it was merely acknowledged that the Trial Chamber was entitled to rely on Principle 8 for 'guidance' purposes.[383] The wider point from this analysis, however, is that clearly the Reparation Principles offer a platform for the evolution of the right to a remedy and do not merely simply restate precisely defined and agreed principles.[384]

A third area has been the general duty under customary international law to investigate serious violations of international humanitarian law and international human rights law. Within human rights regimes, this will often derive from the legal text itself, although there have been occasions in which courts have evaluated a possible customary basis for this investigatory duty. In *Keyu*, the UK Supreme Court did so, given that the applicants sought to establish a duty in custom for a State to investigate extrajudicial killings as it existed in 1948 (i.e. prior to the UK's assumption of obligations under the ECHR in 1953).[385] The Supreme Court did not find a customary basis for this duty to have arisen in 1948, but it did regard it to have emerged in more recent times. Although only tentative, the Supreme Court relied on Principle 3 of the Reparation Principles and the earliest decision from the ECtHR that pronounced upon this duty in 1995.[386] Thus, it 'appears to be common ground that it is only within the past 25 years that international law recognised a duty on States to carry out formal investigations into at least some deaths for which they were responsible' (*Keyu* being decided in 2014).[387] Although unstated, this suggested that the Reparation Principles performed an important function in providing general State acceptance (i.e. *opinio juris*) to the judicial practice of the ECtHR (and, indeed, other human rights mechanisms).[388]

12. Conclusion

The above jurisprudential survey supports the view that the Assembly's quasi-legislative resolutions offer a valuable source of evidence in the identification and development of international law. It is only in a rare instance in which a judge would dismiss a resolution as irrelevant because it was 'non-binding' and deriving from a system that only formally regards such instruments to be 'recommendatory'. In turn, Assembly resolutions have been used by judges to interpret treaty norms, in some cases expanding the ambit of accountability under these regimes. They have also been used as evidence of existing customary international law, with judges finding resolutions to 'reflect' or 'represent' pre-existing norms.

More will be said on the normative value of resolutions in Chapter 3, but a number of general patterns are worth mentioning. Assembly resolutions have tended to be used to corroborate the existence of a norm rather than being used as the sole basis to establish it. However, a review of the jurisprudence in this Chapter shows that courts have attached weight to Assembly resolutions as offering insight into the content of international law, especially those adopted (like the ones above) that have commanded general support of the membership. In earlier times when international law was less developed, the influence of Assembly resolutions could be more clearly ascertained, as with the central role played by Resolutions 95(I), 96(I) and 217 (XXX) (UDHR) in the judicial interpretation of norms in the years following the end of World War II. Similarly, where the temporal jurisdiction of a case is

[383] *Prosecutor v Lubanga* (Victims' Participation Appeal) ICC-01/04-01/06 (11 June 2008), [33]-[35].
[384] See also evolution of the indirect victim concept in the IACtHR and the argument that these developments went further than the Reparation Principles: *Ahmadou Sadio Diallo (Guinea v DRC)* (Compensation) [2012] ICJ Rep 639 (Separate op Judge Trindade) 729, 769.
[385] *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.
[386] *McCann v UK* (1995) 21 EHRR 97.
[387] *Keyu* (n 385), [113] (Lord Neuberger).
[388] See further Chapter 3.

limited to an earlier period, as with the ECCC, Assembly resolutions have been of particular utility in identifying norms as they once were. But in more modern times, with the normative architecture of international justice at a more developed stage, it is apparent that Assembly resolutions have become one of many sources used to ascertain existing norms. In this regard, Assembly resolutions are routinely cited alongside 'hard' sources of international law (such as conventions) and binding decisions of international organisations (such as Security Council resolutions). Despite existing in a more crowded space amongst ostensibly superior norms, Assembly resolutions continue to be cited, which itself would suggest that they continue to possess a certain normative weight that is underpinned by their collective support by a large body of States.

The emergence of a comprehensive set of international justice norms will not render Assembly quasi-legislative resolutions as redundant for another reason. Assembly resolutions have increasingly become adept at consolidating principles as they have developed in various legal regimes. In doing so, the Assembly has also exercised interpretive licence to articulate standards that go beyond the current jurisprudence. The Reparation Principles stands as a model as to how the Assembly is able to influence the normative direction of particular regimes through, in places, a progressive construction of pre-existing, hard sources, of international law. Similarly, where an Assembly resolution 'stands-alone' in outlining a normative proscription of conduct that might lack corroboration in other international instruments or judgments (as with, for example its definition of terrorism) there is still value in it representing an 'emerging consensus', and in stimulating inter-institutional dialogue, which can sow the seeds for future developments towards norm crystallisation or refinement in the future.

CHAPTER 3: RELATION OF GENERAL ASSEMBLY RESOLUTIONS TO INTERNATIONAL LAW

1. Introduction

This Chapter will now consider at a conceptual level the relationship between Assembly resolutions and various sources of international law. This relationship has been acknowledged by the Assembly membership on diverse occasions: in the 2005 World Summit Outcome, all UN Member States reaffirmed the central position of the Assembly 'in the process of standard-setting and the codification of international law'.[389] Assembly resolutions have also acknowledged the importance of promoting codification as not only one of its core functions, but also as 'a more effective means of furthering the purposes and principles' of the UN Charter.[390] It has also been covered in the previous Chapter, particularly in the manner in which judges have used resolutions as an aid to interpret treaties and to identify customary international law. All of this invites closer consideration of a number of questions related to the advancement of international justice through the quasi-legislative development of international norms. Firstly, to what extent is the Assembly able to construct the obligations incumbent upon Members under the UN Charter? Secondly, what is the basis for the Assembly to enter the arena of other treaty regimes to interpret its provisions? Thirdly, what is the best theory to describe the influence of Assembly resolutions on the development of customary international law having regard to the jurisprudence analysed in Chapter 2?[391]

General to all of these questions is ascertaining the factors that will determine whether a resolution, or a series of resolutions on the same subject matter, will be more or less authoritative evidence on a given source of international law. Some resolutions start life as exhortatory but grow in evidentiary influence over time. Other resolutions might enjoy greater prescriptive influence in international life within a shorter period of time or - more controversially - possibly instantly. What is clear in this analysis, however, is that the phrase used to describe Assembly resolutions in the UN Charter - 'recommendations' - masks different shades of influence that have been acquired through practice. In this analysis, however, it is not being claimed that Assembly resolutions are direct sources of law in themselves. This suggestion was rejected in the drafting of the UN Charter and has not gained any traction since amongst Member States.[392] But more importantly, it does not reflect how Assembly resolutions have been used in practice in the construction of norms; rather, they have become regarded as 'evidence' (or, as Justice Higgins has noted, a 'rich source of evidence') of international norms.[393]

What, then, will make Assembly resolutions as a source of normative evidence more convincing? This question has prompted much discussion, although, as argued here, the most important considerations are the use of rule-prescriptive language in the text of a resolution that receives the support of a large majority of Members evidenced by the vote and

[389] UNGA Res 60/1 (2005), [149].
[390] UNGA Res 1686 (XVI) (1961), preamble; UNGA Res 1505 (XV) (1960), Preamble. See also UNGA 1815 (XVII) (1962), Preamble (conscious of 'emergence of many new states and of the contribution which they are in a position to make to the progressive development and codification of international law'); UNGA Res 39/84 (1984), Preamble (codification of rules against mercenaries 'would contribute immensely to the implementation of the purposes and principles of the Charter').
[391] There is also the influence of resolutions on 'general principles of law recognised by civilised nations', of which see Sloan, 'Changing World' (n 54), 77-81.
[392] See Chapter 2.
[393] Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (OUP 1963), 5.

accompanying explanations of vote. As Chapter 2 has already shown, a single resolution can be persuasive evidence of international law, although in practice there will often be a series of resolutions that reinforce the authority of a norm, be they of a quasi-legislative (i.e. expressive of abstract norms) or quasi-judicial (i.e. norms applied to a situation) character.[394] The evidentiary requirement in the identification of a norm might also differ, as will be considered, between norms grounded in the UN Charter (or other multilateral treaty regimes) versus those in customary international law. Whereas the UN members, via an Assembly resolution, are able to more directly interpret the UN Charter and other multilateral treaties to which they are a party as a form of 'subsequent agreement' in the interpretation of a treaty, the identification of customary international law requires *opinio juris* which has correspondence in State practice. Accordingly, the following Chapter will consider the relationship between Assembly resolutions and the identification of international law. Although the analysis in this Chapter is of a general nature, its relevance to the quasi-legislative role of the Assembly in the field of atrocity crimes accountability will also be addressed.

2. Influence: Exhortatory Resolutions

Before delving into the influence of Assembly resolutions on treaty and customary law, it is necessary to first note that many resolutions will not set out, in the first place, to have normative effect but will rather exhort its membership to reach agreement in the future on these norms. These resolutions are, in this regard, offering the weakest of prescriptive claims, lacking both a clear normative statement and indication that the membership regard such norm to be binding.[395] This exhortatory function is envisaged in the text of the UN Charter, being to make 'recommendations' and to provide an environment for the progressive codification of international law.[396] Resolutions of an exhortatory character have, in this regard, been framed in different ways. Some resolutions may acknowledge that a gap exists in international law which Member States should consider filling by way of a multilateral convention. Or they might set out a series of norms which are to be a standard of attainment in the future, as would be apparent from the language used and explanation of vote. Finally, Members might seek to limit the normative influence of resolutions but adopt a statement that envisages a political solution to a problem, as with the Assembly's recent Political Declaration on Trafficking in Persons.[397]

Yet even where there is merely an exhortatory intention of the Assembly for the future development of norms, it is apparent that resolutions of this nature may produce a number of effects. In particular, an exhortatory resolution might, through later reflections or uses, assume greater prescriptive significance, either as a statement of obligations under the UN Charter or in reflecting customary international law.[398] Even 'soft' agreement on the definition of a norm represents an important first step on its journey to an identified law.[399] The most obvious way in which this 'soft' agreement can be crystallised is via the later adoption of a multilateral convention that draws from the text of Assembly resolutions. Indeed, the institutional pattern between resolution and convention is such that they can be said to comprise two-stages of law-

[394] Quasi-judicial resolutions are considered further in Chapter 4.
[395] Falk (n 12) 787.
[396] UN Charter arts 13(1)(a) and 105(3).
[397] UNGA Res 72/1 (2017).
[398] See Sections 3 and 4 below.
[399] See also UNGA Committee on the Peaceful Uses of Outer Space, 'Summary Record of the First Meeting' (21 August 1962) A/AC.105/C.2/SR.1, 9 (US) ('[p]reparing a treaty and obtaining the required number of ratifications was a time-consuming process, whereas the Legal Sub-Committee [on Peaceful Uses of Outer Space] was in a position to act immediately by preparing a draft resolution for action by the General Assembly').

making activity.[400] The first stage declares the principles from which the broadest agreement can be achieved, in turn entering the international consciousness followed by their transformation into a source of international law in the form of a multilateral treaty.[401] This might mean that normative statements in resolutions do not find their way into the final convention (as with 'political groups' in the definition of genocide) but nonetheless stimulate discussion both during the drafting of the convention and thereafter.[402] There is ample authority, for example, to show that Resolution 96 (I) (affirmation that genocide is a crime under international law) was reflective of customary international law even, as the ICJ noted, 'without conventional obligation'.[403] Nonetheless, Resolution 96 (I) was useful in adding further precision to the Genocide Convention and in instilling more specific obligations on States to observe: in this respect Resolution 96 (I) acted as a catalyst for the Genocide Convention. A more obvious example of where soft agreement later crystallised into hard law was the UDHR, which started as a standard of achievement but was later substantially reproduced in the later human rights instruments including the ICCPR.[404]

That said, the efforts at progressive codification in the field of international justice have not always gone in a straight line. The process of codification is often a lengthy one and has been known to take decades to come to fruition. By way of recent example, the Assembly's study into the principle of universal jurisdiction is now into its thirteenth session.[405] The idea for an international criminal court in Assembly committees had a long hiatus during the Cold War before being resurrected under the guise of a proposal to create an international tribunal to prosecute piracy.[406] Sometimes studies have been initiated but later abandoned, either because of a lack of will on the part of Member States, or because a new convention was considered unnecessary.[407]

3. Influences: Interpretation of Treaties

3.1 Interpretive Resolutions: UN Charter

There are also Assembly resolutions that serve to provide meaning to provisions of the UN Charter. Of the 10 resolutions considered in Chapter 2, most in some form purport to be interpreting and applying the principles under the UN Charter.[408] These resolutions are indeed

[400] *Reservations* (Advisory Opinion) (n 113), 23. Also part of the Assembly's norm forming machinery is its Sixth (Legal Committee) and the ILC, both involved in drafting convention texts for deliberation by the Assembly.

[401] As the USSR stated in a legal context other than international justice (space law), 'there might…be great advantages, especially in that new field of law, in making a start with instruments in resolution form, in which unanimity could be achieved without loss of flexibility. Full legal form could be developed later…': UNGA Committee on the Peaceful Uses of Outer Space, 'Summary Record of the Twenty-Third Meeting' (29 April 1963) A/AC.105/C.2/SR.23, 4.

[402] See discussion in Chapter 2.

[403] *Reservations* (Advisory Opinion) (n 113), 23.

[404] Louis Sohn, 'The Shaping of International Law' (1978) 8 Ga J Intl & Comp L 1, 19-20. For more detailed analysis on the prescriptive significance of the UDHR, see Chapter 2.

[405] See eg UNGA Res 74/192 (2019); UNGA Res 73/208 (2018); UNGA Res 64/117 (2009); UNGA Res 65/33 (2010).

[406] See UNGA Res 44/39 (1989). For a detailed account, see Christopher Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court' (2000) 94(4) AJIL 773.

[407] See eg UNGA Res 2673 (XXV) (1970) (called on UNSG and ICRC to consider a treaty to protect journalists in armed conflict).

[408] One of the ten does not mention the UN Charter: UNGA Res 2444 (XXIII) (1968). Similarly, UNGA Res 2675 (XXV) (1970), [8], refers to the UN Charter, but outside of the context of international justice (that the provision of humanitarian relief to civilian populations 'is in conformity with the humanitarian principles' of the UN Charter).

a sampling of a broader recognition of the UN Charter as a feature in Assembly resolutions, with the interpretive language employed varying markedly both in nature and tone. Assembly resolutions that reference the UN Charter might be categorised in four different ways.

The first is teleological, in drawing broadly from the purposes of the UN as representing some form of shared morality, often with the plenary's imputed legal intention left ambiguous. Resolution 96(I) was the first resolution of note to draw this connection, in specifying genocide to be 'contrary to moral law and to the spirit and aims of the United Nations'.[409] Although the legal significance of teleological statements is difficult to ascertain, it is arguable they serve a valuable dialogic function in different ways. Most evidently, the under-theorization of the legal meaning of the UN Charter might support Member State consensus otherwise lacking if more specific formulas were to be used. Such teleological statements also help support, through gradual accretion, the articulation of a more hardened statement of legal intent in later resolutions. This appeared to be the case, for instance, with the denunciation of apartheid, first as essentially being inconsistent with the 'higher interests of humanity' and the 'letter and spirit' of the UN Charter, and later being stated in most unequivocal terms to be a crime against humanity.[410] Teleological statements of this nature can therefore provide the first step in the process towards the maturation of a shared morality into a norm of international law.

The second main reference to the UN Charter is in the further elucidation of the Assembly's institutional competencies and the more general responsibilities of the UN in particular fields of international activity. An early example was Resolution 95(I) (1946), which affirmed the Nuremberg principles, the Assembly recognising 'the obligation laid upon it' by Article 13(1)(a) to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.[411] Other resolutions have sought to achieve institutional reform, most notably the Uniting for Peace resolution in defining the relationship between the Assembly and Security Council on matters pertaining to peace and security, and the circumstances under which the former is able to act in the event of permanent member deadlock.[412] The significance might also go beyond Assembly powers to influence the scope of the powers of other organs within the UN. An argument to this effect could be made for Assembly Resolution 60/1 (2005), in endorsing the Responsibility to Protect principles, which arguably supported the broadening of the ambit of what constitutes a threat to international peace and security to justify Chapter VII action so as to encapsulate 'internal' activities.[413] These types of resolutions would thus be material in determining the scope of the Assembly's authority.

The third main interpretive use of the UN Charter in Assembly resolutions is in explicating upon the legal obligations that Members States owe under this treaty. Many such resolutions will restate preexisting obligations under the UN Charter, but serve a function in defining in more concrete terms the nature and extent of an obligation and the consequences of failing to meet such obligation.[414] Thus, the UN Charter has been invoked in Assembly resolutions so as to denounce conduct that is explicitly said to constitute a violation of this

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[409] preamble.
[410] Compare UNGA Res 2202 (XXI) (1966), [1] and UNGA Res 616 (VII) A (1952), preamble.
[411] UNGA Res 95 (1) (1946), preamble.
[412] UNGA Res 377 A (1950).
[413] UNGA Res 60/1 (2005), [139]. See also UNGA Res 1510 (XV) (1960), preamble (UN 'duty bound to combat' racial and national hatred).
[414] Meron (n 156), 82; Louis Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 Am UL Rev 1, 17. In relation to human rights obligations under the UN Charter, as reflected in the UDHR, see: UNGA Res 47/133 (1992), preamble; UNGA Res 3452 (XXX) (1975), preamble; UNGA Res 917 (X) (1955), [6] (South Africa). See *Namibia* (Advisory Opinion) (n 108), 57; *US v Iran* (Merits) (n 198), 42; Rosalyn Higgins and others (eds), *Oppenheim's International Law: United Nations* (OUP 2017), 816; Louis Sohn, 'The Human Rights Clauses of the Charter' (1977) 12 Texas Intl LJ 129, 133.

treaty, some of which would also violate the standards of international criminal law or international human rights law. The Assembly has found the following conduct to violate the UN Charter: aggression;[415] torture;[416] enforced disappearance;[417] racial persecution and apartheid,[418] the 'international criminal activities of mercenaries',[419] 'all forms of religious intolerance' and national hatred,[420] discrimination,[421] forced labour,[422] and the use of nuclear weapons.[423] It is evident that the context in which these statements are made is concerned with the involvement of Member States in such conduct, or the failure to eliminate such practice, which in turn amounts to a violation of the UN Charter. Conversely, a refusal by Member States to cooperate in the arrest, extradition, trial and punishment of those responsible for such crimes was seen as 'contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law'.[424] Closely related to this, the Assembly has expressed normative positions on types of activities that it regards as automatically (or presumptively) constituting a threat to 'peace and security'. This connection is drawn with respect to the use of mercenaries,[425] the trade in 'blood diamonds',[426] proliferation and development of weapons of mass destruction,[427] and 'acts, methods and practices of terrorism'.[428] Some of these may also be framed as international crimes, but the broader observation is that the plenary has attempted to interpret norms within the UN collective security framework so as to define activities that automatically or presumptively threaten peace and security or violate the UN Charter.

The more fundamental question concerns identifying the legal 'effect' of such Assembly interpretations of the UN Charter. More specifically, is an Assembly resolution capable of amounting to an authoritative or authentic interpretation of the UN Charter?[429] The effect of such a power would be to endow upon an Assembly interpretation the same status as the primary text that was subject to the interpretation. In this respect, some parts of the drafting history indicate that the Assembly was not envisaged to have such interpretive competencies; nor for that matter was any other UN organ, including the ICJ.[430] This was underlined by a concern to avoid the imposition of obligations on sovereign Member States against their will.[431] This drafting history would therefore indicate it to be a misnomer to speak of authoritative or authentic interpretations within the context of the UN system, at least insofar as this entails a formal rule providing recognition of the interpretive act.

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[415] UNGA Res 3314 (XXIX) (1974), [3]. See also UN Charter arts 1(1), 2(4).
[416] UNGA Res 3452 (XXX) (1975), art 2.
[417] UNGA Res 47/133 (1992), art 1.
[418] UNGA Res 1248 (XIII) (1958), [2].
[419] UNGA Res 49/150 (1994), [2].
[420] UNGA Res 1781 (XVII) (1962), preamble; UNGA Res 1536 (XV) (1960), preamble; UNGA Res 1510 (XV) (1960), [1].
[421] UNGA Res 62/133 (2007), preamble; UNGA Res 1178 (XII) (1957), preamble; UNGA Res 616 (VII) B (1952).
[422] UNGA Res 740 (VIII) (1953), preamble.
[423] UNGA Res 70/57 (2015), annex, [4]; UNGA Res 53/77 F (1998), preamble.
[424] UNGA Res 2840 (XXVI) (1971), [4]. Resolutions addressing the trial and extradition of war criminals have a long lineage in the Assembly, although the first one did not express compliance as a requirement under the UN Charter: UNGA Res 3(1) (1946).
[425] UNGA Res 48/92 (1993), preamble.
[426] UNGA Res 72/267 (2018), preamble.
[427] UNGA Res 57/63 (2002), preamble; UNGA Res 58/44 (2003), preamble; UNGA Res 715 (VIII) (1953), preamble.
[428] UNGA Res 58/317 (2004), [11]; UNGA Res 49/60 (1994), [2].
[429] The drafting history to the UN Charter on this point is discussed in Klein (n 8), 481.
[430] Ebere Osieke, 'The Legal Validity of *Ultra Vires* Decisions of International Organizations' (1983) 77 AJIL 239, 249; *Certain Expenses* (n 108), 221.
[431] 9 UNCIO Docs 316 (1945).

On the other hand, the drafting history is not quite so unanimous on the interpretive limitations of the Assembly, which itself offered a forecast into the evolutive process of interpretation within the UN. The delegates resolved that it was 'inevitable' that each UN organ would define its own powers, a process that was 'inherent in the functioning of any body which operates under an instrument defining its functions and powers', as later affirmed by the ICJ.[432] Moreover, Committee 2 of Commission IV declared that an interpretation by any organ that is not 'generally acceptable' to the membership will not be binding.[433] As some writers have noted, the inverse must also be true: if an interpretation is generally accepted then it would be binding.[434] The delegates did not indicate how membership agreement is to be identified. Yet, none of the other UN organs, due to their smaller membership, provide a means for the common agreement of the membership to be discerned.[435] It was for this reason that some delegates in San Francisco regarded the Assembly to be the 'logical body' to interpret the Charter, especially those provisions that did not pertain to any other organ, given its wider membership.[436] It is no surprise, for example, that when referring to the Security Council practice that voluntary abstention by permanent members does not bar the adoption of a resolution, the ICJ in *Namibia* noted that this practice has been 'generally accepted' by the membership thereby evincing a 'general practice' of the UN.[437] This dictum also underlines that the ultimate sovereigns of the UN Charter are the membership itself (it is 'their' treaty) with the legality of an organ's practice subject, in the final analysis, to members' acceptance.

This raises the issue as to the conditions under which such an interpretation of the Assembly would be considered to be 'accepted'. The ILC in a recent study, which the Assembly has taken note of, provides some guidance.[438] Article 31 of the VCLT, as a 'supplementary' means of interpretation, provides a focal point to ascertain the understanding of the parties to a treaty though 'subsequent agreement' and 'subsequent practice'.[439] Whereas the former derives from a formal act of agreement between the parties to a treaty, the latter engages in a more holistic assessment of practice which in turn establishes 'the agreement of the parties'.[440] The effect under either would be the same but they can be distinguished, as the ILC noted, 'based on whether an agreement of the parties can be identified as such, in a common act or undertaking, or whether it is necessary to identify an agreement through separate acts that in combination demonstrate a common position'.[441] What is also noteworthy about Article 31 is that it is not limited solely to interpretations that serve to clarify ambiguous or general terms, but also those constructions that read down or excise treaty provisions,

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[432] UNCIO XIII 633-634, 668-669 (1945); *Certain Expenses* (n 108), 168; *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, 259; *Prosecutor v Rwamakuba* (Appropriate Remedy) ICTR-98-44C-T (31 January 2007), [45]-[47]. See also Ervin Hexner, 'Interpretation by Public International Organizations of their Basic Instruments' (1959) 53 AJIL 341.

[433] UNCIO XIII 710 (1945).

[434] Henry Schermers and Niels Blokker, *International Institutional Law: Unity Within Diversity* (Brill 2011), 787.

[435] UNGA Sixth Committee, Seventy-first session, 21st meeting (16 November 2016) UN Doc A/C.6/71/SR.21, [141] ('When assessing the decisions of international organizations, it was important to focus on the organ within the organization that has the broadest membership'); James Crawford, 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013), 31.

[436] UNCIO XIII 633-634 (1945). See also Richard Gardiner, *Treaty Interpretation* (OUP 2015), [4.1.6] (noting that an Assembly resolution can be equated with the practice of parties to the treaty).

[437] *Namibia* (Advisory Opinion) (n 108), 22.

[438] ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108); UNGA Res 73/202 (2018), annex.

[439] VCLT (n 108), art 31. Being a 'device for giving voice to the changing intentions of the parties': Arato (n 108), 311.

[440] ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108), 24.

[441] ibid, 30.

provided that this is supported by subsequent practice or subsequent agreement.[442] Furthermore, the ILC took the position that both forms of interpretation ('subsequent agreement' and 'subsequent practice') 'may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.'[443] However, whether that practice alone would suffice to establish interpretation, or whether there would be a need to also ascertain agreement of the membership, was left ambiguous (an issue returned to below).[444]

There is ample authority to support Assembly resolutions as being able to constitute a 'subsequent agreement' between the parties to the Charter, even if this rule of interpretation (contained in Article 31(3)(a) of the VCLT) is not always expressly acknowledged.[445] In *Nicaragua*, the ICJ implied that the Friendly Relations Declaration (Resolution 2625 (XXV) (1970)) constituted a subsequent agreement of the parties: '[t]he effect of consent to the text of such resolutions 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'.[446] As the ILC noted, although this statement served the primary purpose of explaining the possible role of the Assembly in the formation of customary international law, it also recognises that Resolution 2625 (XXV) served to express the agreement of the parties regarding a certain interpretation of the Charter.[447] The ICJ has noted that non-binding recommendations of another international organization (International Whaling Commission), when adopted by 'consensus or unanimous vote' and which 'establish a requirement', might evince a subsequent agreement in the interpretation of its constituent instrument (although as noted below, 'general acceptance' rather than 'consensus' is only required for Assembly resolutions to be a subsequent agreement in the interpretation of the Charter).[448] The size of the supporting vote aside, the resolution also has to be interpretive in character; it has to be accompanied by a text that seeks to 'construe and concretize' the principles of the Charter, using rule-formulating language in resolutions, or in the ICJ's words, to amount to an 'elucidation' or the specification of a 'requirement' of the Charter.[449] Similarly, it can also be said that the landmark resolutions explored in Chapter 2, insofar as they purport to interpret Charter principles, also constitute

[442] ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108), conclusion 7; ILC, 'First report on subsequent agreements and subsequent practice in relation to treaty interpretation' (19 March 2013) UN Doc A/CN.4/660, [49]-[50].
[443] ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108), conclusion 12(2).
[444] ibid, 101-104.
[445] See also *Youssef v Home Secretary* (CA) [2018] 3 WLR, [55] (Irwin LJ) (noting that there 'is no suggestion that the Charter itself, and Resolutions of the General Assembly, represent other than authoritative statements as to the purposes and principles of the United Nations').
[446] *Nicaragua (Merits)* (n 156), 100. See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, 437; *Writ Petition No 1551-P/2012* [2013] 3 LRC, [10]-[11] (High Court of Pakistan) (using UNGA Res 2625 (XXV) (1970) to show conduct that was 'strictly prohibited' under the UN Charter).
[447] ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108), 99, fn545. See also Louis Sohn, 'The UN system as authoritative interpreter of its law' in Oscar Schachter and Christopher Joyner (eds) *United Nations Legal Order* (vol 1, CUP 1995), 177 (ICJ in *Nicaragua (Merits)* (n 273) 'accepted the *Friendly Relations Declaration* as an authentic interpretation of the Charter"); Öberg (n 40), 897.
[448] *Whaling in the Antarctic (Australia v Japan)* (Merits) [2014] ICJ Rep 226, 257. See also Schermers and Blokker (n 434), 854 (Assembly interpretations on the constituent instruments of the Oil Pollution Compensation Fund); Nigel White, *The United Nations System: Toward International Justice* (Lynne Rienner 2002), 38 (Assembly resolutions adopted by consensus may be regarded as subsequent agreements; ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108), 99, fn545.
[449] *Whaling* (Merits) (n 448), 257; *Nicaragua (Merits)* (n 273), 100. See also Oscar Schachter, 'General course in public international law' in *Recueil des cours* (Vol 178, Martinus Nijhoff 1982*)* 9, 113; Sloan, 'Binding Force' (n 31), 14-16.

subsequent agreements given the language employed and their adoption by consensus.[450] Similarly, the ILC has acknowledged the possibility that Resolution 51/210 (1997), concerning measures to eliminate international terrorism, adopted by consensus, amounts to a subsequent agreement (indeed, the same could also be said of the resolution that pre-dated it, the 1994 International Terrorism Declaration.[451]

Similarly, the role of the Assembly in generating 'subsequent practice' might be gleaned from Charter jurisprudence, although the use of language in formulating the test has been inconsistent. The ILC in particular has considered two cases from the ICJ to implicitly contain elements of reasoning from Article 31(1)(b) of the VCLT.[452] Firstly, the ICJ in *Namibia* looked to the 'procedure followed by the Security Council' over time which was 'generally accepted' by Member States to evidence a 'general practice' of the UN.[453] What this suggests is that each organ is capable of generating 'practice' but for this to be accepted then it must receive the acceptance of the membership. More specifically in relation to the Assembly, the ICJ in *Wall* noted that the interpretation of Article 12 of the Charter – which forbade Assembly resolutions on the subject matter in which the Security Council was exercising its functions – had 'evolved subsequently' (both the Assembly and Council interpreting this provision in its most restrictive sense initially).[454] Having drawn from a series of resolutions the ICJ deduced 'an increasing tendency over time' for the Assembly and Security Council to deal 'in parallel with the same matter'.[455] The ICJ also considered that the '*accepted practice* of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter'.[456] Unlike *Namibia*, the ICJ in *Wall* did not seek to establish the extent to which this institutional practice was 'generally accepted' by the membership.[457] A further ambiguity in using the 'subsequent practice' principle here concerns the ICJ's focus on 'accepted practice' of the Assembly in its own right: the practice of an international organisation (and an organ within it) is not, as such, a subsequent practice of the 'parties' themselves under Article 31(3)(b).[458]

It seems clear that the scope for interpretive evolution under Article 31 of the VCLT, be it via subsequent agreement or practice, is premised upon a showing of Member State unanimity (or at the very least, acquiescence so as to demonstrate unanimity over time).[459] Some writers also only place weight on Assembly resolutions where they are unanimous; even a 'consensus' vote on this criterion, given that it might conceal differences, might not be enough.[460] However, Charter interpretation was envisaged by the drafters, as already noted, to be premised upon 'general acceptance'; this does not mean unanimity but rather leaves room

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[450] See also Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007), 216-217 ('[t]here are well-known instances of General Assembly resolutions interpreting and applying the UN Charter, including the Universal Declaration of Human Rights, the Declaration of Principles of International Law Concerning Friendly Relations, and others dealing with decolonization, terrorism or the use of force'); Anthony Aust, *Modern Treaty Law and Practice* (CUP 2013), 213 (UNGA Res 51/210 (1996) 'can be seen as a subsequent agreement about the interpretation of the UN Charter').

[451] ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108) 99, fn545. See further Chapter 2 for a detailed analysis

[452] ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108), 100.

[453] *Namibia* (Advisory Opinion) (n 108), 22.

[454] *Wall* (Advisory Opinion) (n 108), 149.

[455] ibid 149

[456] ibid 150. See also ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108), 100.

[457] Although the ILC suggested that the membership implicitly acquiesced though its participation in the Assembly over time: ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108), 100.

[458] ibid.

[459] ibid 79-81.

[460] See UN Secretariat, 'Use of the Term "Consensus" in UN Practice' <http://legal.un.org/ola/media/GA_RoP/GA_RoP_EN.pdf> ('Consensus is generally understood as a decision-taking process consisting in arriving at a decision without formal objections and vote. It may however not necessarily reflect "unanimity" of opinion on the substantive matter.')

for evolution even against the objections of a group of Member States.[461] This principle – 'general acceptance' – was subsequently applied by the ICJ in *Namibia*.[462] There is also a notable absence of judicial consideration on the extent to which a resolution is supported, including whether the negative votes and abstentions deprive it of interpretive force. In *Wall*, the ICJ only referred to the 'accepted practice of the General Assembly' but did not interrogate the nature and scope of this acceptance: in fact, it relied on resolutions that were far from unanimous.[463] The requirement for a 'consensus' in relation to resolutions of the International Whaling Commission (see the *Whaling Case* above) has also not been considered by scholars to amount to a departure from this 'general acceptance' standard in relation to the UN as an organisation able to act autonomously with its own international legal personality.[464] Similarly, the ICTY in *Tadić* referred to Assembly resolutions on Congo, Liberia, and Somalia to support the interpretive practice of treating an internal armed conflict as a 'threat to the peace'; however these resolutions were not unanimous but still demonstrated the 'common understanding of the United Nations membership in general'.[465] The emphasis in these cases on a series of resolutions might speak to the importance of recitation as a means to discern the solemn intent of the membership as to the binding character of a norm.[466] However, even without recitation, singular resolutions without unanimous support have also been recognised to constitute a 'generally accepted' interpretation of the UN Charter by Member States.

Perhaps the most famous example is provided by the Assembly's interpretation of its peace and security powers under the UN Charter in Resolution 377 (V) (1950) (Uniting for Peace). The sponsors argued that the Assembly had a general competence to consider various matters on the maintenance of international peace and security even where the Security Council was seized of the matter.[467] However, Article 12 forbade the Assembly from making any recommendations in a situation in which the Security Council was 'exercising' its functions (indeed, the Assembly had previously refused to recommend measures in the Indonesia

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[461] See n 433 and 434.

[462] *Namibia* (Advisory Opinion) (n 108), 22. See also ILC, 'Report of the International Law Commission on the Work of its 70th Session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 105-06.

[463] *Wall* (Advisory Opinion) (n 108), 149 (appearing to rely on UNGA Res 1913 (XVIII) (1963) (two negative votes and 11 abstentions); UNGA Res 1955 (XV) (1961) (12 abstentions); UNGA Res 1600 (XV) (1961) (16 negative votes and 23 abstentions)).

[464] See in particular Julian Arato, 'Subsequent Practice in the Whaling Case, and what the ICJ Implies about Treaty Interpretation in International Organisations' (*EJIL:Talk!,* 31 March 2014) <https://www.ejiltalk.org/subsequent-practice-in-the-whaling-case-and-what-the-icj-implies-about-treaty-interpretation-in-international-organizations/> (noting that the 'ICJ seems to treat its own organization as a special case - based perhaps on a commitment to the flexibility and dynamism of the U.N. system of which it forms a part', perhaps owing to 'an important difference in kind: between an organization characterized by international legal personality (the UN), and a treaty body with certain functions bearing no autonomous personality on the international stage (the International Whaling Commission)'). See also Stefan Raffeiner, 'Organ Practice in the Whaling Case: Consensus and Dissent between Subsequent Practice, Other Practice and a Duty to Give Due Regard' (2017) 27 EJIL 1043; Malgosia Fitzmaurice, 'The Whaling Convention and Thorny Issues of Interpretation' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: The ICJ Judgment and its Implications* (Brill Nijhoff 2014), 117.

[465] *Tadić* (Jurisdiction) (n 125), [30]. Although unstated, the ICTY was probably referring to resolutions including UNGA Res 1474 (ES-IV) (1960), with 11 abstentions.

[466] See generally Bleicher (n 23); *Nuclear Weapons* (Advisory Opinion) (n 232), 255 (emphasis added) ('it is necessary to look at [the resolution's] content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to 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.') (emphasis added); *South West Africa Cases* (n 197) (Dissenting Op Judge Tanaka) 250, 292; *Wall* (Advisory Opinion) (n 108) (Sep op Judge Al-Khasawneh), 236 ('very large number of resolutions'); *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 1975 12, 99 (Separate op Vice-President Ammoun) (resolutions adopted 'over a period of time'). See also ILC, 'Second report on Identification of Customary International Law' (22 May 2014) UN Doc A/CN.4/672, 67.

[467] UN, *Yearbook of the United Nations* (1950), 184.

situation given this impediment).[468] Undeterred, the sponsors of Resolution 377 (V) argued that Article 12 placed limitations only on timing: the provision was only intended to avoid the possibility of the Security Council and Assembly discussing the same question simultaneously.[469] It did not impede the Assembly from acting where the Security Council had decided against action; or in the language of Resolution 377(V) where it 'failed' to exercise its function.[470] Although the ICJ in *Wall* described this as an 'accepted practice' of the Assembly (above), based upon an 'increasing tendency over time', this does not detract from the singular significance of Resolution 377 (V) in positing an interpretation of the UN Charter that took root upon adoption; its use in practice was immediate, with resolutions adopted in the Korea situation given Security Council deadlock on this situation.[471] As the UN Secretary General noted shortly after the adoption of Resolution 377 (V), 'under *that resolution* the General Assembly has certain rights *otherwise reserved* to the Security Council'.[472] What is significant for present purposes is that Resolution 377 (V) was not unanimous: 52 states voted in favour with five against (including Russia). Still, it was certainly 'generally accepted', the lack of support of a small number of States not impeding the legal significance of the interpretation.

It would therefore be more accurate to locate the method for identifying evolutive interpretation within the UN from the 'rule of the organization', rather than one that falls to be interpreted subject to the unanimity principle in Article 31 of the VCLT. Indeed, Article 5 provides that the VCLT applies to treaties constituting international organizations 'without prejudice to any rules of the organization'. In this regard, 'established practice', as other instruments have stipulated, is one such 'rule of the organization'.[473] Both 'subsequent' and 'established' practice are fundamentally concerned with interpretation but the ascertainment of the established practice will depend ultimately on the rules that prevail within the UN for an interpretation to be accepted.[474] In saying this, it is important to be clear that this does not entail a radical departure from the principles of interpretation in Article 31 of the VCLT: both 'agreement' and 'practice' remain general canons of interpretation in the Charter system.[475] Rather, as Christopher Peters has argued, the 'established practice' of the UN has created a customary rule of the organization to the effect that the practice of its organs does not strictly require the agreement of *all* the Member States for the interpretation of the Charter to be legally valid.[476] It would suffice for an interpretation to succeed even with some dissents, provided

[468] UNGA *Ad Hoc* Political Committee, 'Summary Records of Meetings', Fourth session, 56th meeting (3 December 1949), 339.
[469] UN, *Yearbook of the United Nations* (1950),184.
[470] See further Mahnoush Arsanjani, 'Are there limits to the dynamic interpretation of the constitution and statutes of IOs by the internal organs of such organizations?' (Institut de Droit International, 2019), 124; Klein (n 8), 511.
[471] *Wall* (Advisory Opinion) (n 108),149; UNGA Res 500 (V) (1951); UNGA Res 498 (V) (1951) (although it did not directly invoke UNGA Res 377 (V) (1950)).
[472] UNSG, 'Question Concerned by the First Emergency Special Session of the General Assembly from 1 to 10 November 1956, Report of the Secretary-General in pursuance of the resolution of the General Assembly of 2 February 1957 (A/Res 461)' (11 February 1957) UN Doc A/3527, [19]. See also Reicher (n 78), 37 (noting that question over the validity of Uniting for Peace is 'truly a non-issue' given its wide support in the Assembly); Christian Henderson, 'Authority without Accountability? The UN Security Council's Authorization Method and Institutional Mechanisms of Accountability' (2014) 19(3) JCSL 489, 506.
[473] ILC, 'Draft Articles on the Responsibility of International Organizations' (2011) UN Doc A/66/10, art 2(b); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 25 ILM 543 (1986) (not yet in force), art 2 (1)(j); VCLT (n 108), arts 5 and art 31(3)(b).
[474] Christopher Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?' (2011) 3(2) Goettingen J Intl L 617, 623.
[475] See also ILC, 'Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties' (7 April 2015) UN Doc A/CN.4/683, [68]-[60] (recognising that there may be different manifestations of VCLT, art 31 (n 108) within the rules of international organisations).
[476] Peters (n 474), 624. See also Christiane Ahlborn, 'The Rules of International Organisations and the Law of International Responsibility' (2011) 8(2) Intl Org L Rev 397, 425 (the internal secondary law of international

that the interpretation is 'generally accepted' by the membership, a condition not only alluded to in Charter jurisprudence, but in the drafting history (see above).[477]

While 'general acceptance' is the legal touchstone for a Charter interpretation, would there be any circumstances in which unanimity would be required? Some might argue that a distinction is to be drawn between interpretations that pertain to the internal division of functions within the UN (such as Resolution 377 (V) above), and those that seek to impose obligations on Member States, or otherwise to change the character of norms under the UN Charter (such as to cooperate in the arrest of war criminals under Resolution 3074 (1973), or on conduct that is inconsistent with the Charter, such as genocide under Resolution 96(I) (1946).[478] Indeed, there is some basis in Charter jurisprudence to focus on Assembly practice (rather than 'general agreement' of the membership) where the issue concerns institutional powers: 'each organ must, in the first place at least, determine its own jurisdiction.'[479] This is, however, more a question of where the enquiry is focused, rather than the imposition of different canons depending on the nature of the interpretive exercise. The ICJ has relied on Assembly resolutions, even singular ones where they are rule-expressive, to evince general acceptance of a Charter interpretation that does not concern institutional powers.[480] The inevitable focus when it comes to institutional powers will be the practice of the organisation itself, as it is this to which the membership then generally accepts (which might be clearly visible, for example, via a resolution, or often invisibly, via acquiescence). But that does not detract from the generality of the proposition that 'general acceptance' of the membership remains the basis for all Charter interpretations, whether they concern institutional powers, the definition of norms, or obligations incumbent on Member States under the Charter. Still, there might be resistance to the notion that the canons of Charter interpretation derive from rules that are customary to the UN legal order. A principal objection is that this would appear to contradict the general finding by the ICJ, when evaluating the powers of the World Health Organisation (WHO), that Article 31 of the VCLT was applicable to the interpretation of the Charter.[481] However, even the ICJ in its opinion equivocated over the nature of interpretation of the Charter, noting the particular features of international organisations – being entities established to achieve objectives – are elements 'which may deserve special attention when the time comes to interpret these constituent treaties'.[482] Although citing Article 31, the ICJ did

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organisations may also comprise customary rules resulting from the 'established practice of the organisation'); Jose E Alvarez, *International Organisations as Law-makers* (OUP 2006), 81 ('it has become common for Charter interpreters to rely on institutional (or "customary") practice as evidence of the meaning of a constitutional provision'); Rebecca Barber, 'Revisiting the Legal Effect of General Assembly Resolutions: Can an Authorising Competence for the Assembly be Grounded in the Assembly's 'Established Practice', 'Subsequent Practice' or Customary International Law?' (2021 forthcoming) JCSL (arguing that the 'conceptualisation of a kind of "customary law of the organisation" seems to better explain the ICJ's reliance on the practice of the political organs of the UN, than does an approach which attempts to frame that jurisprudence as "subsequent practice" for purpose of the VCLT').

[477] See also Arsanjani (n 470), 234 (an interpretation will succeed where it attracts 'consensus or the consent of the majority of the Member States including a large portion of the Permanent Members of the Security Council').

[478] See further Chapter 3.

[479] *Certain Expenses* (n 108), 168; See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 75 (an organ's interpretation 'may deserve special attention' in interpretation); *Reparations for injuries suffered in the service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 180 ('purposes and functions as specified or implied in its constituent documents and developed in practice'); *Competence of Assembly Regarding Admission to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 9 ('The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text…').

[480] See n 446. See also ILC, 'Third Report' (n 475), [33]-[42] reviewing ICJ caselaw where unanimity or practical unanimity might have been implicit in the analysis).

[481] *Nuclear Weapons in Armed Conflict* (Advisory Opinion) (n 479), 74. See also *Certain Expenses* (n 108), 157.

[482] ibid.

not ultimately follow through in applying this provision in its evaluation of the scope of powers of the WHO powers, even though it considered at length the practice of this organ.[483] This dictum must also be considered in light of other jurisprudence (above) where the ICJ has not been so unequivocal as to the legal foundation for interpretation in the Charter.

Another objection is that to locate the source of interpretation within a customary rule of 'general acceptance' provides no tangible outer limit in which the scope of the Charter can go. This is considered especially the case given that the ICJ is only able to give piecemeal supervision of Charter interpretations.[484] On this reading, it might lead to the aggrandisement of UN powers to the detriment of State sovereignty. Whether this is a negative, however, depends on perspective: some Member States once argued that allegations of human rights abuse fell within their internal affairs under Art 2(7) of the UN Charter.[485] Still, the notion that it is 'easy' to secure an interpretation if the touchstone for legal validity is 'general acceptance' belies the complex process in which agreement is reached. Constraints on interpretation are embedded in the structure and manner in which the UN operates.[486] It is also evident that Member States do have differing conceptions as to the weight to be placed on different sources of interpretation, with varying emphasis in Assembly meetings being placed on the object and purpose (Articles 1 and 2), the text of a provision, and (where appropriate) implied or inherent powers, under the Charter.[487] These differing sources provide the dialogic parameters within which the UN may operate and place (some) constraint on interpretive possibilities. For example, the debate leading to the adoption of Resolution 377(V) heavily referenced these varying sources of interpretation, both for and against the resolution.[488] The framing of discussion in line with these sources, as often occurs, ensures that any such interpretation has been rationally made following a constitutional dialogue that produced an outcome that was generally acceptable to the membership.

Having noted that the membership, acting through the Assembly, is able to develop norms under the UN Charter, what implications might this have for atrocity crimes response? At the very least, the Assembly's articulations that atrocity crimes are inconsistent with the UN Charter lends support to the argument that Article 2(7), considered in greater detail in Chapter 4, does not preclude scrutiny into such alleged conduct in country situations.[489] But the closer interpretive alignment between atrocity crimes and Charter violations also serves as a tool in which to hold Member States to account within the terms of the UN Charter. This might in turn justify the Assembly in seeking to deprive Member States of some of their membership rights (see Chapter 4). The role of the Assembly in interpreting its institutional powers also supports arguments for it to play a greater role in atrocity responses, be that in establishing subsidiary organs or in assuming some of the legal functions of the Security Council in exceptional circumstances (Chapter 6). It is also possible that, through established practice, the Assembly assumes a function in authorising what would be otherwise unlawful conduct, in the context of economic sanctions against Member States adjudged to have violated the UN Charter and international law (Chapter 7).

Beyond enabling the Assembly to carry out particular functions, a full realisation of an interpretive function under the UN Charter might also serve to offer a measure of supervision

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[483] Schermers and Blokker (n 434), 884.
[484] See Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of the Political Organs of the United Nations?' (1997) 46(2) ICLQ 309, 334; Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011), 59.
[485] See Chapter 5.
[486] Arsanjani (n 470), 124, 238.
[487] ibid 235 (noting that the limits on interpretation are found in the 'world political process').
[488] UN, *Yearbook of the United Nations* (1950), 183-190.
[489] See also Louis Henkin, 'An Agenda for the Next Century: The Myths and Mantra of State Sovereignty' (1994) 35(1) Va J Intl L 115, 45; White, 'Relationship' (n 8), 296.

on the Security Council's exercise of their functions. It was noted that the Assembly's Definition of Aggression was adopted at least in part to guide the Security Council on the substantive principles on the use of force that it was to apply in discharge of its responsibilities under the UN Charter.[490] It is also conceivable that the Assembly adds finer texture to provisions of the UN Charter concerned with the exercise of the veto. Jennifer Trahan has argued that the veto power is not legally unfettered; indeed textually within the UN Charter itself, the Security Council 'shall act in accordance with the Purposes and Principles of the UN Charter'.[491] The Assembly has, occasionally, noted particular instances of veto use to be so inconsistent with the purposes and principles, although by no means on a regular and consistent basis.[492] Nonetheless, based upon its power to harmonise general acceptance amongst the membership as to the meaning of the UN Charter, it is open for the Assembly to, as Trahan argues, confirm an understanding that use of the veto is constrained by substantive legal principles which might include its non-use in atrocity situations.[493] The argument in this section concerning the function of the Assembly in interpreting the Charter provides the necessary legal foundation to support this development.

3.2 Interpretive Resolutions: Other Treaties

Assembly resolutions also expressly draw from independent, pre-existing, obligations under other international agreements. The Reparation Principles, considered in Chapter 2, is a prime example, drawing from multiple conventions in distilling a set of principles that derive from these various regimes.[494] It might be said that Assembly resolutions that do so are merely declaratory and carrying no new legal content. However, the line between finding law and making law through interpretation is not always easy to maintain. Assembly interpretations of existing law have been used to advance the jurisprudence in various international tribunals on areas that had, until such resolution, lacked support in international law. This is seen, most prominently, in relation to the ICC's use of the Reparation Principles in the construction of victim norms in the ICC Statute.[495] Furthermore, the restatement of obligations owed in multiple treaty regimes can more generally help support the creation of customary international law that parallels such conventional obligations. For example, the Assembly's restatement of the duty to prosecute and extradite alleged war criminals as provided in its Convention on Statutory Limitations has supported claims that this duty also forms part of customary international law, thereby binding all, including those who had not ratified the Convention, except persistent objectors.[496] The Assembly has also interpreted treaties to have universal application as part of customary international, as with the principles espoused in the Nuremberg Charter or the Geneva Conventions.[497]

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[490] UNGA Res 3314 (XXIX) (1974), [4].
[491] Trahan, 'Existing Legal Limits' (n 66); UN Charter art 24(2).
[492] See eg UNGA Res 37/233 A (1982), preamble ('grave concern' that the Security Council has been prevented from taking effective action 'in discharge of its responsibilities under Chapter VII of the Charter').
[493] Trahan, 'Existing Legal Limits' (n 66), 143.
[494] See also UNGA Res 74/143 (2019), [4] (torture as prohibited under multiple sources of international law).
[495] See Chapter 2.
[496] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted as GA Res 2391 (1968), entered into force 11 November 1970) 754 UNTS 73 ('Convention on Statutory Limitations'); Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005), 105 (citing UNGA Res 2840 (XXVI) (1971) and UNGA Res 3074 (XXVIII) (1973) as what 'could be thought to give rise to a duty'.)
[497] UNGA Res 3220 (XXIX) (1974), preamble ('Bearing in mind the inadmissibility of a refusal to apply the Geneva Conventions of 1949').

There are numerous reasons as to why Assembly resolutions might influence the interpretation of norms by actors in discrete treaty regimes. The most obvious reasons include because the resolution deals with the same subject matter as a treaty provision that a court is empowered to apply. Or because such treaty is interpreted in light of customary international law (with resolutions providing evidence of custom, as developed further below). An Assembly resolution that draws from multiple sources of law can also become convenient shorthand for obligations that might appear in a myriad of other instruments, thereby assuming a life of their own in other legal regimes (as seen in relation to the Reparation Principles). The nature of resolutions as 'non-binding', in this respect, does not fully capture the influence that resolutions have in the progressive development of treaty norms in international courts, as Chapter 2 shows. Assembly resolutions might also be conceptualised as a form of 'subsequent agreement' to a treaty under Article 31(3)(b) of the VCLT.[498] Indeed, the ILC considered that Assembly resolutions adopted without a vote that affirmed *General Comment No 29* (protection of human rights while countering terrorism) to be an example of 'subsequent agreement' in the interpretation of Article 4 of the ICCPR.[499] Still, as Chapter 2 has shown, international courts have not conceived of Assembly resolutions as 'subsequent agreements' as such, they instead being used to corroborate a particular understanding of a treaty.

At the same time, the extent to which a competent court uses Assembly resolutions to interpret the treaty it is required to apply will also depend on factors that are internal to that particular treaty regime. For example, the ICTY was expressly mandated to apply those norms that were part of customary international law, thereby opening the door for use of Assembly resolutions in the identification of this source. Conversely, not all treaty regimes will necessarily lend themselves so readily to interpretive evolution via Assembly resolutions. In *Bosnia and Herzegovina v Serbia and Montenegro*, the ICJ did not consider Resolution 47/121 (1992), that defined genocide to encompass the concept of 'ethnic cleansing', to reflect the definition under the Genocide Convention.[500] The ICJ observed that '[n]either the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide'.[501] It arrived at this conclusion based upon an analysis of the text of the Genocide Convention and its drafting history, noting that a proposal to include 'measures intended to oblige members of a group to abandon their homes' was not accepted by the State Parties.[502] The emphasis on the text of the Genocide Convention and drafting history in turn reduced the scope for an Assembly resolution to support evolutive interpretations of treaty provisions, particularly where concerned with the definition of a treaty-based offence. However, in equal measure, Resolution 47/121 was hardly a model resolution in which to support interpretive evolution of the conventional genocide definition, particularly given the lack of widespread support and inconsistent use of the ethnic cleansing concept in the text of other resolutions.[503]

The legal basis for the Assembly to interpret norms in multilateral treaty regimes is clear from a number of provisions in the UN Charter. Article 13 mandates the Assembly to make recommendations for the purpose of 'encouraging the progressive development of

[498] ILC, 'Draft conclusions on subsequent agreements and subsequent practice' (n 108), 111.
[499] UNGA Res 65/221 (2010), [5], fn 8 (adopted without a vote); UNGA Res 68/178 (2013), [5], fn 8 (adopted without a vote). See also UNGA Res 70/169 (2015) (adopted without a vote), recalling UNCESCR, 'General Comment No 15: The Right to Water' (20 January 2003) E/C.12/2002/11.
[500] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 122.
[501] ibid 123.
[502] ibid.
[503] While the resolution was supported by 102 Members to 0 against, it attracted 57 abstentions with 20 not voting. As to inconsistencies in the characterisation of ethnic cleansing, see: UNGA Res 48/91 (1993); UNGA Res 47/80 (1992); UNGA Res 46/242 (1992), preamble.

international law and its codification' which would, it is submitted, amply cover the interpretation of multilateral treaty regimes. Similarly, Article 14 enables the Assembly to recommend 'measures for the peaceful adjustment of any situation'. This provision would be furthered where the Assembly's interpretation of multilateral treaties would further the peaceful adjustment of a situation by bringing to bear upon it rules of international law.[504] This point is buttressed further by the fact that many multilateral treaties that the Assembly interpreted in its resolutions were actually initiated by this body as a means to give effect to the principles and purposes of the UN Charter. In other words, for the Assembly to interpret, say, the Torture Convention, the plenary is doing so as a means to further the UN Charter, given that the purposes that underpin these two regimes coalesce. Even so, it has become generally acceptable for the Assembly to draw from a myriad of multilateral conventions in its resolutions, thereby demonstrating an established practice in doing so under the UN Charter.

4. Influences: Identification and Formation of Customary International Law

It is evident from the survey of jurisprudence in Chapter 2 that Assembly resolutions have played a role in the development of customary international law. Still, early sceptics did not believe Assembly resolutions to offer a reliable enough picture of the expectations of States, or pointed to a discord between votes in the Assembly from the 'rougher climate' of State practice.[505] Judge Schwebel, writing extra judicially, once cautioned that Member States of the UN 'often vote casually', do not 'meaningfully support what a resolution says' and 'almost always do not mean that the resolution is law'.[506] States have also voted for resolutions in the past as a means to forestall more effective legal action on an issue, which was the apparent strategy of the US and UK in supporting Resolution 96 (I) (1946) instead of an earlier adoption of a convention on genocide.[507] There are, similarly, many instances where Member States reserve their position, such as to approve or make suggestions in relation to a resolution on the proviso that it does not represent their final view.[508] Based on these criticisms, resolutions remain non-binding instruments from which *opinio juris* cannot be inferred.

However, the frequent recognition, both by Member States and legal bodies, that Assembly resolutions are capable of playing some role in the construction of customary international law shows these criticisms to be overstated. While a particular resolution might not reflect the legal position of Member States, it is too sweeping a statement to assert that they are never capable of doing so.[509] As the ILC has also noted in the commentary to its 2018 study on the identification of customary international law (CIL Conclusions), resolutions, although strictly speaking acts of the organisation itself, are relevant in that they 'may reflect the collective expression of the views of such States: when they purport (explicitly or implicitly) to touch upon legal matters, the resolutions may afford an insight into the attitudes of the Member States towards such matters.'[510] Indeed, the ILC noted 'special attention should be placed' on resolutions of the Assembly, being 'a plenary organ of the [UN] with virtually

[504] Sloan, 'Changing World' (n 54), 67.
[505] Schwebel, 'The Effect of Resolutions' (n 21), 308. See also Christopher Joyner, 'UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation' (1981) 11 Cal W Intl LJ 445; Weisburd (n 112), 363.
[506] Schwebel, 'The Effect of Resolutions' (n 21), 308.
[507] Irvin-Erickson (n 139), 157-158.
[508] See eg UNCHR, 'Text of Letter from Lord Dukeston, the United Kingdom representative on the Human Rights Commission, to the Secretary-General of the United Nations' (4 June 1947) UN Doc E/CN.4/AC.1/4, 2.
[509] ILC, 'Report of the International Law Commission on the work of its sixty-eighth session' (2016) UN Doc A/CN.4/703, 26.
[510] ILC, 'Draft conclusions on CIL' (n 24), 147.

universal participation, that may offer important evidence of the collective opinion of its Members.' [511] The ICJ similarly expressed the view that Assembly resolutions are 'international instruments of universal application' and therefore evidence of custom.[512] This reflects the view of many Member States that the Assembly possesses 'unique characteristics' making it deserving of a special place in the process of identifying customary international law.[513]

The more salient issue, rather, is identifying the *extent* of this normative role. Debate in this regard has tended to focus on the difference between using resolutions to identify pre-existing law in contrast to their use in creating new custom; their function as evidence in establishing State practice and *opinio juris*; and sufficiency of a resolution, by itself, in creating customary international law. There has been considerable scholarly and judicial attention on these issues. This literature is now bolstered by the publication of the ILC's CIL Conclusions, which have considered these issues in varying degrees.[514] Although the Assembly has not endorsed the report, adopting the neutral language of 'taking note', it provides a valuable insight into the extent to which Assembly resolutions are able to contribute towards the identification and indeed creation of customary international law.[515] It will therefore be given special attention in the following analysis.

4.1 Forms of Contribution to Customary International Law

At the outset, a conceptual distinction needs to be drawn between the potential for Assembly resolutions to declare existing law (*lex lata*), crystallise emerging custom (*in statu nascendi*), or to be a focal point for the future development of a customary norm (*de lege ferenda*).

In relation to the *lex lata*, it is clear that the binding force comes not from the resolution but from the customary law as reflected in the resolution.[516] Some might say that the Assembly resolution that declares customary international law contributes nothing, it being a mere exhortation to comply with an existing obligation. However, particularly when looking at the use of Assembly resolutions in the jurisprudence in Chapter 2, this view is misconceived.[517] The view assumes that custom was perfectly formed and expressed prior to its articulation in a Assembly resolution. The reality is that custom, being derived from diffuse practice, will often be lacking the precision that comes from a text.[518] As Blaine Sloan noted, the function of a Assembly resolution is that it will define, formulate, clarify, specify, authenticate and corroborate the rule contained within it.[519] This is a particularly important function where an individual is sought for trial for international crimes that derived from customary international law. In the absence of a precise text setting out the offence, a conviction might not comply with *nullum crimen sine lege* because the putative crime was neither accessible or foreseeable to the

[511] ibid.
[512] *Belgium v Senegal* (Merits) (n 303), [99].
[513] UNGA Sixth Committee, Seventy-first session, 20th meeting (11 November 2016) UN Doc A/C.6/71/SR.20, [52] (Finland); UNGA Sixth Committee, 21st meeting (n 435), [141] (Sudan); UNGA Sixth Committee, Seventy-first session, 23rd meeting (26 October 2016) UN Doc A/C.6/71/SR.23, [30] (Algeria), [41] (Egypt).
[514] ILC, 'Draft conclusions on CIL' (n 24).
[515] The Commentaries also acknowledge that ILC output 'merits special consideration' in the present context: ibid, 142.
[516] See also UN Office of Legal Affairs, 'Memorandum on Use of the Terms "Declaration and Recommendation"' (2 April 1962) UN Doc E/CN.4/L.610.
[517] ibid 68.
[518] ibid 69.
[519] ibid.

accused at the time of its commission.[520] It is therefore unsurprising that reliance has been placed on Assembly resolutions to offer precision that was not available when the putative customary rule at issue was unwritten and diffuse. The many examples from the ECCC covered in Chapter 2, whose temporal jurisdiction would necessarily involve reliance on customary international (criminal) law at an early stage of its development, also demonstrate the important role of Assembly resolutions in bringing greater textual specificity to the offence applicable at this earlier time.

The function of Assembly resolutions in crystallising customary international law, *in statu nascendi*, differs from one which declares law in an important way: with the former, it was the Assembly that gave the final push for the norm to become customary international law, whereas with the latter function the norm had this status prior to the resolution. The norm might have had, in the famous words of Justice Cardozo, a 'twilight existence which is hardly distinguishable from morality or justice', until an authoritative body 'attests to its jural quality'.[521] That said, the Assembly has never, as such, indicated that a resolution, upon its adoption, is constitutive of a new custom. Even resolutions that might be conceived as *in statu nascendi*, such as Resolutions 95 (I) and 96 (I), were only purporting to affirm pre-existing law, be that the Nuremberg Principles or the crime of genocide. Still, the Assembly's use of declaratory language might in fact mask the role that such resolutions had in crystallising *opinio juris*. Indeed, this view accords with some judicial approaches in the survey in Chapter 2, where the time in which a resolution was adopted was considered material in determining when a norm matured into customary international law.[522] There is some basis therefore to claim that an Assembly resolution is able to supply the missing element so as to elevate an emerging norm into customary international law.

Finally, an Assembly resolution might offer a focal point for development (*de lege ferenda)* and therefore have 'pre-substantive' effects.[523] The analysis above as to exhortatory resolutions is also germane here. In this respect, unlike a resolution *in statu nascendi* (i.e. crystallising) a resolution *de lege ferenda* represents the start of a norm's journey to legal status. The value of an Assembly resolution of this nature is that it offers the precision of a text from which corroborating *opinio juris* (and State practice) can then later be built. An additional benefit of a resolution *de lege ferenda* is that the rational deliberative process, involving the community of States, might lead to an acceleration in the development of the customary international law after the resolution's adoption. Again, some of the resolutions analysed in Chapter 2 can be characterised as having pre-substantive effects; most certainly this function best describes the gradual emergence of UDHR as reflecting customary international law, an instrument that started as an aspired 'standard of achievement' but which provided a textual framework for later practice to converge so as to cross the threshold into law.

4.2 Contribution of Assembly resolutions to State Practice and *Opinio Juris*

It is trite that customary international law, at least as traditionally conceived 'general practice accepted as law', comes to be ascertained through the twin requirements of State

[520] Susan Lamb, 'Nullum Crimen, Nulla Poena Sine Lege, International Criminal Law' in Antonio Cassese and others (eds) *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002).
[521] *New Jersey v Delaware* 291 US 383 (1933).
[522] See in particular *Pinochet (No 3)* (n 127) (Lord Browne-Wilkinson) ('[a]t least *from that date onwards*' referring to Resolution 95 (I) (1946)).
[523] Öberg (n 40), 903-904; ILC, 'Draft conclusions on CIL' (n 24), conclusion 12(2) (resolutions of international organizations 'may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development').

practice and *opinio juris*.[524] The CIL Conclusions reaffirm this two-part test, noting these to be separate stages in the enquiry, with practice focusing on the usage and/or physical acts, with *opinio juris* concerned with a belief in the legally binding nature of the practice.[525] In this regard, there is debate as to the extent to which Assembly resolutions are able to fulfil one or indeed both of these requirements. This is also tied to a more general debate about the emergence of a 'modern' approach to finding customary international law that places greater emphasis on *opinio juris* over State practice, or documentary sources more generally.

The first issue is whether Assembly resolutions constitute a form of State practice. A conventional view is that they do not because practice can only be manifested through 'physical' acts.[526] On the other hand, a broader view was taken by Michael Akehurst who regarded claims and abstract declarations (such as Assembly resolutions) as constituent elements of State practice.[527] More recently the ICRC in its voluminous study on customary international humanitarian law classified Assembly resolutions as 'Practice'.[528] So too have commission of inquiry reports.[529] The CIL Conclusions list 'resolutions adopted by an international organization' as a form of State practice, which would cover those adopted by the Assembly.[530] The commentaries to the CIL Conclusions further explain that this 'includes acts by States related to the negotiation, adoption and implementation of resolutions'.[531] The ILC's recognition here was a natural extension of the principle that verbal conduct (such as diplomatic protests) is now generally accepted to amount to State practice; by reasonable extension so, too, would Assembly resolutions.[532] By contrast, the ICJ has not defined Assembly resolutions as contributing to State practice and the survey of judgments in Chapter 2 have not tended to do so explicitly either. However, this is not dispositive of the matter, particularly given that many judgments do not clearly disaggregate the evidence relied upon (as either State practice or *opinio juris*) in finding custom.

The notion that an Assembly resolution cannot be a form of State practice essentially boils down to an aversion of 'double counting' pieces of evidence in the identification of customary international law.[533] The CIL Conclusions thus affirmed that '[a] resolution…cannot, of itself, create a rule of customary international law.'[534] The commentaries to the CIL Conclusions also noted that a resolution 'can neither constitute rules of customary international law nor serve as conclusive evidence of their existence and content'.[535] However, the CIL Conclusions also note that the same piece of evidence can be used to establish both State practice and *opinio juris*, and even listed resolutions as an example

[524] ICJ Statute, art 38(1)(b).
[525] ILC, 'Draft conclusions on CIL' (n 24), conclusion 3(2); *North Sea Continental Shelf Cases (FRG v Denmark; FRG v Netherlands)* [1969] ICJ Rep 3, 44.
[526] Anthony D'Amato, *The Concept of Custom in International Law* (Cornell U Press 1971), 123-127.
[527] Michael Akehurst, 'Custom as a Source of International Law' (1974-75) 47 BYBIL 1, 53; Kenneth Bailey, 'Making International Law in the United Nations' (1967) ASIL Proc 235.
[528] See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume II: Practice* (CUP 2015).
[529] UNHRC, 'Report of the detailed findings of the Independent Commission of Inquiry established pursuant to Human Rights Council Resolution S-21/1' (24 June 2015) UN Doc A/HRC/29/CRP.4, [36] (citing UNGA Res 58/97 (2003) as relevant State practice).
[530] ILC, 'Draft conclusions on CIL' (n 24), conclusion 6(2).
[531] ibid 133.
[532] ibid.
[533] Maurice Mendelson, 'The International Court of Justice and the Sources of International Law' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP 1996), 87.
[534] ILC, 'Draft conclusions on CIL' (n 24), conclusion 12.
[535] ibid 147.

of evidence under both elements.[536] The caution expressed in the CIL Conclusions, rather, concerns the proposition that resolutions, by themselves, constitute 'conclusive' evidence of custom without other pieces of evidence.[537] What the CIL Conclusions do not do, however, is differentiate between different types of resolutions in the evidentiary assessment of each element, namely quasi-legislative and quasi-judicial. Where a norm is affirmed in the abstract in a resolution and then applied in the Assembly's quasi-judicial capacity to a country-specific situation (see Chapter 4)), it is submitted that such body of resolutions would provide evidence of both elements and might conclusively establish the custom. This is because the norm framed in the abstract has been given concrete form in the quasi-adjudication of a set of facts at a level of specificity. That was arguably the case, for example, with apartheid as a crime against humanity, with the framing of this definition occurring through a series of resolutions both of a quasi-legislative and quasi-judicial character.[538] The broader point, however, is that the different functions served by Assembly resolutions (as being a means to both frame and apply a rule) counteracts the notion of double-counting, thereby showing resolutions to be valuable evidence of both State practice and *opinio juris*.

The effect of Assembly resolutions on *opinio juris* has received the most coverage. The CIL Conclusions particularly noted 'conduct in connection with resolutions adopted by an international organization' as a form of evidence of *opinio juris*, citing Assembly resolutions to be of 'special importance'.[539] The ICJ in *Nicaragua* noted that '*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of States towards certain General Assembly resolutions…', referring in particular to 'declarations'.[540] However, the CIL Conclusions also noted, drawing upon caselaw, that 'all due caution' must be exercised in relying on resolutions given that votes could be motivated by political or other non-legal considerations.[541] Given this, the ILC noted that a 'careful assessment' of various factors is required to verify whether the States concerned intended to acknowledge the existence of customary international law. The 'precise wording' of the resolution is the 'starting point', with references to international law and the choice (or avoidance) of particular terms being of possible significance.[542] Resolution 96 (I) (1946), for example, 'affirm[ed]' genocide to be a crime 'under international law'.[543] That said, there are many examples in Chapter 2 where courts have found a Assembly resolution to be expressive of custom without such a narrow focus as to whether a particular formula of words ('under international law') were uttered in the resolution concerned. For example, Resolution 2444 (XXIII) (1968) has been accepted as representative of customary international law without explicitly saying that it was referencing custom.[544] What seems to matter most is that the language addresses inherent legal questions, concerning rights, obligations and responsibility.[545] The framing of a resolution as a

[536] ibid 129. See also discussions in the Sixth Committee: 21st meeting (n 435), [14] (Australia); 20th meeting (n 510), [51] (Finland); 23rd meeting (2016) (n 510), [24] (Slovakia).
[537] Some jurists have analysed resolutions as if they could be conclusive on both elements: *Kanatami v European Commission* (Opinion of Advocate General Kokott) (19 March 2015) Case C-398/13 P, [90].
[538] See Chapter 4; International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted as GA Res 3068 (XXVIII) (1973), entered into force 18 July 1976) 1015 UNTS 243 ('Apartheid Convention'), preamble ('*Observing* that the General Assembly of the United Nations has adopted a number of resolutions in which the policies and practices of apartheid are condemned as a crime against humanity').
[539] ILC, 'Draft conclusions on CIL' (n 24), conclusion 10(2).
[540] *Nicaragua (Merits)* (n 273), 99-100 (citing UNGA Res 2625 (XXV) (1970)).
[541] ILC, 'Draft conclusions on CIL' (n 24), 148.
[542] ibid.
[543] ibid.
[544] See Chapter 2.
[545] Michael Scharf, 'Seizing the 'Grotian Moment': Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 Cornell Intl LJ 439, 454-455 (UNGA Res 95 (I) dealt with 'inherently legal questions').

'declaration' would also impart, as the UN Office of Legal Affairs noted, a 'strong expectation that Members of the international community will abide by it', in view of the 'greater solemnity and significance' of a resolution that seeks to declare norms over one which is merely recommendatory.[546] By contrast, there is language that indicates an intention not to express custom. These include references to a 'standard of achievement', mere expressions of 'concern and regret', or an exhortations for Member States to ratify a relevant treaty.[547] This all reflects a convention within the Assembly that the use of rule-expressive language conveys the necessary solemnity of those voting in support of it, unless the resolution in the text more explicitly seeks to limit its normative effects.

Next, the CIL Conclusions noted that the degree of support for a resolution 'is critical'.[548] This would be evidenced by the size of the majority, with resolutions attracting negative votes and abstentions 'unlikely' to reflect customary international law.[549] The CIL Conclusions did not specify, however, how much support was required: it did cite *Nuclear Weapons*, where the ICJ noted that several resolutions, due to their 'substantial numbers of negative votes and abstentions' fell short of establishing *opinio juris*.[550] The ILC could have drawn from other dictum in this advisory opinion, where the ICJ acknowledged the possibility of an emerging consensus based on the adoption of Assembly resolutions by a 'large majority' each year which recalled the content of a resolution on the prohibition of the use of nuclear weapons.[551] Elsewhere the ILC noted that 'it is broad and representative acceptance, together with little or no objection, that is required'.[552] Given that the CIL Conclusions acknowledge in other places that *opinio juris* need not be completely shared by all States, it seems reasonable to also assume this to be the case where such acceptance of custom derives from an Assembly resolution.[553]

The CIL Conclusions also note that debates and negotiations, especially explanations of vote, provide a context for understanding the extent to which a resolution is supported.[554] Although the report does not specify, this would tend to suggest that even resolutions meeting the other two factors above (in being adopted with wide support and which use rule-expressive language) might not reflect a genuine *opinio juris* given the background leading to the adoption.[555] In reality, there will often be a correlation in the application of these three factors: the text itself, and the extent to which rule-expressive language is used, will invariably be drafted to accommodate the differences of opinion amongst Member States. The UDHR, as

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[546] UN Office of Legal Affairs, 'Memorandum on Use of the Terms' (n 517). See also UNGA Res 3232 (XXIX) (1974) ('development of international law may be reflected *inter alia*, by declarations and resolutions of the General Assembly').

[547] *BE (Disobedience to orders, landmines)* [2007] UKAIT 35, [63]; *Kanatami* (n 538), [89].

[548] ILC, 'Draft conclusions on CIL' (n 24), 148.

[549] The identity of Member States voting against or abstaining might also be material: *Gujral v Maharashtra* [2011] INSC 949 215 (India Supreme Court) (noting that 4 Member States that retain the death penalty voted against an Assembly resolution on a moratorium on the death penalty).

[550] ILC, 'Draft conclusions on CIL' (n 24), 148, fn767.

[551] ibid.

[552] ILC, 'Draft conclusions on CIL' (n 24), 139.

[553] ibid 139 ('It is not necessary to establish that all States have recognized (accepted as law) the alleged rule as a rule of customary international law; it is broad and representative acceptance, together with no or *little* objection, that is required' (emphasis added)). A large majority also seems material in domestic jurisprudence, see eg *Cal v AG Belize* (2007) 71 WIR (Supreme Court of Belize), [131]. However, some jurists insist upon unanimity: Stephen Schwebel, 'United Nations Resolutions, Recent Arbitral Awards and Customary International Law' in Adriaan Bos and Hugo Siblesz (eds), *Realism in Law-Making: Essays in International Law in Honour of Willem Riphagen* (Martinus Nijhoff 1986), 203, 210.

[554] ILC, 'Draft conclusions on CIL' (n 24), 148.

[555] *Nuclear Weapons* (Advisory Opinion) (n 232), 315 (Dissenting op Vice-President Schwebel) ('vehement protest and reservation of right, as successive resolutions of the General Assembly... abort the birth or survival of *opinio juris* to the contrary').

many Member States noted, was designed as a 'common standard of achievement' rather than reflective of custom, language that found its way into the text itself. Still, there are noted instances where the language, vote and explanations are at odds: Resolution 96 (I) has been taken by many respected courts to be reflective of customary international law at the point of adoption (see Chapter 2), even though a minority of Member States in 1946 explained that their vote did not endorse the proposition that genocide was actually a crime under international law.[556] The wide support threshold seems equally apposite to an evaluation of explanations of vote; the reservations of a minority of Members should not deprive the expressed norm of legal force, unless the explanations of vote are more widely shared.

4.3 Customary Method in International Justice

As developed in this dissertation, international justice comprises a set of sources of law that might be invoked so as to secure accountability for acts of atrocities, including international criminal law and international human rights law. In contrast to the inductive method of custom identification (which seeks empirical evidence of both State practice and *opinio juris*), some writers argue that norms in these areas of law are more amenable to deductive forms of reasoning that emphasise statements over actions.[557] If international justice is more open to the development of custom from deduction, then this would make these fields of law particularly fertile terrain from which an Assembly resolution (and indeed other documentary sources) could take root.

In this respect, the areas of law relating to international justice have been noted to support a less stringent burden of proving custom, on the basis that they are underpinned by elementary considerations of morality or, as the ICTY Trial Chamber observed in *Kupreškić*, 'the demands of humanity or the dictates of public conscience'.[558] The Martens Clause has also been invoked to support greater latitude in custom finding, in permitting decision-makers to fill gaps where State practice conforming with *opinio juris* is absent.[559] During debate on the appropriate method for regulating outer space, the US delegate also noted that an Assembly resolution, rather than a treaty, was sufficient given that its subject matter concerned 'shared humanitarian and scientific concerns of the international community', such that 'States would willingly comply with such a resolution'.[560] This willingness to dispense with State practice reflects, as Kirgis noted, a sliding methodological scale in custom-finding: the more destabilising or morally distasteful the activity, the more readily decision-makers will substitute one element for the other; conversely, where the activity is not so destructive of widely accepted human values, the more that the decision-maker is to be exacting in looking to both elements of custom.[561]

The CIL Conclusions seem to offer mixed support for methodological variances in the identifications of customary international law. On the one hand, the two-element approach (i.e. State practice and *opinio juris*) are 'essential conditions' and apply in 'all' fields of

[556] UNGA Sixth Committee, First session, 22nd meeting (22 November 1946) UN Doc A/C.6/84, 102.
[557] Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law' (2001) 95 AJIL 757, 758; Oscar Schachter, *International Law in Theory and Practice* (Springer 1991), 335.
[558] *Kupreškić* (n 176), [527]. See also Meron (n 156), 114; Frederic Kirgis, 'Custom on a Sliding Scale' (1987) 81 AJIL 146, 147; Menno Kamminga and Martin Scheinin, *The Impact of Human Rights Law on General International Law* (OUP 2009), 112.
[559] *Prosecutor v El Sayed* (Assignment Order) STL/CH/PRES/2010/01 (15 April 2010), [30].
[560] See Committee on the Peaceful Uses of Outer Space (n 399).
[561] Kirgis (n 558), 148.

international law.[562] Moreover, the ILC notes that 'alternative approaches' that seek to emphasise one constituent element or even exclude one element altogether have not been adopted by States or in the caselaw.[563] On the other hand, albeit adopting a cautious tone, the CIL Conclusions acknowledge that the assessment of evidence looks to 'overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be formed'.[564] The ILC further note that the 'underlying principles of international law that may be applicable to the matter ought to be taken into account'.[565] Moreover, although the two-element approach is inductive, the ILC readily accept that this does not preclude '*a measure of deduction* as an aid, to be employed with caution'.[566] This would include the identification of custom that operate 'against the backdrop of rules framed in more general terms'.[567] While therefore the CIL Conclusions are not entirely receptive towards methodological variance according to the legal area, they are not entirely hostile towards it either. But there are two features in particular alluded to in the CIL Conclusions that support greater reliance on deductive sources and an emphasis on *opinio juris* over State practice within the normative fields of international justice.

Firstly, international justice has become increasingly judicialised over the years, with courts at every level (be they domestic or international) tasked with interpreting and developing the norms that comprise international criminal law and international human rights law. The decisions of these courts and tribunals might be described as a subsidiary means of interpreting custom; but not a source of custom in itself.[568] However, the output of these courts arguably carry greater legal significance. As the CIL Conclusions acknowledge, the exercise of judicial functions by a State also amount to a form of State practice.[569] The CIL Conclusions note, in this respect, that the practice of international organisations can contribute towards the identification of custom, where such organisation has been clothed with the competence to exercise some of the public powers of its Member States.[570] This supports the argument that, where an international court is established, for example to try perpetrators of international crimes, Member States are entrusting some of their judicial functions to this court. Such international judicial practice is therefore also a form of State practice. However, this argument does not render sources of non-judicial State practice (be it domestic legislation, diplomatic protests etc) redundant. Where it is available, other evidence of State practice can (and has) been taken into account.[571] Rather, the point is that, where an international court has been entrusted with the exercise of judicial functions, a particularly important form of State practice derives from the courts themselves: judgments.

Secondly, the character of some of the norms that comprise the fields of international justice do not lend themselves to a great deal of State participation. There are obviously contentious areas such as the scope of Head of State immunity where states have formed

[562] ILC, 'Draft conclusions on CIL' (n 24), 125. Indeed, Russia was vehement that the rules for identification of CIL should be applied equally in all 'areas' of international law: UNGA Sixth Committee 21st meeting (n 435), [48].
[563] ILC, 'Draft conclusions on CIL' (n 24) 126. See also ILC, 'First report on formation and evidence of customary international law' (17 May 2013) UN Doc A/CN.4/663, 29-34 (reviewing approaches from the *ad hoc* tribunals).
[564] ILC, 'Draft conclusions on CIL' (n 24), conclusion 3.
[565] ibid 127 (citing the example that State immunity is premised upon sovereign equality).
[566] ibid 126 (emphasis added).
[567] ibid.
[568] ibid conclusion 13
[569] ibid, conclusion 5.
[570] ibid, conclusion 4(2).
[571] There might also be a practical limitation that leads to international courts emphasising documentary sources given that they constitute 'easily available practice': UNGA Sixth Committee 21st meeting (n 435), [130] (Netherlands).

positions and acted, but there are also other areas in which State practice is silent or neutral.[572] This is especially so with prohibited rules, it being more difficult to establish State practice conforming or departing from such a rule. As debates into the Assembly's quasi-judicial resolutions also confirm (see Chapter 4) States will tend to counter allegations of abuse by denying such conduct or justifying its action in accordance with the rule; it will not deny the rule itself. As the CIL Conclusions rightly note, where prohibited rules are concerned, the validity of the custom is 'more likely' to turn on evaluating whether the inaction is accepted as law.[573] Sometimes international courts will see whether a proscription has a basis in domestic legislation as a means to confirm international acceptance.[574] However, the absence of domestic legislation has not proven fatal to the construction of custom such as, for example, whether forced marriage qualified as a crime against humanity as an 'other inhumane act': here, for example, the ICC drew from international sources including Assembly resolutions, not national legislation or other forms of non-judicial State practice.[575] In other words, State practice in relation to prohibited rules becomes a form of acquiescence to a documented *opinio juris*, such as that contained in an Assembly resolution.[576]

All of these principles feature, in varying degrees, in the jurisprudence considered in Chapter 2. A common theme is to focus on documentary sources – treaties, resolutions and comparative jurisprudence – in the identification of customary international law.[577] Of course, this is to be reconciled with the recognition in cases that non-judicial State practice remains relevant, with the two-element approach often upheld as essential to the enquiry into the identification of custom. This is not disputed here.[578] Rather, the broader point is that judicial institution building in the field of international justice itself represented an act of State practice, and there is certainly a trend in the jurisprudence to focus on international instruments of universal application (including Assembly resolutions) in finding custom. In turn, this trend assists in understanding the normative influence of Assembly resolutions in the process of identifying customary international law. It also reveals potential for the Assembly to support the progressive judicial development of international law in the future.

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[572] Arajärvi (n 117) 20; Jean-Marie Henckaerts, 'Customary International Humanitarian Law: a response to US comments' (2007) 89(866) Intl Rev Red Cross 473, 475-476

[573] ILC, 'Draft conclusions on CIL' (n 24), 128.

[574] See eg *Belgium v Senegal* (Merits) (n 303), [99] (noting that the torture prohibition is part of custom, drawing from UNGA Res 3452 (XXX) (1975) and other international instruments, including evidence that the prohibition had been 'introduced into the domestic law of almost all States').

[575] *Ongwen* (Confirmation) (n 173), [87]-[94].

[576] There are instances, however, where State practice was inconsistent with an alleged prohibitory rule stated in an Assembly resolution: *Ajitsingh Harnamsingh Gujral v Maharashtra* [2011] INSC 949 215 India Supreme Court (that the moratorium on the death penalty called for by the Assembly did not correspond uniformly to State practice). See also ILC, 'Third report on identification of customary international law' (27 March 2015) UN Doc A/CN.4/682 37-38.

[577] See also Arajärvi (n 117); Roberts (n 557), 757; Niels Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' (2007) 23(2) Am U Intl L Rev 275, 280; Iain MacGibbon, 'Means for the Identification of International Law: General Assembly Resolutions: Custom, Practice and Mistaken Identity' in Bin Cheng (ed) *International Law: Teaching and Practice* (Stevens 1982), 21; Onuma Yasuaki, 'Is the International Court of Justice an Emperor Without Clothes?' (2002) 8(1) Intl Legal Theory 1, 16.

[578] It has also been observed that where Assembly resolutions represent a proposition of particular novelty which would constitute a radical revision of a key conceptual foundation of international law then greater evidence would be required to establish State agreement (such as in imposing human rights obligation on non-State actors). In such instances, State practice will remain material: Jessica Burnskie and others, 'Armed State Actors and International Human Rights Law: An Analysis of the Practice of the UN Security Council and UN General Assembly' (Harvard Law School Program on Intl Law & Armed Conflict, 2017), 27 <https://dash.harvard.edu/handle/1/33117816>.

5. Conclusion

It is apparent from the analysis in this and the previous Chapter that Assembly resolutions have shaped the normative development of a number of legal regimes in the realm of international justice, including the UN Charter, other treaty-based regimes, and customary international law. Assembly resolutions, even though non-binding in the formal institutional sense, have codified, defined, authenticated and legitimated some of the most important norms of international justice. These resolutions have provided a foundation in which further advancements could be built, whether this be in the adoption of a later convention or in the judicial interpretation of a norm. However, not all resolutions will be equal to the task of normative development. Some being exhortatory might sow the seed for normative debate in the future but which lack authority in themselves, whereas other resolutions have been more forthright in expressing norms to be part of international law.

Within the UN, although not vested with a formal power of authoritative interpretation, the Assembly is the natural forum to positivise members' current and ongoing interpretations of their obligations under the UN Charter and the scope of Assembly powers. The notion that Members are constrained by an 'original interpretation' of the UN Charter based upon negotiations in San Francisco in 1945 does not accord with contemporary institutional reality and the role played by the UN's established practice and the memberships' subsequent agreement in the development of treaty norms and powers. What bearing, though, does the Assembly's interpretation of the UN Charter have in the field of international justice? As the following chapters show, there is a great deal that can be done within the UN to advance international justice, including the creation of commission of inquiries and *ad hoc* tribunals (Chapter 6), and the recommendation of measures against recalcitrant States that have legal effects (Chapter 7). Assembly interpretations of the UN Charter can also serve a function in exerting pressure on Member States to comply, given the possible reputational costs arising from a perception that it has failed to meet its obligations under the Charter, as covered further in Chapter 5. All of these measures are premised on the Assembly being able to interpret the UN Charter and its specific powers within this framework.

The Assembly has also interpreted provisions from other treaties and its resolutions have influenced normative developments in such regimes. The legal basis for the Assembly to interpret other treaties flows from its discursive functions under the UN Charter, such as in promoting progressive codification of international law and to facilitate the 'peaceful adjustment of any situation'. It also flows from the indivisibility of purpose between the UN Charter and other treaty regimes to end impunity and advance human rights (treaty regimes, it should also be noted, the Assembly was instrumental in establishing). It is also apparent that some of the judicial mechanisms of these different legal regimes have drawn liberally from Assembly resolutions in the construction of provisions in its own constituent instruments: there are ample examples of this from the ICC, *ad hoc* tribunals, and regional human rights mechanisms. Resolutions have inspired, catalysed and augmented judicial constructions of these constituent instruments. At the same time, it is necessary to consider the effect of such resolutions in the particular context of the regime in which they have been received. It was noted that while international courts have generally placed emphasis on documentary sources to identify international law, there are other occasions in which a treaty is held to be relatively insulated from normative development, as with the ICJ's construction of the scope of the definition of genocide in the Genocide Convention.

Furthermore, resolutions can contribute to the development of customary international law in one of three ways: *lex lata* (declaring existing law), *in statu nascendi* (crystallising emerging custom) and *de lege ferenda* (acting as a focal point for the future development of custom). The relevance of an Assembly resolution to either of these categories will turn upon

the language used (whether it is 'rule-prescriptive') together with the extent of its support (evidenced by the vote and accompanying explanations). While the Assembly has confined itself, in relation to its normative role, to declaring pre-existing law, the reality is that resolutions have developed customary international law under an appearance of interpretation. Assessing the normative influence of Assembly resolutions is also intimately bound to difficult questions over the method for discerning customary international law. It is apparent that many tribunals have adopted a more holistic approach in identifying custom, by placing reduced evidentiary importance on State practice over *opinio juris*, or at least have been prepared to use very strong indicators of *opinio juris* to offset a lack of State practice. This has tended to focus on multilateral instruments (including resolutions) in the identification of custom. In this context, the scope for Assembly resolutions to influence the development and identification of customary international law, at least within the courtroom, is auspicious indeed, as past instances show.

CHAPTER 4: THE GENERAL ASSEMBLY AS A 'QUASI-JUDICIAL' ACTOR IN ADVANCING ATROCITY CRIMES ACCOUNTABILITY

1. Introduction

The previous Chapters have shown the role of the Assembly in contributing towards the legal norms that comprise the field of international justice; the next logical enquiry is to assess the practice of this body in applying these norms in relation to specific atrocity situations. Activity of this kind has already been defined in the introductory chapter as 'quasi-judicial', denoting the mandate of a political body to monitor compliance with a set of norms or to make evidence-based factual determinations.[579] The Assembly, it will be shown, has a rich quasi-judicial practice in relation to the field of international justice. This practice is categorised here in three ways: the occurrence of international crimes or gross human rights violations within the territory of a Member State; the responsibility of a Member State for violations of international law arising from the commission of crimes; and the recognition of states of affairs, particularly in relation to statehood, government legitimacy and territorial disputes.[580] Recognition practice of this kind is not as such motivated by an imperative to secure accountability for atrocity crimes; but the recognition of international 'facts' has, as this Chapter aims to show, produced indirect effects in advancing accountability.

The legal effect of the Assembly's quasi-judicial resolutions merge with the more general debate over the binding force of such resolutions.[581] It has already been noted that Assembly resolutions are not, as a general matter, legally binding under the UN Charter.[582] There are rare instances in which Member States have through special agreement conferred a power on the Assembly to resolve any dispute between them and to accept such determinations as binding.[583] However, the Assembly has not been conferred a formal quasi-judicial role in legal regimes concerned with international justice, despite failed attempts to recognise the competencies of the Assembly under certain provisions of the Geneva Conventions and the ICC Statute.[584]

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[579] Tignino (n 30), 242-261.

[580] See further Charles Alexandrowicz-Alexander, 'The Quasi-Judicial Function in Recognition of States and Governments' (1952) 46 AJIL 631. This quasi-judicial function is evident in other areas of international affairs, too, including the entitlement of a State to act in self-defence in relation to a particular situation, the legitimacy of national liberation movements, and the need for humanitarian assistance during a conflict. See eg UNGA Res 71/93 (2016); UNGA Res 68/262 (2014); UNGA Res 49/21N (1994); UNGA Res 37/233 A (1982); UNGA Res 36/226 A (1981); UNGA Res A/ES-9/1 (1982); UNGA Res 36/27 (1981); UNGA Res ES-10/6 (1999); UNGA Res 33/183 A (1979); UNGA Res 31/6 I (1976); UNGA Res 100 (ES-II) (1956); UNGA Res 1005 (ES-II) (1956). On the humanitarian assistance quasi-judicial function, see: Rebecca Barber, 'Is Security Council Authorisation Really Necessary to Allow Cross-Border Humanitarian Assistance Without Consent?'(*EJIL:Talk!,* 24 February 2020) <https://www.ejiltalk.org/is-security-council-authorisation-really-necessary-to-allow-cross-border-humanitarian-assistance-in-syria/>.

[581] Alvarez, 'International Organizations' (n 476), 430.

[582] See Chapter 1.

[583] Treaty of Peace with Italy (entered into force 10 February 1947) UNTS 747 (any dispute between the allies on the disposal of territories should 'be referred to the General Assembly of the United Nations for a recommendation, and the Four Powers agree to accept the recommendation and to take appropriate measures for giving effect to it'). There are a category of binding quasi-judicial Assembly resolutions on internal operational matters, such as admission of UN members, or budget apportionment: *South West Africa Cases* (n 197), 50–51. The Assembly has also asserted authority in relation to Mandated Territories: UNGA Res 2145 (XXI) (1966) (Mandate conferred upon South Africa 'is therefore terminated'); *Namibia* (Advisory Opinion) (n 108), 57.

[584] 'Final Record of the Diplomatic Conference Convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims and Held at Geneva from April 21st to August 12th

Nonetheless, it remains instructive to consider whether, and to what extent, the Assembly's quasi-judicial resolutions have supported accountability responses to atrocity crimes by both political and judicial entities. Chapter 2 has already shown that Assembly resolutions have been extensively used by judges as evidence of international law; it is equally worthwhile to enquire into the extent to which the Assembly's quasi-judicial resolutions have been used by courts to support their functions, including the ICC and *ad hoc* tribunals. Furthermore, there is also a body of Assembly resolutions that characterize certain conduct as inconsistent with the UN Charter; this raises the question as to the measures that organs within the UN, particularly the Security Council, have taken to draw upon these findings in the exercise of their functions.

It is also acknowledged that analysis of Assembly quasi-judicial practice has to be mindful of the criticism often heard that this body acts with a political bias.[585] Sometimes a discretionary component forms part of the norm, as with the power of the Assembly to determine what constitutes a 'threat' to the peace under the UN Charter.[586] Yet, there are other areas where political assessment in the application of a norm might lead to allegations that the Assembly is biased or lacking even-handedness in its consideration of country-situations, thereby reducing its perceived legitimacy. In previous studies into Assembly practice, MJ Peterson noted the Assembly's tendency to place disproportionate focus on Israel and to shield from scrutiny situations in the 'global south'.[587] In turn, Member States on the receiving end of Assembly condemnations, aside from challenging the legality of these resolutions, will often point to the unchecked human rights abuses in Member States that supported the resolution.[588] Evaluating the range of the Assembly's quasi-judicial practice, this Chapter considers whether this criticism is valid. It also considers whether the Assembly has been consistent in its application of these standards across different situations and sessions. It examines whether the rise of commissions of inquiry, both from within the UN and outside, have had any influence on the nature of the Assembly's quasi-judicial determinations, particularly in promoting greater evidence-based conclusions that reduce or obviate the suggestion that its conclusions are based upon political biases.

Another factor acknowledged in this Chapter is the multitude of purposes that Assembly resolutions serve; they cannot be seen exclusively through the optic of securing accountability for atrocity crimes, even where such crimes have allegedly occurred in a country situation. For example, the Assembly has long been concerned with advancing decolonisation, which also incidentally involved monitoring the way in which colonial authorities treated the local populations. Where the Assembly then denounced this conduct as, for example, a crime against humanity, it did not necessarily do this as a means to secure accountability but as part of its broader campaign to promote decolonisation. Therefore, it must be acknowledged that the imperative of accountability for atrocity crimes has not dominated the agenda of the Assembly even in cases where norms of international justice have been invoked in quasi-judicial resolutions. Even so, it is also instructive to consider whether the Assembly's use of atrocity crime labels in these contexts nonetheless produce indirect effects that led to accountability in those or other situations, or otherwise in the prescriptive development of relevant international law.

1949' (Vol II, Section B), 121 (Australia proposal). See also *Prosecutor v Limaj* (Judgment) ICTY-06-66-T (30 November 2005), [85]-[86]; 'Report of the Preparatory Commission for the ICC, Part II, Proposals for a Provision on the Crime of Aggression' (24 July 2002) PCNICC/2002/2/Add.2; 'Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression' (13-15 June 2005) ICC-ASP/4/SWGCA/INF.1, [65]-[74]; 'Note by the Secretariat' (19 October 2007) ICC-ASP/6/INF.2, 27-28.

[585] See also the discussion in Chapter 1.

[586] *Tadić* (Jurisdiction) (n 125) (Separate op Judge Sidwa), [21].

[587] MJ Peterson, *The UN General Assembly* (Psychology Press 2006), 103-131.

[588] UNGA, Seventy-second session, 73rd plenary meeting (19 December 2017) A/72/PV.73, 24-25 (Iran); UNGA, 73rd plenary meeting (2014) (n 93), 21 (Cuba).

Accordingly, the aim of this Chapter is to evaluate the legal foundation for quasi-judicial resolutions, the extent of Assembly practice, their effects in augmenting accountability responses to atrocity crimes, and the validity of the bias critique. It first starts with the legal basis for quasi-judicial resolutions, drawing upon some of the common objections raised by Member States to resist this form of Assembly scrutiny. The analysis then moves to existing practice and the observable effects that have derived from it. Here the analysis is structured according to the variety of sources of international law used by the Assembly as a framework for its scrutiny of country situations that address atrocity crimes; international criminal law, international humanitarian law, international human rights law and the UN Charter. It finishes by examining Assembly resolutions concerned more generally with the creation of facts in international relations and the indirect effects these have created in advancing accountability for atrocity crimes. Having engaged with the legal foundations and practice, the Chapter finishes by evaluating the critique that the Assembly is biased in its selection and scrutiny of country situations as it relates to international justice.

2. Legal Foundations for Quasi-Judicial Powers

This Chapter outlines a substantial body of Assembly practice in making quasi-judicial determinations in relation to country situations. Although it is submitted that this would suffice to constitute 'established practice' under the UN Charter, it is nonetheless instructive to engage with some of the recurring legal objections to the Assembly performing a quasi-judicial function of this kind.[589] In explanation of votes and other records, these objections typically rely on the internal affairs clause of Article 2(7) of the UN Charter as well as the lack of any textual power for the Assembly to engage in a quasi-judicial function, as this section outlines. While these arguments are against the current of established practice, it is nonetheless instructive to engage with them, if anything to counter the lingering concerns amongst a minority of Member States that the Assembly is acting *ultra vires*. A concern is also sometimes expressed by Member States that the Assembly is ill-suited (being a large plenary organ where Members votes for a multitude of motivations including self-interest) to judge the conduct of Member States. Although this point ties to the general allegation that the Assembly acts with political bias, the concern has sometimes been framed as one engaging legal standards of a fair hearing (*audi altaram partem*); that the Assembly, in condemning Member States according to international law does not give proper consideration to evidence and the representations of the 'other side'. This section engages with these various critiques of the Assembly performing a quasi-judicial function.

2.1 The Assembly as a Quasi-Judicial Actor: Legal Basis

Opposition to the Assembly acting quasi-judicially stems from the lack of any express textual power in the UN Charter particularly in being able to form the view that a Member State has violated its international obligations. By contrast, where the Assembly does have decisional competence, this is expressly provided in the UN Charter. [590] Critics would say that the absence of any explicit reference to quasi-judicial functions accords with the drafting history of the UN Charter.[591] This history reflects the traditional view in favour of auto-interpretation by Member States of their international obligations and a reluctance to confer

[589] As to the established practice principle in UN Charter interpretation, see Chapter 3.
[590] See eg art 17 (budget approval) and arts 4-6 (membership). See also *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 7-8.
[591] Schachter, 'Quasi-Judicial Role' (n 31), 960; UNCIO XIII (1945), 48-49.

authority on collective organs.[592] Referring to the powers of the Security Council as originally conceived, Schachter noted that it seemed probable that the drafters believed that the primary task of the Council would not be served if it had the power to determine that a side was guilty of violating its international obligations.[593] The same logic can also be applied to the Assembly, in that a resolution that condemns Member State conduct could be regarded, on this reasoning, as inimical to Charter purposes of promoting inter-state cooperation and peace. However, these various arguments misfire, not only because they do not accord with established practice of the UN (outlined in this Chapter) but because the effective discharge of the Assembly's power to recommend necessarily requires it to form evaluative judgment on certain facts or events. Or, at the very least, that the Assembly is entitled to form such evaluative judgment, in its discretion, where it regards doing so as contributing to Charter purposes. The interpretation is a reasonable corollary from the text of various Charter provisions.

In particular, Article 14 of the UN Charter provides that the Assembly is able to recommend measures for the 'peaceful adjustment of any situation…*which it deems likely* to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations'.[594] In order for the Assembly to make a recommendation, Article 14 stipulates that one of two preconditions should be met, namely either that a situation is deemed as 'likely' to impair the 'general welfare' or 'friendly relations', which includes violations of the 'Purposes and Principles' of the UN Charter. Even if 'friendly relations' is focused on inter-State dynamics, it is plain that 'general welfare' is sufficiently broad to include accountability for atrocities and in turn the observance of relevant norms within the territory of a Member State. Indeed, the language of Article 14 has been used by the Assembly in many resolutions dealing with the treatment of individuals in country-specific resolutions.[595] This is also reinforced by the reference to violations of the 'provisions of the present Charter', which has been considered by the Assembly to include violations of human rights within a Member State (of which, see Part 3 below). Article 14 is therefore broad enough to encapsulate the power of the Assembly to make findings, as an incidence of the power to recommend 'peaceful adjustments' and to ensure observance of obligations under the UN Charter. Reading Article 10 with Article 14 would also support a quasi-judicial power, given that Article 10 permits the Assembly to discuss 'any questions or any matters within the scope of the present Charter', which would include the UN's broadly defined 'Purposes and Principles'.[596]

Furthermore, Assembly resolutions that 'recognise' a state of affairs as an international fact are also supported textually in the UN Charter. These acts include Statehood, government, or territorial recognition (or, conversely, non-recognition of State acts or assertions in these areas). Given the primary focus of this dissertation on atrocity crimes accountability, space precludes a detailed analysis of Assembly recognition practice; suffice it to say that it is extensive.[597] The basis for them to do so, apart from this established practice, is textually

[592] ibid.
[593] ibid.
[594] Emphasis added.
[595] See eg UNGA Res 36/172 C (1981) (South Africa); UNGA Res 34/30 (1979) (Cyprus); UNGA Res 34/22 (1979) (Kampuchea). Although Article 14 has seldom been explicitly invoked in Assembly resolutions, it is broadly accepted that this provision allows the Assembly to involve itself in international disputes, see: Donald Riznik and Markus Zöckler, 'Ch.IV The General Assembly, Functions and Powers, Article 14' in Simma (vol I) (n 8).
[596] Alvarez, 'International Organizations' (n 476), 428-429.
[597] See eg UNGA Res 68/262 (2014); UNGA Res ES-10/6 (1999); UNGA Res 37/233 A (1982); UNGA Res 36/226 A (1981); UNGA Res A/ES-9/1 (1982); UNGA Res 31/6 I (1976); UNGA Res 1883 (XVIII) (1963); UNGA Res 195 (III) (1948). See further Rebecca Barber, 'How Necessary is Security Council Authorisation' (n 42).

underpinned by the UN Charter. The Assembly is authorised by Article 14, as noted, to make recommendations for the 'peaceful adjustment' or 'general welfare' of any situation; a function that reasonably includes resolutions dealing with 'recognition' especially where there are disputes concerning Statehood, government or territory. Where questions relating to Statehood, government or territorial recognition have a peace and security dimension then the Assembly's responsibility in this area would also provide an additional basis for quasi-judicial resolutions.[598] In relation to the Assembly's recognition of Statehood, this is supported by its powers to regulate admission to the Organisation under Article 4, with one of the relevant preconditions being that membership is open to 'States'; it is therefore incumbent upon the Assembly to determine this precondition. Similarly, questions of governmental validity can also occasionally arise in the course of determining the credentials of those purporting to represent a state in the Assembly.[599]

Some critics would still argue that the Assembly, insofar as it has quasi-judicial competencies, is only able to interpret and apply those provisions that fall within its functions, particularly having regard to the role of the Security Council in the maintenance of international peace and security. This was the argument of Belgium and Portugal in 1983 when seeking to resist the Assembly's finding that apartheid constituted a threat to peace and security.[600] To these Member States, only the Security Council possessed the competence to make this finding given its authority under Chapter VII. This argument can be quickly dispensed with, not least because the ICJ in *Certain Expenses* has noted that the Assembly 'is also to be concerned with international peace and security'; the Security Council is the 'primary' but not the sole actor within the UN framework.[601] It also arises as an incidence of the Assembly's power under Article 11(2) of the UN Charter to recommend the Security Council to take enforcement action to maintain international peace and security; this necessarily implies a competence on the part of the Assembly to determine whether a matter threatens international peace and security.[602] The standard move at this point would be to argue, based on the text of the UN Charter, that the Assembly can only make such determinations where the Security Council is not otherwise acting on a given situation, which would greatly restrict the ability of the plenary to make country-specific determinations.[603] However, as the ICJ noted in *Wall*, it is now 'accepted practice' for the Assembly to act in parallel with the Security Council, which is also reinforced by practice under the Uniting for Peace mechanism.[604] There is also practice of the Assembly acting alongside and separately from the Security Council within the sphere of international peace and security, and human rights, including, as will be seen here, in matters pertaining to accountability for atrocity crimes.[605]

What about the Assembly's quasi-judicial insertion into other treaty regimes? It was noted above that the Assembly frequently applies norms from other such regimes. This has, on occasion, been criticised as overreaching, particularly where the treaty regime already has a designated organ or procedure to resolve disputes in the application of the treaty. In this regard,

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[598] *Certain Expenses* (n 108), 163 (there the ICJ cited Article 14 to establish that the Assembly also has institutional responsibility for the maintenance of international peace and security).
[599] See Rule 29, UNGA Rules of Procedure (21 February 2017) UN Doc A/520/Rev.18; Higgins, 'Oppenheim's International Law' (n 414), 183-184 (noting the practice of the Assembly's Credentials Committee).
[600] UN, *Yearbook of the United Nations* (1983), 804.
[601] Certain Expenses (n 108), 163-165
[602] See FA Vallat, 'The General Assembly and the Security Council of the United Nations' (1952) 29 BYBIL 63, 74.
[603] Supported by the plain text of Article 12, UN Charter ('While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.')
[604] *Wall* (Advisory Opinion) (n 108), 149-150.
[605] See further Barber, 'How Necessary is Security Council Authorisation' (n 42).

during the 1982 Assembly debate on the Sabra and Shatila massacre, Singapore objected to the majority's factual and legal characterisation of genocide occurring in this situation on the basis that such a determination should be 'made by the appropriate legal bodies', pursuant to Article VIII of the Genocide Convention.[606] Another way to frame the point is that any determination itself rests upon a particular interpretation of obligations under a treaty; for example, it was not for the Assembly to declare apartheid to be genocide in the South Africa situation as this was tantamount to a legal interpretation of the Genocide Convention (the view of the British delegate, on behalf of 12 European Community members, on the matter in 1986).[607] According to this view, the Assembly has no business in purporting to interpret the terms of a treaty other than the UN Charter given that it is not a party.

These arguments have a number of deficiencies. Insofar as the Genocide Convention is concerned, it actually recognises a role for 'any Contracting Party' to 'call upon the competent *organs* of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide'.[608] The reference to 'organs' here envisages action beyond that of the Security Council; it envisages a role for the Assembly to take action within its competencies, including to establish commissions of inquiry (considered further in Chapter 6).[609] Yet even without any textual basis in other regimes there are good arguments to support a quasi-judicial function for the Assembly in applying such norms. In particular, the scope of the Assembly's competence under Article 14 of the UN Charter is (as noted above) very broad, such that its deliberations must necessarily deal with situations under other treaty regimes that engage with issues within the mandate of the UN, such as security and human rights.[610] In any event, Assembly resolutions are a reflection of the views of those Member States who voted for their adoption. As Chapter 3 discussed, Assembly resolutions are capable of amounting to a 'subsequent agreement' in the interpretation of another treaty regime (i.e. outside the UN Charter), insofar as the resolution encapsulates the support of those Member States that are a party to that other regime. Furthermore, the Assembly has acknowledged the importance of promoting codification as 'a more effective means of furthering the purposes and principles' of the UN Charter.[611] On this basis, while instruments such as the Genocide Convention and Geneva Conventions are independent legal regimes, the application of their norms by the Assembly at a level of specificity in country situations provides a means to give them greater texture and promotes codification. Indeed, as was shown above, the codification of apartheid as a crime against humanity in the Apartheid Convention and the ICC Statute owes its origins to the Assembly's quasi-judicial practice affirming this characterisation.

A final argument that the Assembly is not vested with quasi-judicial powers is premised on the notion of an institutional separation of powers within the UN system.[612] The ICJ is, following this reasoning, considered to be the exclusive judicial authority and the 'guardian of the Charter'.[613] Indeed, before the ICJ considered its first case, a question arose whether the Security Council was entitled to form a view on the legality of Albania's conduct in the Corfu

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[606] UNGA, Thirty-seventh session, 108th plenary meeting (16 December 1982) UN Doc A/37/PV.108, [121].
[607] UN, *Yearbook of the United Nations* (1986), 750.
[608] Genocide Convention (n 145), art VIII (emphasis added). See also art 15(bis) of the ICC Statute (n 83) which acknowledges a plurality of quasi-judicial actors on matters of aggression: 'A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.'
[609] Irvin-Erickson (n 139), 192
[610] Sloan, 'Changing World*'* (n 54*)*, 66.
[611] UNGA Res 1686 (XVI) (1961), preamble; UNGA Res 1505 (XV) (1960), preamble. See also UNGA Res 1815 (XVII) (1962), preamble; UNGA Res 39/84 (1984), preamble.
[612] See recently Miriam Cullen, 'Separation of Powers in the United Nations System?' (2020) IOLR 1.
[613] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v UK) (Provisional Measures) [1992] ICJ Rep 3 (Dissenting op Judge Weeramantry), 56.

Channel. The British requested that the Security Council find that the laying of mines constituted a 'crime against humanity'; all but the Union of Soviet Socialist Republics (USSR) and Poland were prepared to do so.[614] To the USSR, this matter was essentially a question for the ICJ rather than being based on 'suppositions' presented to the Security Council.[615] However, the reality since then has been an active quasi-judicial role for both principal political organs.[616] This practice reinforces the limited institutional powers of the ICJ, its judicial power only arising where it is vested with jurisdiction.[617] The concept of a separation of powers in the UN system is rendered all the more artificial given the practice of the political organs in establishing subsidiary judicial organs.[618] Furthermore, the 2020 provisional measures decision handed down by the ICJ (*Gambia v Myanmar*) suggests the scope for greater dialogue between the UN's judicial and political organs. There the ICJ drew heavily from Assembly quasi-judicial determinations to justify the ordering of provisional measures.[619] Doing so not only validates the institutional aptness of the Assembly to apply norms and make evaluations in country situations, but also acknowledges the multi-faceted nature of legal problems in international justice. Judge Xue in her separate opinion alluded to this duality, noting that 'resort to the Court is *not the only way* to protect the common interest of States in the accomplishment of the high purposes of the [Genocide] Convention'; rather organs including the Assembly 'all stand ready, and indeed, are being involved in the current case to see to it that acts prohibited by the Genocide Convention be prevented and, should they have occurred, perpetrators be brought to justice.'[620]

2.2 Limits Imposed by Article 2(7) of the UN Charter

At various points in UN history, including in recent times, Member States have invoked Article 2(7) of the UN Charter in an attempt to resist, or at least delegitimise, the Assembly's consideration of country situations. The basis of the argument here is that Article 2(7) prohibits the UN from intervening 'in matters which are essentially within the domestic jurisdiction of any state'. The construction of Article 2(7), in this respect, turns upon the meaning of 'intervention' and 'domestic jurisdiction'.

Dealing first with 'intervention', this might be read to imply a strong incursion into internal affairs, such as the use of Chapter VII enforcement action. Reference can also be made to the Assembly's Friendly Relations Declaration, of which States have a duty to refrain from coercion aimed at undermining the political independence or territorial integrity of another state.[621] Or in the words of Oppenheim and Lauterpacht, intervention means the 'dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things'.[622] This would mean that a quasi-judicial resolution of the

[614] UN, *Yearbook of the United Nations* (1946-1947), 393.
[615] ibid. On the other hand, Australia regarded the Security Council as an appropriate forum, given that it was able to take enforcement action or recommend those responsible to be punished: ibid.
[616] See Schachter, 'Quasi-Judicial Role' (n 31); Ian Johnstone, 'Legislation and adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102(2) AJIL 275.
[617] See the four jurisdictional routes: ICJ Statute, art 36(2).
[618] The Security Council established the ICTY and ICTR, and the Assembly created the United Nations Administrative Tribunal ('UNAT'). See also *Libya v UK* (Provisional Measures) (n 613) (Separate op Judge Lachs), 26 ('[T]he intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction').
[619] *The Gambia v Myanmar* (Provisional Measures) (n 144).
[620] ibid (Separate op Vice-President Xue), [7] (emphasis added).
[621] UNGA Res 2625 (XXV) (1970), annex, preamble.
[622] Lassa Oppenheim and Herch Lauterpacht, *International Law: A Treatise* (Longmans 1955), 305. See also the ICJ's analysis of the coercion doctrine: *Nicaragua (Merits)* (n 273), 108.

Assembly would not count as 'intervention' provided that it does not have these effects. However, this argument fails to have regard to the savings clause in Article 2(7) acknowledging that it 'shall not prejudice the application of enforcement measures under Chapter VII'. Conversely, no other UN organ has been vested with coercive powers. Given that this saving clause exists, it follows that Article 2(7) would be redundant if intervention only pertained to Chapter VII enforcement action. 'Intervention' must therefore logically include 'lesser' forms of UN activity, including Assembly condemnations of Member State conduct.[623]

The key issue therefore turns on defining the parameters of 'domestic jurisdiction'. There was much debate about this term at various stages in UN history. In 1954, many Member States were sympathetic to South Africa's position that the Assembly was lacking in competence over the human rights situation within its borders.[624] In 1959, the issue resurfaced in the Assembly' Special Political Committee; by this point there was a prevailing view that apartheid constituted a crime against humanity. Framed as such, Ireland regarded a restrictive interpretation of Article 2(7) to be indefensible in instances where these crimes occurred.[625] By contrast, decades later in 1980, the perpetration of crimes was considered by Luxembourg (on behalf of the European Economic Community) to fall within the realm of 'domestic jurisdiction'.[626] Accordingly, it abstained from a resolution condemning apartheid as a crime against humanity on the basis that it had reservations as to the extent to which members 'could condemn acts committed outside of its jurisdiction by non-nationals'.[627] Here, a link seems to be drawn between a State's ability to exercise criminal jurisdiction and Article 2(7). On this basis, Luxembourg seemed to be ignoring the possible application of universal jurisdiction to such crimes, or implicitly denying the validity of the principle.

It seems apparent that the best argument in favour of a restrictive interpretation to Article 2(7) is to attribute a fixed meaning to 'domestic jurisdiction', as it was understood by the drafters at the time of the conclusion of the UN Charter; a period when the norms of international human rights law, international criminal law and international humanitarian law were yet to be fully developed.[628] There are, however, at least two difficulties with this originalist argument. First, the events of World War II were an important driving force behind the creation of the UN; the imperatives to secure accountability for breaches of international law was a live concern in 1945, with the Assembly underlying the need for accountability in three resolutions in its first session.[629] It cannot therefore be said that the original drafters would reasonably intend 'domestic jurisdiction' to act as a shield against the scrutiny of international crimes occurring within a Member State. Indeed, it is an unattractive argument to suggest that the commission of international crimes is purely a domestic concern, especially given that State officials are often the ones who authorise or perpetrate such offences. Second, the UN Charter is a 'living instrument'; institutional functions and obligations have evolved beyond the strict parameters of the text.[630] It follows that 'domestic jurisdiction' is also an evolving concept, as the PCIJ noted when interpreting an analogous provision in the Covenant of the League of Nations.[631] It did not take long for the Assembly to expressly limit the ambit of Article 2(7), when it endorsed the inquiry report on the Soviet intervention in Hungary: aggression was a

[623] Georg Nolte, 'Ch.I Purposes and Principles, Article 2 (7)' in Simma (vol I) (n 8), 285; Tomuschat, 'Human Rights' (n 35), 200.
[624] UN, *Yearbook of the United Nations* (1954), 86–8.
[625] UN, *Yearbook of the United Nations* (1959), 56-59.
[626] UN, *Yearbook of the United Nations* (1980), 808.
[627] ibid. Still, the resolution debated (UNGA Res 35/39 (1980)) was adopted by 113 votes to 1, with 22 abstentions.
[628] Tomuschat, 'Human Rights' (n 36), 186.
[629] See UNGA Res 96 (I) (1946) (genocide); UNGA Res 95 (I) (1946) (Nuremberg); UNGA Res 3(I) (1946) (extradition and punishment of war criminals).
[630] See Chapter 1.
[631] *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) PCIJ Rep Series B No 4.

subject 'of international concern' and not activity that fell within the domestic jurisdiction of a Member State.[632] Accordingly, the parameters of 'domestic jurisdiction' have reduced accordingly and certainly do not preclude quasi-judicial resolutions concerning State conduct that violates the norms of international human rights law and international criminal law.

However, it might be argued that a situation must meet a particular level of gravity for it cease being within a Member State's 'domestic jurisdiction'.[633] This view might be used to explain the common reference in Assembly resolutions to 'systematic' violations of international human rights law (and words to that effect).[634] Indeed, a delimitation of the Assembly's role based upon such gravity considerations would be consistent with its long-held view that 'mass and flagrant violations are of special concern to the United Nations'.[635] But this is not a hard and fast rule: the Assembly has occasionally concerned itself with matters on a smaller scale, such as a single death, as with the assassination of the Prime Minister of Burundi in 1961.[636] Similarly, the Assembly also condemned the excessive use of force against 'eleven Africans' by the South African authorities in South West Africa.[637] In the final analysis, the Assembly has the discretion to determine what it regards as a situation warranting its consideration; a resolution's adoption will show in itself that the situation is of international concern and not shielded by Article 2(7).[638]

2.3 Compatibility with Standards of Procedural Fairness

To say that the Assembly performs a quasi-judicial function might imply the need to meet general principles of procedural fairness: that the decision-maker take a decision that is impartial and free from bias (*nemo iudex in causa sua*) and provide a fair hearing and means of participation in the proceedings of those affected by the decision (*audi alteram partem*).[639] Member States typically on the receiving end of a quasi-judicial resolution will criticise the Assembly's process along either of these lines, even if not specifically framed as a legal claim. In this regard, it is apparent that the principles of procedural fairness do not, as such, act as a legal constraint on the Assembly's quasi-adjudicatory function.[640] Nonetheless, it is also clear that the Assembly membership has been conscious to ensure some degree of procedural fairness in the exercise of its quasi-judicial function.

With regards to the rule against bias, some criticism directed towards the Assembly (and indeed the political organs generally within international institutions) is that delegates make decisions that accord with their national interest rather than based upon an objective and impartial application of the legal issues.[641] Critics point to the blind spots in country selection and the disproportionate attention on certain situations (such as that of Israel) to challenge the impartiality of the Assembly in making quasi-judicial determinations in the field of

[632] UNRP Supp no 2 (1955–59) vol I, art 2(7), 151, [85].
[633] Tomuschat, 'Human Rights' (n 36), 200-201.
[634] Similarly, the UNHRC's Universal Periodic Review addresses 'consistent patterns of gross and reliably attested violations' of human rights: UNHRC Res 5(1) (2007), annex, [87(f)], [103].
[635] UNGA Res 34/175, [3].
[636] UNGA Res 1627 (XVI) (1961).
[637] UNGA Res 1567 (XV) (1960), [1].
[638] Tomuschat, 'Human Rights' (n 36), 201.
[639] As to these norms, see eg Christopher Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010).
[640] Although there are detailed rules on the procedure for Assembly business, including voting procedure and a right of reply. See UNGA Rules of Procedure (n 599).
[641] Schachter, 'Quasi-Judicial Role' (n 31), 962; UNGA, Fifty-seventh session, 77th plenary meeting (18 December 2002) UN Doc A/57/PV.77, 33 (Sudan).

international justice.[642] Within selected situations, too, the Assembly has been criticised for myopic attention on the conduct of just one side of a conflict, despite there being evidence of crimes being committed by parties that were perhaps on friendlier terms with a majority of the UN membership.[643] Still, this criticism should not be overstated; there are many instances in which the Assembly avoids attributing blame in its quasi-judicial resolutions, or explicitly calls for accountability of perpetrators to both sides of the conflict.[644] Even so, a 'quasi-judicial' function necessarily recognizes some margin for decision-making based upon discretionary rather than purely judicial considerations.[645] Selectivity is often countered on the basis that all Member States have at least had the opportunity to participate in the vote, with there being a 'practice' of prior consultation, thereby legitimating the fairness of the procedure leading to the adopted resolution.[646] Furthermore, it does not follow that merely because there are inconsistencies in selection of a situation for scrutiny that the Assembly has acted with a political bias. A country might not be selected for a myriad of reasons, including, for example, to avoid prejudicing peaceful reconciliation.[647] Even a resolution criticised as 'unbalanced' in its condemnation of certain parties to a conflict might nonetheless advance the goals of international justice, such as the interests of victims to know the truth.[648]

The compatibility of Assembly quasi-judicial resolutions with *audi alteram partem* has also been raised by Member States. However, it is practice within the Assembly to provide the impugned Member State with the opportunity to explain their position; the explanations of vote also provide a public means for Member States to associate or disassociate from the proposed resolution. Rather, the criticism is often framed as the Assembly condemning a Member State 'a priori'; such a decision, rather, should only take place 'following an objective and credible investigation to confirm the veracity of events'.[649] This criticism does have some traction, especially given that the Assembly has underlined in its Fact Finding Declaration that competent UN organs 'should endeavour' to have 'full knowledge' of all relevant facts in

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[642] See eg UNGA, Seventy-first session, 66th plenary meeting (21 December 2016) UN Doc A/71/PV.66, 25 (Ecuador). See e.g. alleged bias against Latin America in Assembly resolutions: UNGA, Thirty-seventh session, 110th plenary meeting (17 December 1982), UN Doc A/37/PV.110, 1880 (El Salvador).

[643] See eg UNGA, Seventeenth session, 1183rd plenary meeting (5 December 1962) UN Doc A/PV.1183, 966-967 (Portugal) (noting that the Union of the Populations of Angola was responsible for the massacre of '8,000 Angolans' and lamenting that this is an aspect 'which is not considered in any' UN documents). In relation to the Libya situation of 2011, Assembly resolutions were focused on accountability for pro-Gaddafi forces, despite credible evidence being produced in a report of a UNHRC-established commission of inquiry to show that crimes were in fact committed by all sides to the conflict. Compare UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (31 May 2011) A/HRC/17/44, [252] and UNGA Res 66/11 (2011). Finally, this friend-enemy distinction has been raised in Assembly meetings: UNGA, Sixty-fourth session, 72nd plenary meeting (26 February 2010) UN Doc A/64/PV.72, 3 (Israel).

[644] The Assembly has been praised where it has avoided assigning blame: UNGA, Sixty-eight session, 90th plenary meeting (5 June 2014) UN Doc A/68/PV.90, 7 (Honduras); UNGA 66th plenary meeting (n 642), 35 (Belize); UNGA, Sixty-ninth session, 92nd plenary meeting (3 June 2015) UN Doc A/69/PV.92, 7 (Georgia); Zeray Yihdego, 'The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding' (2012) 13 Melbourne J Intl L 1, 20.

[645] Mark Stein, 'The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression' (2005) 16(1) Ind Intl & Comp LR 1, 9. However, the quasi-judicial activities of a commission of inquiry would entail a greater expectation of impartiality and non-selective evidence gathering on the ground: UNGA 66th plenary meeting (n 642), 31 (Brazil).

[646] See eg UNGA 66th plenary meeting (n 642), 20 (Liechtenstein), 33 (Egypt); UNGA, Seventy-seventh session, 80th plenary meeting (15 May 2013) UN Doc A/67/PV.80, 8 (Russia) (on the nature of this consultation practice), 13 (Bolivia); UNGA, Fifty-second session, 71st plenary meeting (15 December 1997) UN Doc A/52/PV.71, 3 (Slovenia). See also UNGA Rules of Procedure (n 599), rule 78.

[647] UNGA 90th plenary meeting (n 644), 8 (Brazil); UNGA 66th plenary meeting (n 642), 34 (Singapore).

[648] UNGA 80th plenary meeting (n 646), 7 (Saudi Arabia).

[649] UNGA, Sixty-fifth session, 76th plenary meeting (1 March 2011) UN Doc A/65/PV.76, 7 (Venezuela).

exercising their functions.[650] This supports an argument that the Assembly cannot purport to make findings in a country situation that are not supported by evidence; although apart from this 'endeavour', no procedural requirements are set out either in the UN Charter or the Fact Finding Declaration.[651] A related argument could be that Member States have a duty to act in good faith; conversely, supporting a resolution condemning the conduct of another Member knowing there to be no evidence to support this conclusion might be construed as acting in bad faith. A charge of bad faith alone would not render a resolution *ultra vires*, particularly given that it is an accepted UN principle that the properly adopted resolutions of the Assembly enjoy a presumption of validity.[652] However, the failure of a quasi-judicial resolution to have a reasonable evidentiary basis might affect its influence, both in terms of being recited in future sessions and in influencing action on this situation by other entities or Member States. The desirability that the Assembly has for its resolutions to carry weight in international life therefore provides a measure of supervision on the propriety of its determinations, as does the involvement of all Member States in the process leading to their adoption.

3. Quasi-Judicial Practice: Criminal Responsibility

There is a body of Assembly resolutions that have noted the occurrence of international crimes within a Member State. However, Assembly characterisations have not always been consistent, with some resolutions simply preferring to report upon events or express moral indignation, without reaching any conclusion based upon legal principles.[653] Other times the Assembly has used the terminology of 'crimes' without legal precision. For example, it has denounced 'as an international crime the policy of bantustanization' and described apartheid as 'a crime against the conscience and dignity of mankind', both which appear to be more akin to political or moral evaluations.[654] However, there has been an increasing trend towards the Assembly applying legal concepts with greater precision over time: the following analysis focuses on those occasions in which the Assembly has applied norms from international criminal law to a situation and arrived at an evidence-based conclusion.

There are some common elements of these resolutions. A major feature is that they do not tend to identify specific perpetrators, but rather note generally that crimes occurred, affirming the need for 'individual responsibility' of the perpetrators.[655] While some resolutions avoid identifying specific groups of perpetrators, others have attributed blame (or a greater share of it) to a particular group or party to a conflict, such as the 'SS organization', 'Khmer Rouge', 'Serbian forces', 'Syrian authorities' or 'South African regime'.[656] Other quasi-judicial resolutions focus their finding on a particular event, geographical area, or time frame,

[650] UNGA Res 46/59 (1991), [1] (titled 'Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security' (Fact-Finding Declaration)).
[651] For a similar argument, see Christopher Ford, 'Judicial Discretion in International Jurisprudence' (1994) 5 Duke J Comp & Intl L 35, 81-82.
[652] *Certain Expenses* (n 108), 168; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47, 58.
[653] See eg UNGA Res 55/243 (2001) (Afghanistan); UNGA Res 2714 (XXV) (1970) (Portugal); UNGA Res 1598 (XV) (1961), [2] (South Africa); UNGA Res 1127 (XI) (1956) (Hungary); UNGA Res 385 (1950), [3] (Bulgaria, Hungary and Romania).
[654] UNGA Res 36/172 A (1981), preamble; UNGA Res 33/183 A (1979), preamble.
[655] UNGA Res 49/206 (1994), [4] (Rwanda); UNGA Res 49/10 (1994), [26] (Bosnia and Herzegovina).
[656] UNGA Res 71/203 (2016) ('Syrian authorities'); UNGA Res 64/147 (2009), [8] ('SS organization'); UNGA Res 53/145 (1998), [16] ('Khmer Rouge leaders'); UNGA Res 49/196 (1994) ('commanders of Serb paramilitary forces'); UNGA Res 2107 (XX) (1965), preamble ('Government of Portugal'); UNGA Res 804 (VIII) (1953), [2] ('any governments or authorities' in North Korea); UNGA Res 37/233 A (1982), [6] ('South African regime').

in which atrocities occurred.[657] Most such resolutions focus on the commission of crimes generally in a situation, although some also address singular incidents, such as the execution of named political prisoners.[658] Sometimes these findings are focused around one or more of the core international crimes (i.e. aggression, genocide, war crimes, or crimes against humanity). The purpose of the following sections is to explicate further these classifications, according to the four core international crimes.

3.1 Genocide

The crime of genocide has featured in Assembly debates and resolutions, although its record has been inconsistent and controversial.[659] Member States had levied allegations against other Members during earlier Assembly sessions – against the People's Republic of China (PRC) in 1959 and Iraq in 1963 respectively - without it resulting in any substantive discussion or consideration.[660] The implication of genocide – without using the phrase itself - can be seen in Resolution 1819 (XVII) (1962) on Angola, condemning the 'mass extermination of the indigenous population' by the Portuguese colonial authorities.[661] Portugal referred to this statement as a 'grossly unjust allegation', the 'product of a fertile imagination' and seduced by the 'cult of slogans'.[662] Brazil also opposed the resolution because the language used (including, 'suppression') 'suggests the idea of genocide' and it would be better that the 'door to a solution should not be closed'.[663] Here was an early indication, from the perspective of one of its Member States, of the possibility that the imperatives of 'peace' and 'justice' can come into conflict in the Assembly; here Brazil's preference, as they saw it, was to keep dialogue alive rather than foreclosing this possibility through the use of what they regarded to be polarising language with genocidal connotations. In actuality, there was no further discussion in the explanations of vote on the 'mass extermination' reference and the evidence that it was based upon. Rather, what dominated discussions was the competence of the Assembly to recommend

[657] See eg UNGA Res 54/179 (1999), [2] (violations in the 'eastern parts' of the DRC); UNGA Res 49/199 (1994), [11] ('massacre of approximately fifty villagers in Battambang Province in October 1994'); UNGA Res 40/161 E (1985), [1] (expelling the mayor of a town in the Israeli-occupied territories).
[658] UNGA Res 1312 (XIII) (1958), [5] (Hungary).
[659] Although its record has been criticised as inconsistent: Paola Gaeta, *The UN Genocide Convention: A Commentary* (OUP 2009), 538; Antonio Cassese, *Violence and the Modern Age* (Polity 1988), 76-77.
[660] On allegations that the PRC had committed genocide: UNGA, Fourteenth session, 833rd plenary meeting (21 October 1959) UN Doc A/PV.833, [8] (El Salvador), [28] (Netherlands); UNGA, Fourteenth session, 831st plenary meeting (20 October 1959) UN Doc A/PV.831, [13] (Malaya), [126] (Cuba); UNGA, Fourteenth session, 812th plenary meeting (20 September 1959) UN Doc A/PV.812, [127] (El Salvador). Similarly, Mongolia requested the Assembly to include on its agenda the alleged genocide of Kurds in Iraq: UNGA, 'Mongolia: Request for the Inclusion of an Item in the Provisional Agenda of the Eighteenth Session' (2 July 1963) UN Doc A/5429. Victims and political exiles have also submitted statements, such as Baltic persons in exile claiming that the USSR committed genocide in the Baltic States in the 1940s: Aleksander Kaelas, 'Human Rights and Genocide in the Baltic States: A Statement Submitted to the Delegations of the United Nations General Assembly' (Estonian Information Centre 1950), 52. Member States continue to bring to the Assembly allegations of historic genocide with a view to it denouncing past conduct. These have included the 1932-33 famine in Ukraine, described as a 'conscious and deliberate genocide undertaken by the Soviet regime', and the occupation of northern Cyprus by Turkey since 1974, described by Cyprus as 'ethnic cleansing' in the context of a debate marking the anniversary of the Genocide Convention: UNGA, Fifty-third session, 77th plenary meeting (2 December 1998) UN Doc A/53/PV.77, 3 (Cyprus), 8 (Ukraine); Schabas, 'Genocide in International Law' (n 149), 535.
[661] UNGA Res 1819 (XVII) (1962), preamble (Angola).
[662] UNGA, Seventeenth session, 1196th plenary meeting (18 December 1962), UN Doc A/PV.1196, [30]-[37] (Portugal). There are also more recent allegations that use the crime in a less than technical sense, as with Iraq, noting that the sanctions imposed against it constituted 'a premeditated form of genocide against the people of Iraq': UNGA, Fifty-second session, 34th plenary meeting (17 October 1997) UN Doc A/52/PV.34, 26.
[663] ibid [59] (Brazil) (use of the word 'suppression' in preambular paragraph 5 of UNGA Res 1819 (XVII) (1962), 'suggests the idea of genocide').

Member States and the Security Council to impose sanctions against Portugal.[664] Aside from a lack of dialogue on the 'mass extermination' reference, the evidentiary foundation was questionable given that no inquiry was established at that point to investigate these allegations. In reality, this reference served a political purpose of stigmatising and delegitimising continued Portuguese rule in Angola rather than as a means to secure accountability for genocide (or indeed other forms of international crimes).

The first direct reference to genocide in an Assembly resolution came in 1982, in response to the attack on Palestinian civilians in the Sabra and Shatila refugee camps situated in Beirut; Resolution 37/123 D (1982) described this as 'an act of genocide'.[665] The application of genocide here provoked controversy: this paragraph of the resolution was only adopted by 98 votes to 19, with 23 abstentions.[666] It differed from the characterisation given by the Security Council to the same event, which more cautiously condemned 'the criminal massacre of Palestinian civilians in Beirut'.[667] In explaining its vote, Canada regarded the crime of genocide to be inapplicable: 'the term "genocide" cannot, in our view, be applied to this particular inhuman act'.[668] Still, this statement implies a role for the Assembly in making genocidal findings, the contention rather being its applicability in this specific case. The US, by contrast, was more pointed in criticising this as 'a serious and reckless misuse of language to label this tragedy genocide as defined in the 1948 Convention.'[669] The difficulty here – shared with Resolution 1819 (XVII) (above) – was that the Assembly's determination was lacking evidentiary support by an independent investigative body. The Secretary-General prepared a report on the massacre but stopped short of characterising it as genocide.[670] Lacking evidentiary support on a contentious issue left the Assembly exposed to the criticism that it was using the crime of genocide as a political instrument to embarrass Israel rather than to genuinely support the instigation of mechanisms under the Genocide Convention and other legal regimes. Despite this criticism, Resolution 37/123 D (1982) has influenced international jurisprudence; in *Jelisić*, the ICTY Trial Chamber approved of the resolution, 'even if it is appropriate to look upon this evaluation with caution due to its undoubtedly being more of a political assessment than a legal one.'[671] Even so, the ICTY was able to distil from this resolution a broader point of normative importance: that genocide can be perpetrated in a limited geographical zone.[672] Despite the Assembly's factual assessment being called into question for its political overtones, the normative assumption that underpinned it was treated as persuasive authority in the interpretation of the crime of genocide.[673] A legal derivative can therefore sometimes be found from disputed resolutions.

Despite using the genocide label in the Angola and Beirut situations, it is noteworthy that there was a lack of any follow up or recitation of this characterisation in subsequent sessions. The 'mass extermination' reference in Resolution 1819 (XVII) was not repeated and nor was there much enthusiasm for the proposal of the US that an inquiry be dispatched to

[664] ibid 37. While UNGA Res 1819 (XVII) (1962) was adopted by 57 votes to 14, it also attracted 18 abstentions.
[665] UNGA Res 37/123 D (1982). For a critique, see Duxbury (n 73) 238.
[666] Whereas the other parts were was adopted by 123 votes to none, with 22 abstentions.
[667] UNSC Res 521 (1982), [1].
[668] UNGA 108th plenary meeting (n 606), [197].
[669] ibid [164]. See also ibid Finland [171], Singapore [121] and Sweden [178].
[670] UNSC, 'Secretary-General Report in Pursuance of Security Council Resolution 520' (18 September 1982) UN Doc S/15400.
[671] *Prosecutor v Jelisić* (Judgment) ICTY-95-10-T (14 December 1999), [83]. See also *Prosecutor v Krstić* (Judgment) ICTY-98-33-T (2 August 2001), [589].
[672] ibid.
[673] UNGA Res 37/123 D (1982) was also used to support the conclusion that Israel was responsible for genocide: *Kuala Lumpur War Crimes Commission v Israel* (Judgment) 4-CHG-2013 (20-25 November 2013).

Angola to verify the allegations.[674] Similar inconsistency can be seen in relation to apartheid South Africa. In 1985, the Assembly alluded to genocide in expressing its deep shock 'by the policy of extermination carried out by the racist regime towards the black civilian population of South Africa'.[675] In 1986, Resolution 41/103 was 'mindful' of the conviction of the Commission on Human Rights ('CHR') that the policy of apartheid in South Africa was 'a form of the crime of genocide'.[676] Although being 'mindful' suggests something that falls short of endorsing the CHR's position, the Assembly's motives for including this statement are open to question. Israel criticised the Assembly for using the crime of genocide 'out of context'.[677] Again, it appeared that the Assembly used this label to underscore the prohibition on apartheid rather than to determine that the crime of genocide occurred in South Africa.[678] In so describing apartheid as genocide, the label was used by the Assembly in a causal manner without any effort to substantiate this legal conclusion.

The growth in the UN commissions of inquiry have provided some opportunity for the Assembly to include evidence-based conclusions in its resolutions, and with it, greater objectivity in the use of the crime of genocide. The start of this trend can be seen in the 1990s, in response to allegations of genocide in the former Yugoslavia and Rwanda; resolutions in turn drew from the conclusions in commission of inquiry reports.[679] Even so, as an aside, the Assembly was hardly consistent; it also avoided a direct reference to genocide in a series of other resolutions in these situations.[680] Nonetheless, the ICJ would later draw upon some of these Assembly resolutions in relation to the crimes in the former Yugoslavia as part of its assessment as to whether genocide had occurred.[681] The ICJ attached particular 'significance' to ICTY findings, as is natural given that this judicial body tested all the evidence according to international standards of due process.[682] Nonetheless, the value of Assembly resolutions appeared to be that they were contemporaneous to the killings within the former Yugoslavia in question and corroborated the ICTY's later findings. It also reflects a wider point that the ICJ has limited capacity to engage in fact-finding and therefore must draw from the findings of external fact-finding bodies.[683] This demonstrates scope for the Assembly to support the fact-finding of the ICJ in future cases, both in terms of establishing commissions of inquiry and endorsing their conclusions (a point returned to below).

The Assembly has recognised that certain conduct might constitute genocide. Notably this included rape and also extrajudicial, summary and arbitrary executions.[684] More contentious was the Assembly's assertion that 'ethnic cleansing' was a form of genocide.[685] Support for the proposition that ethnic cleansing constituted genocide was given by the

[674] GA, 1196th plenary meeting (n 662), [64] (US), [82]-[83] (Portugal).
[675] UNGA Res 40/64 A (1985), preamble (South Africa).
[676] UNGA Res 41/103 (1986), preamble.
[677] UN, *United Nations Year Book* (1986), 750.
[678] The UK objected to this sentence on the basis that it might 'extend the definition of genocide': ibid.
[679] UNGA Res 54/188 (1998), [1], [2]; UNGA Res 49/206 (1994), preamble.
[680] See, for example, UNGA Res 50/193 (1995), [25] ('mass killings'); UNGA Res 50/190 (1995), preamble ('killing of ethnic Albanians'); UNGA Res 49/205 (1994), preamble (ethnic cleansing as genocide); UNGA Res 49/196 (1994), [6] ('killings'); UNGA Res 48/153 (1993), [5] ('ethnic cleansing'); UNGA Res 47/147 (1992), preamble (referencing the threat of 'virtual extermination' of the Muslim population). See also debate records, UNGA, Fifty-second session, 44th plenary meeting (4 November 1997) UN Doc A/52/PV.44.
[681] *Bosnia and Herzegovina v Serbia and Montenegro* (Merits) (n 500), 153-155 (citing UNGA Res 48/153 (1993), [5], [6]; UNGA Res 49/196 (1994), [6]).
[682] ibid 130.
[683] See generally James Devaney, *Fact-Finding before the International Court of Justice* (CUP 2016).
[684] UNGA Res 67/168 (2012), [16]; UNGA Res 65/208 (2010), preamble; UNGA Res 50/192 (1995), [3].
[685] Schabas, 'Genocide in International Law' (n 149), 199; Clotilde Pegorier, *Ethnic Cleansing: A Legal Qualification* (Routledge 2013).

Assembly in its 1992 determination over the crimes taking place in Bosnia and Herzegovina. Resolution 47/121 (1992) stated that the Assembly was:

> Gravely concerned about the deterioration of the situation in the Republic of Bosnia and Herzegovina owing to intensified aggressive acts by the Serbian and Montenegrin forces to acquire more territories by force, characterized by a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee population resulting from mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of 'ethnic cleansing', *which is a form of genocide*...[686]

Aside from contributing towards the political isolation of the regime from Serbia and Montenegro, Resolution 47/121 (1992) has received a mixed response in a legal context in the courtroom. Its significance here flowed not from the proposition that Serbia and Montenegro was responsible for ethnic cleansing but whether this practice legally constituted a form of genocide (again showing the potential contribution of quasi-judicial resolutions to the identification of customary international law). In 2000, the ICTY Trial Chamber in *Blagojević and Jokić* used this resolution to lend support to its conclusion that the term 'destroy' in the genocide definition can encompass the forcible transfer of a population.[687] This was based on the notion that the 'physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself'.[688] In 2001, the ICTY Trial Chamber in *Krstić*, notwithstanding Resolution 47/121, noted that customary international law limits the definition of genocide to those seeking the 'physical or biological destruction of all or part of the group', rather than 'attacking only the cultural or sociological characteristics of the group'.[689] The implication therefore was that the Assembly's characterisation of the practice of ethnic cleansing as genocide in Bosnia and Herzegovina was incorrect (at least insofar as this meant that ethnic cleansing from an area did not entail physical/biological destruction). The limited influence of Resolution 47/121 here might also be due to the resolution's failure to attract support of the 'large majority' requirement to establish customary international law discussed in Chapter 2. While the resolution was supported by 102 Members to 0 against, it attracted 57 abstentions with 20 not voting. Based on the analysis in Chapter 2, it could not be said to be representative of customary international law.

In 2007, the ICJ also weighed in on the implications of Resolution 47/121 (and related resolutions) in *Bosnia and Herzegovina v Serbia and Montenegro,* in relation to the claim that the latter bore state responsibility for genocide.[690] Discussing the term used in the Resolution ('ethnic cleansing'), the ICJ noted that '[n]either the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such

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[686] UNGA Res 47/121 (1992) (emphasis added). Still, the Assembly hardly maintained a consistent position with resolutions in even the same sessions failing to label ethnic cleansing as a form of genocide: UNGA Res 48/91 (1993); UNGA Res 47/80 (1992); UNGA Res 46/242 (1992), preamble. See also UNGA Res 60/1 (2005), annex (where the Assembly affirmed the responsibility to protect populations from '*genocide*, war crimes, *ethnic cleansing* and crimes against humanity' (emphasis added) thereby implying a difference between these categories. The Security Council has also not expressly equated ethnic cleansing with genocide: UNSC Res 827 (1993), preamble; UNSC Res 787 (1992), [2].

[687] *Blagojević* (n 153), [663], fn 2103, citing UNGA Res 47/121 (1992).

[688] ibid [666].

[689] *Krstić* (n 671), [580]. This view was confirmed on appeal: *Prosecutor v Krstić* (Appeal Judgment), ICTY-98-33-A (19 April 2004), [25]. See also *Kupreškić* (n 175), [751].

[690] *Bosnia and Herzegovina v Serbia and Montenegro* (Merits) (n 496), 122.

policy, can *as such* be designated as genocide'.[691] It arrived at this conclusion based upon an analysis of the text of the Genocide Convention and its drafting history, noting that a proposal to include 'measures intended to oblige members of a group to abandon their homes' was not accepted by the state Parties.[692] The ICJ then observed that ethnic cleansing can only be a form of genocide if it corresponds with one of the acts prohibited by the Genocide Convention; however, the term (ethnic cleansing) has no independent legal significance.[693] The Assembly's proposition in Resolution 47/121 was therefore read in line with the types of conduct specifically circumscribed in the Genocide Convention; it did not serve to expand the conventional definition of genocide to include the destruction of the social unit or culture by means of displacement.

Nonetheless, Resolution 47/121 has been considered to serve a purpose in ensuring that a national law was foreseeable to a charged person. On this basis, the ECtHR in *Jorgic* attached greater significance to Resolution 47/121 in support of its finding that it was not unreasonable for Germany, as a matter of its national law, to construe the criminal offence of genocide to include an intent to destroy a group as a social unit in the course of the 'ethnic cleansing' of an area.[694] The key point for the ECtHR was that such a domestic interpretation of genocide did not violate the principle of *nullum crimen sine lege* given that it was reasonably foreseeable to the applicant in the case that he risked being charged with and convicted of genocide for the acts he committed in 1992, having regard to the interpretation of the offence of genocide in Resolution 47/121.[695] In this regard, Resolution 47/121 (adopted in 1992, no less) was material to the ECtHR's conclusion, particularly given that this resolution pre-dated the more restrictive interpretation of genocide in judgments of the ICJ and ICTY (as above) that were handed down *after* the applicant in *Jorgic* was alleged to have committed the acts of genocide for which he was charged.[696]

The Assembly's recognition as to possible genocide against the Rohingya in Myanmar has also supported the ICJ's factual determinations. In Resolution 73/264 (2018) the Assembly expressed 'grave concern' at the COI's finding that there 'is sufficient information to warrant investigation and prosecution so that a competent court may determine liability for genocide in relation to the situation'.[697] Furthermore, the Assembly also recognised other facts that would support a genocide determination, including the Rohingya constituting a minority group who have been subjected to historic abuse.[698] It is noteworthy that the ICJ in January 2020 drew extensively from Assembly resolutions to order provisional measures obliging Myanmar to observe its obligations under the Genocide Convention.[699] To make this order, amongst other things, it was necessary to establish that the claimant's arguments were 'plausible' and that 'irreparable prejudice' would ensue without provisional measures.[700] The references in Resolution 73/264 (2018) to the possible occurrence of genocide; systematic and gross human rights abuses; and 'exodus of more than 723,000 Rohingya Muslims' were used in particular by the ICJ to show that the claimant's arguments were plausible.[701] The importance of the genocide proscription, reflected in Resolution 96(I), was also used to show the irreparable

[691] ibid.
[692] ibid.
[693] ibid.
[694] *Jorgic v Germany* (App no 74613/01) (ECtHR, 12 July 2007), [107]-[108], [114].
[695] ibid [113].
[696] ibid [112].
[697] UNGA Res 73/264 (2018), [1].
[698] ibid preamble. See earlier resistance to Assembly characterisation of the Rohingya as a minority: UNGA, Sixty-seventh session, 62nd plenary meeting (21 December 2012) UN Doc A/67/PV.62, 4 (Saudi Arabia).
[699] *The Gambia v Myanmar* (Provisional Measures) (n 144).
[700] ibid [43], [64].
[701] ibid [54], [56].

prejudice in the event that provisional measures were not ordered.[702] The Assembly's findings that many of the Rohingya minority were stateless, disenfranchised and unable to return to their homes, were used to substantiate the ICJ's conclusion that they 'remain extremely vulnerable'.[703] It is important to note, however, that the ICJ did not draw exclusively from resolutions to support the ordering provisional measures; it also cited the commission of inquiry reports that underpinned the findings in these resolutions.[704] Still, the ICJ could have just as easily cited the inquiry report and omitted any reference to Assembly resolutions. The resolutions might have been referenced for a practical reason, such as they offered a succinct compilation of findings generally on the Rohingya situation that included findings from the commission of inquiry reports. But it also seems likely that they were cited for an extra-legal reason; to add a layer of 'collective legitimacy' to the ICJ's order, in showing that their considered legal opinion would also command the support of the vast majority of Member States.[705]

Finally, there have been alleged incidents of genocide that have not received timely scrutiny in the Assembly, or never at all, either due to political reasons or because the imperative of peace has been prioritised. The forcible expulsion of people from their homes in Azerbaijan has never been referred to as ethnic cleansing by the Assembly (and by extension, a possible form of genocide according to Resolution 47/121 (1992) above); nor have the allegations pertaining to the Khojaly 'massacre' been seriously scrutinised.[706] This appears to reflect a preference to explore peace over justice solutions in relation to the Nagorno-Karabakh conflict, given that the conflict is tied to the broader Minsk peace process under EU auspices.[707] A prominent example of avoidance was the failure over many decades for the Assembly to recognise the possible occurrence of genocide in Cambodia during the Democratic Kampuchea period; to the contrary, it continued to recognise the credentials of this regime despite it being forced into exile.[708] It was only at the end of the Cambodian civil war when it would note the historical occurrence of genocide when offering to 'assist efforts' of the incumbent government to secure responsibility for these past crimes (a partnership that would later severely compromise the independence of the ECCC).[709] The Assembly can perhaps be forgiven for not jumping to conclusions earlier on complex factual questions such as the occurrence of genocide in Cambodia between 1975-1979. But it is open to criticism for its failure to muster the political will necessary to establish a commission of inquiry to investigate allegations at an earlier stage.[710] Even where credible allegations of genocide have been noted in reports of other UN organs, such as by the Secretary-General or a UNHRC-commission of inquiry, the Assembly

[702] ibid [71].
[703] ibid [72]-[73].
[704] For a full analysis, see Michael Ramsden 'Accountability for Crimes Against the Rohingya: Strategic Litigation in the International Court of Justice' (2021) Harvard Negotiation LR.
[705] On this theory, see Sloan, 'Changing World*'* (n 54*)*, 42; Claude (n 6).
[706] UNGA Res 62/243 (2008), [3]. On these allegations: Evheny Finkel, 'In Search of Lost Genocide: Historical Policy and International Politics in Post-1989 Eastern Europe' (2010) 1 Global Soc 51.
[707] UNGA Res 60/285 (2006); UNGA, Sixty-second session, 86th plenary meeting (14 March 2008) UN Doc A/62/PV.86, 5.
[708] UNGA, Thirty-fourth session, 2nd plenary meeting (21 September 1979) UN Doc A134/PV.2, 18; Suellen Ratliff, 'UN Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century' (1999) 87(5) Cal L Rev 1207.
[709] UNGA Res 52/135, 12 December 1997, A/RES/52/135 ('*Desiring* that the United Nations respond positively to assist efforts to investigate Cambodia's tragic history, including responsibility for past international crimes, such as acts of genocide and crimes against humanity'); Tom Hamilton and Ramsden, 'The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia' (2014) 14(1) Intl Crim L Rev 115.
[710] The timing of the creation of the ECCC has also come in for criticism, as recounted in Hamilton and Ramsden (n 709).

has not always endorsed their findings. For example, the UNHRC-established inquiry on Syria concluded that the Islamic State in Iraq and Syria (ISIS) had committed the crime of genocide against the Yazidis, a label the Assembly has not, as of yet, used.[711]

3.2 Crimes Against Humanity

Assembly resolutions that address the occurrence of crimes against humanity in a given situation also have a checkered history, due at least in part to the lack of precision in which this term has been employed. The term was first used in Resolution 95(I) (1946) to affirm the findings of the Nuremberg Tribunal (and the Charter) in application of this crime.[712] Despite these origins, the use of 'crimes against humanity' has been beset with inconsistency in the Assembly, with Member States disagreeing as to the forms of conduct that would fall within this prohibition. Such tensions have also played out in the application of resolutions to country situations.

In 1961, the Assembly first noted that the use of nuclear weapons would constitute a crime against humanity, a position it would reiterate on several occasions, albeit far from unanimous in each vote.[713] This issue aroused considerable discussion over the years; some Members (Sweden and Finland) queried whether this finding was in conformity with the UN Charter, on the basis that the Assembly did not have the competence to furnish a legal interpretation of this nature.[714] As with the Assembly's earlier applications of the crime of genocide, a concern about the relaxed use of legal terms led to criticism, although to other Member States there was a clear rational basis: the German Democratic Republic and Hungary noted that making this finding was necessary for the integrity of international criminal law, as it was hard to imagine a circumstance in which the use of nuclear weapons against a civilian population would not be a crime against humanity.[715] Attempts to extend this characterisation to the use of other weapons, such as chemical and bacteriological weapons, met with less success.[716]

The Assembly made other determinations during the 1960s, often in the context of colonial rule. In 1965, it first noted that the 'practice of apartheid as well as all forms of racial discrimination' constitute a crime against humanity.[717] This was held to be the case repeatedly with respect to apartheid in South Africa, but also for the colonial policies of racial segregation in Southern Rhodesia and South West Africa.[718] That the practice of apartheid amounts to a crime against humanity is now well accepted and also enumerated in the ICC Statute, but these early attempts to equate the two were controversial.[719] Some Member States did not regard this

[711] Compare UNHRC, '"They came to destroy": ISIS Crimes Against the Yazidis' (5 June 2016) UN Doc A/HRC/32/CRP.2, [202] and UNGA Res 71/203 (2016) (where genocide is not even mentioned).
[712] UNGA Res 95 (I) (1946).
[713] UNGA Res 73/74 (2018), Preamble (For: 124; Against: 50; Abstentions: 13); UNGA Res 72/59 (2017), Preamble (For: 123; Against: 50; Abstentions: 10); UNGA Res 36/92(I) (1981), [1] (For: 121; Against: 19; Abstentions: 6); UNGA Res 35/152 D (1980), [1] (For: 112; Against: 19; Abstentions: 14); UNGA Res 34/83 G (1979), Preamble (For: 112; Against: 16; Abstentions: 14); UNGA Res 33/71(B) (1978), [1] (For: 103; Against: 18; Abstentions: 18); UNGA Res1653(XVI) (1961), [1] (For: 55; Against: 20; Abstentions: 26).
[714] UN, *Yearbook of the United Nations* (1980), 43.
[715] UN, *Yearbook of the United Nations* (1981), 1213.
[716] UN, *Yearbook of the United Nations* (1967), 25 (attempts by Madagascar and Mali to have the Assembly declare that the use of chemical and bacteriological weapons constituted a crime against humanity). This was removed from the draft text and thus not reflected in the final version in UNGA Res 2342 B (XXII) (1967).
[717] UNGA Res 2202 (XXI) (1966), [1]; UNGA Res 2105 (XX) (1965), Preamble.
[718] UNGA Res 2074 (1965), [4] (South West Africa); UNGA Res 2022 (XX) (1965), [4] (Southern Rhodesia).
[719] ICC Statute, art 7(1)(j)

characterisation to have definitive legal implications.[720] Many Members of the European Community were also initially against the proposition, on the basis that it introduced irrelevant and controversial elements.[721] Even so, the repeated reference to apartheid in the Assembly as a crime against humanity gathered legal momentum and supported its maturation into a crime in customary international law.[722] That the Assembly adopted a 'number of resolutions' condemning apartheid as a crime against humanity was used in the Preamble of the Apartheid Convention to support the legal foundation of this crime. This crime was also included amongst those enumerated crimes against humanity in the ICC Statute.[723]

But not all attempts by the Assembly to apply crimes against humanity had (or would come to have) a clear legal implication, being used rather to stigmatise continued colonial rule. In 1966, Portugal's policy to settle foreign immigrants in the colonial territories under its control was condemned as a 'crime against humanity' because it violated 'the economic and political rights of the indigenous population'.[724] While crimes against humanity often do correlate with gross and systematic violations of human rights, discussion on the record focused on the socio-economic rather than legal effects of this immigration policy. Hungary, for example, focused on the poor labour conditions in Portuguese-administered territories, which 'served the economic interests of South Africa and Southern Rhodesia in obtaining cheap labour…and the interest of Portugal in maintaining its colonies'.[725] Portugal, in response, justified its immigration policy as promoting a multi-racial society in the colonial territories.[726] Absent from all of this was how the policy met the legal elements to constitute a crime against humanity.[727] The crime against humanity label, as with some use of genocide above, was therefore used more as a political tool to delegitimise a colonial regime rather than to secure accountability for noted atrocity crimes.

In the 1970s and 1980s the Assembly did not apply the concept of crimes against humanity to new situations, other than apartheid in South Africa. However, it did start to note that the use of mercenaries was a 'universal crime against humanity'.[728] There were country situations during this period where the Assembly could have arguably done more to consider the use of the crime against humanity label, despite having evidence from an independent fact finder in which to support this conclusion. The Iran-Iraq conflict in 1983 attracted a body of correspondence by these Member States to the UN in relation to alleged crimes occurring during the conflict and by both sides. Specifically, Iran criticised the UN for 'indifference' to the crimes against humanity committed by Iraq.[729] Indeed, a UN mission dispatched by the Secretary-General to the war zones noted that large civilian areas occupied by Iraq had been 'razed to the ground'.[730] While calling for a ceasefire, the Assembly did not determine that crimes against humanity occurred, although there was certainly a basis in the mission's report for them to note that there might have been.[731] The reluctance of the Assembly was to be

[720] See eg discussion on UNGA Res 40/28 (1985) in UN, *Yearbook of the United Nations* (1985), 841 (Japan understood 'crime against humanity' in the resolution to have no legal implications).
[721] Luxembourg (on behalf of 10 EC State-parties): ibid.
[722] Alvarez, 'International Organizations' (n 476), 430-432.
[723] ICC Statute (n 83), art 7(1)(j).
[724] UNGA Res 2184 (XXI) (1966), [3].
[725] UN, *Yearbook of the United Nations* (1966), 612-613.
[726] ibid.
[727] See further UN, *Yearbook of the United Nations* (1982), 543 (India, on behalf of nine sponsors: the 'infringement of the freedom of education [in the Occupied Palestinian Territories] was a heinous crime against humanity' although this language was not included in UNGA Res 37/88 F (1982)).
[728] UNGA Res 34/140 (1979), preamble.
[729] UN, *Yearbook of the United Nations* (1983), 236
[730] ibid 238.
[731] ibid 237-238; UNGA Res 37/3 (1982), [1] (only noting that the 'heavy loss in human lives' endangered peace and security).

contrasted to that of the Security Council, which did condemn violations of international humanitarian law in Iraq during this period (albeit not crimes against humanity).[732]

The conflicts of the 1990s, on the other hand, resurrected the use of crimes against humanity as a concept in Assembly resolutions. The Assembly noted that the systematic practice of enforced disappearances and rape respectively, can, in 'appropriate circumstances', amount to crimes against humanity.[733] As Chapter 2 has shown, the Assembly championed an international proscription of enforced disappearances; combined with its quasi-judicial resolutions condemning the same, these resolutions contributed towards the norm's maturation in customary international law and inclusion in the ICC Statute, even if this link is difficult to trace.[734] In 1993, the Assembly also showed signs of greater sophistication in the use of international criminal law, when it noted that those who 'perpetrate or authorize' crimes against humanity in the former Yugoslavia are to be held to account, in a possible reference to the doctrine of command responsibility which, practically speaking, will be an important mode of liability for crimes of a 'widespread or systematic' nature.[735] In 1994, the end of colonial struggles also led the Assembly to draw a line between prosecutions of those struggling for independence based on domestic crimes vis-à-vis crimes against humanity: the plenary '[d]emands the immediate and unconditional release of all persons who have not committed crimes against humanity' in the campaign for self-determination in colonial territories.[736] As was also apparent from the quasi-judicial practice on genocide above, the 1990s was also a period in which the Assembly placed greater reliance on the evidence-based conclusions of commission of inquiry reports, noting their findings with respect to the possible occurrence of crimes against humanity in the former Yugoslavia and Rwanda.[737]

The growth in the number of commissions of inquiry in the 2000s has also provided the Assembly with the opportunity to make determinations focused on the occurrence of crimes against humanity. Similarly, debates that precede the adoption of a quasi-judicial resolution, be it on crimes against humanity or other violations, have also been enriched by the findings of inquiry reports. This practice is, however, somewhat uneven.[738] The Goldstone Commission, established by the UNHRC to investigate the conduct of Israeli forces in Gaza, noted that some conduct may amount to crimes against humanity: by contrast, the Assembly did not use such language when calling for accountability, referring instead more generally to 'serious violations of international humanitarian law'.[739] Still, the inquiries established to investigate crimes in Syria and DPRK prompted the Assembly to make more specific and measured references to crimes against humanity.[740] This included in 2017 an acknowledgment that 'the body of testimony gathered and the information received provide *reasonable grounds to believe* that crimes against humanity have been committed…'.[741] Curiously, this mirrors the International Law Commission's Draft articles on Prevention and Punishment of Crimes Against Humanity, which would require a State to conduct an investigation 'whenever there is

[732] UNSC Res 540 (1983), [2].
[733] UNGA Res 47/133 (1992), preamble; UNGA Res 50/192 (1995), [3].
[734] Alvarez, 'International Organizations' (n 476), 430-432.
[735] UNGA Res 48/143 (1993), [5]. See also UNGA Res 49/10 (1994), [26]; UNGA Res 48/88 (1993), [23] (affirming individual responsibility for the perpetration of crimes against humanity).
[736] UNGA Res 49/151 (1994), [8].
[737] See eg reports relied on in UNGA Res 52/146 (1997); UNGA Res 50/192 (1995), [3]; UNGA Res 49/206 (1994), preamble.
[738] Member States also continued to have misconceptions on the definition of crimes against humanity: UNGA Third Committee, Fifty-fifth session, 55th meeting (29 November 2000) A/C.3/55/SR.55, [68] India (crimes against humanity can only be committed in times of war).
[739] UNGA Res 64/10 (2009), [4].
[740] UNGA Res 72/191 (2017), [32] (Syria); UNGA Res 68/182 (2013), [10] (Syria).
[741] UNGA Res 72/188 (2017), [9] (DPRK) (emphasis added).

reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction'.[742] The language of 'reasonable grounds to believe' also reflects the test applied at the early phases of investigations at the ICC.[743] Such harmonisation of language offers scope for closer dialogue between the Assembly and ICC (and other tribunals).[744]

Finally, as with the crime of genocide, the Assembly has also become a forum to consider historic occurrences of crimes against humanity. This has included an acknowledgement that such crimes occurred in Cambodia so as to support UN-Cambodia cooperation on a future tribunal.[745] However, the same point made about the Assembly's failure to address allegations of genocide earlier in relation to the Cambodia situation also apply to allegations of crimes against humanity perpetrated by the Democratic Kampuchea. More generally, the Assembly has also regarded it as necessary to reaffirm the occurrence of crimes against humanity as a means to counteract any attempts at historical revisionism by extremist groups, as with the Nazi atrocities during World War II.[746] Member States also use the Assembly as a forum to make historical accusations of crimes against humanity; Mauritius thus accused the UK of committing crimes against humanity for its 'forcible eviction of the inhabitants of the Chagos archipelago', an allegation that the UK regarded as a 'gross mischaracterization' and a serious allegation that was 'not to be used lightly'.[747] But it is also apparent that quasi-judicial determinations on crimes against humanity have not always been consistent; what the Assembly once regarded to amount to such a crime it might have later excised from subsequent resolutions, as recently with the use of nuclear weapons.[748]

3.3 War Crimes

The Assembly has made quasi-judicial determinations on many aspects of international humanitarian law. Indeed, a more specific role within the framework of the Geneva Conventions was once contemplated, so that the Assembly (or the Security Council) could trigger the application of certain provisions of this treaty. This was because, at the drafting conference in 1949, the proposed Common Article 3 of the Geneva Conventions posed difficulties for some delegations, particularly in determining whether an 'armed conflict not of an international character' had occurred.[749] One proposal, that was ultimately not taken, was that Common Article 3 would only be triggered in the event that the 'dispute' at issue was admitted to the agenda either of the Security Council or Assembly as being a threat to international peace, a breach of the peace, or an act of aggression.[750] Despite no formal role in the Geneva Conventions, the Assembly has frequently applied provisions from these

[742] 'Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries' in ILC, Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, article 8.
[743] See further: Michael Ramsden and Cecilia Chung, 'Reasonable Grounds to Believe: An Unreasonably Unclear Evidentiary Threshold in the ICC Statute' (2015) 13(3) JICJ 555.
[744] See also UNGA Seventy-fourth session, 50th plenary meeting (18 December 2019) UN Doc A/74/PV.50, 17-18 (US) (noting that any references in Assembly resolutions to crimes against humanity 'should be understood in the context of how those terms are defined in the Statute itself, including that crimes against humanity must include a widespread or systematic attack against a civilian population and/or must be committed pursuant to a State or organizational policy').
[745] UNGA Res 52/135 (1997), Preamble.
[746] UNGA Res 72/156 (2017), [15]; UNGA Res 60/143 (2005), [5].
[747] UNGA, Seventy-third session, 83rd meeting (22 May 2019) UN Doc A/73/PV.83, 8 (Mauritius), 10 (UK). No such characterisation was included in the resolution, however: UNGA Res 73/295 (2019).
[748] See criticisms: UNGA, Seventieth session, 67th plenary meeting (7 December 2015) A/70/PV.67, 8 (Iran).
[749] See 'Final Record' (n 584).
[750] ibid.

instruments as well as from the general corpus of international humanitarian law. This often begins with a pronouncement that a state of armed conflict - be it international or non-international – exists.[751] The Assembly has on many occasions declared the applicability of the Geneva Conventions to armed conflicts.[752] This has extended to placing 'demands' on occupying powers to abide by international law.[753] Sometimes Assembly findings have included specific application of laws to these armed conflict, including protection of the environment;[754] humane treatment of prisoners of war;[755] human rights and Common Article 3;[756] and the laws of military occupation.[757] It has included declarations that political prisoners be treated as prisoners of war in accordance with international law and the protections specified in the second Geneva Convention, condemning such violations of the same.[758] The Assembly has also declared torture to amount to a 'grave breach' of the Geneva Conventions and a 'serious violation' of international humanitarian law that 'must be prosecuted and punished' including through the ICC.[759] As will be developed here, there is a wealth of practice since the 1950s where the Assembly has declared that war crimes, or grave breaches of the Geneva Conventions, occurred during these conflicts.

In 1953, the Assembly, recalling the Geneva Conventions, thus expressed its concern in Resolution 804 at 'reports' that the North Korean and Chinese Communist forces had employed 'inhuman practices' against UN forces and civilian populations.[760] The debate into Resolution 804 was politically charged and focused on the reliability of the investigatory reports. The USSR and Polish representatives resisted the inclusion of this item on the agenda on the basis that the allegations were a 'slanderous falsification', aimed at fomenting 'war hysteria'.[761] According to the USSR, the 'Assembly could not become a tool of the foreign

[751] UNGA Res 51/112 (1997), [9] ('Calls upon parties to the hostilities to respect fully the applicable provisions of international humanitarian law, including article 3 common to the Geneva Conventions of 12 August 1949'); UNGA Res 39/120 (1984), [9] ('ensure the application of the relevant norms of international humanitarian law applicable in armed conflict'); UNGA Res 38/100 (1983), preamble (Guatemala); UNGA Res 37/185 (1982), [2] (El Salvador); UNGA Res 41/39 A (1986), [75] ('declares' that the 'liberation struggle' in Namibia was an international armed conflict); UNGA Res 38/100 (1983), Preamble (Guatemala); UNGA Res 37/185 (1982), [2] (El Salvador); UNGA Res 3103 (XXVIII) (1973), [3] ('the Armed Conflict involving the struggle of people against colonial and alien domination ….are to be regarded as international armed conflicts in the sense of 1949's Geneva Convention.'); UNGA Res 2395 (1968), [13] ('in view of the armed conflict prevailing in the territories…to ensure the application of the Geneva Convention.').

[752] UNGA Res 40/137 (1985), [8] (Afghanistan); UNGA Res 38/180 A (1983), [6] (Middle East); UNGA Res 2652 (XXV) (1970), [11] (Southern Rhodesia). See also the general pronouncements that international humanitarian law principles should be 'strictly observed': UNGA Res 37/123 A (1982), [6]; UNGA Res 2853 (XXVI) (1971), [1]; UNGA Res 2852 (XXVI) (1971), [1], [6]; UNGA Res 2677 (XXV) (1970), [1]; UNGA Res 2674 (XXV) (1970), [3].

[753] UNGA Res 74/88 (2019), [2] (Israel).

[754] UNGA Res 47/47 (1992).

[755] UNGA Res 47/141 (1992), [5] (Afghanistan); UNGA Res 46/136 (1991), [6] (Afghanistan); UNGA Res 2674 (XXV), [4] (southern Africa).

[756] UNGA Res 41/157 (1986), Preamble (El Salvador).

[757] The focus has been predominantly on the Occupied Palestinian Territories: UNGA Res 43/21 (1988), [5]; UNGA Res 40/161 B (1985), [4]; UNGA Res 40/161 C (1985), [5]; UNGA Res 39/95 A (1984), [4]; UNGA Res 39/95 B (1984), [5]; UNGA Res 38/79 A (1983), [4]; UNGA Res 38/79 B (1983), [5]; UNGA Res 38/79 H (1983), [1]; UNGA Res 37/88 A, (1982), [4]; UNGA Res 37/88 B, (1982), [5]; UNGA Res 36/147 A (1981), [5]; UNGA Res 36/147 B (1981), [5]; UNGA Res 35/122 A (1980), [4]; UNGA Res 35/122 B (1980), [5]; UNGA Res 34/90 A (1979), [4]; UNGA Res 34/90 C.
(1979), [5]; UNGA Res 33/113 A (1978), [4]; UNGA Res 32/91 A (1977), [4]. See also UNGA Res 45/170 (1990), [2] (Iraq's occupation of Kuwait).

[758] UNGA Res 41/35 A (1986), [6]–[9], [13] (South Africa); UNGA Res 34/93 H (1979), [1], [4] (South Africa); UNGA Res 2547 (XXIV) A, (1969), [2]-[3], [7] (southern Africa); UNGA Res 3103 (XXVIII) (1973), [4].

[759] UNGA Res 74/143 (2019), [4].

[760] UNGA Res 804 (VIII) (1953), [1].

[761] UN, *Yearbook of the United Nations* (1953), 148.

policy of the United States and of certain other countries'.[762] Yet, the American representative went into great detail during the debate on the alleged crimes, drawing upon multiple investigations, noting that the Assembly had before it a 'clear record' of the large scale violations of the Geneva Conventions.[763] The Assembly, the American representative considered, 'should speak dearly in defence of the civilized standards of conduct which had found expression in the Geneva Conventions'.[764] Pakistan, while seeing no reason to doubt the veracity of the investigatory reports, abstained on the basis that the 'other side' (i.e. the North Korean and Chinese Communist forces) were not heard nor invited to be heard: this constituted a 'disquieting tendency to secure *ex parte* hearings and to record *ex parte* verdicts'.[765] The Pakistani observations would show an unease in using a political forum to make factual determinations, not least of a character that could support charges of criminal responsibility for perpetrators at a later stage. However, this was not regarded to be a major issue for the majority of States. Rather, according to a group of supporting States, if the Assembly was to ignore these reports of atrocities it would be guilty of a 'callousness unworthy of the United Nations'.[766] Accordingly, 42 voted in favour of Resolution 804, to 5 against, with 10 abstentions.

After Resolution 804 (1953), the Assembly would remain active in expressing concern in response to violations of international humanitarian law. These resolutions reacted to violations as they arose, as in 1957 where the Assembly found that the USSR 'carried out mass deportation of Hungarian citizens' contrary to the Geneva Conventions.[767] Certain themes have emerged since then, notably from the late 1960s in the emphasis placed on condemning reprisals against civilian objects and populations, be that in international or non-international armed conflicts.[768] The 1990s also saw emphasis on ethnic and gender-based violence; the Assembly thus found that the 'systematic practice of rape has been used as a weapon of war' in the former Yugoslavia, with rape in this context constituting a war crime.[769] Reported attacks against medical and humanitarian personnel also attracted strong Assembly condemnation on many occasions, as had the use of child soldiers by parties to a conflict.[770] Another important theme has been attempts by the Assembly plenary to condemn certain means and methods of warfare as unlawful, or at least to raise sufficient alarm on humanitarian grounds to justify a future prohibition on their use.[771] In 1995, the Assembly turned its attention to cluster bombs, condemning their reported use by the Bosnian Serb and Croatian Serb forces.[772]

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[762] ibid 151.
[763] ibid 149.
[764] ibid 150.
[765] ibid 152.
[766] ibid 150.
[767] UNGA Res 1133 (XI) (1957), [4] (drawing on the Special Committee's report).
[768] UNGA Res 55/116 (2000), [2] (Sudan); UNGA Res 53/164 (1998), preamble (Kosovo); UNGA Res 51/112 (1996), preamble (Sudan); UNGA Res 50/193 (1995), [5], [13] (Yugoslavia); UNGA Res 48/152 (1993), [8] (Afghanistan).
[769] UNGA Res 51/115 (1996), [1], [3]; UNGA Res 50/193 (1995), [15]; UNGA Res 50/192 (1995), [1]-[3]; UNGA Res 49/205 (1994), [6]; UNGA Res 48/143 (1993), [1]-[3]; UNGA Res 50/193 (1995).
[770] UNGA Res 68/182, [5] (Syria); UNGA Res 67/233 (2013), [16] (Myanmar); UNGA Res 67/262 (2013), [16] (Syria); UNGA Res 64/238 (2009), [16] (Myanmar); UNGA Res 61/232 (2007), [1(e)] (Myanmar); UNGA Res 59/207 (2004), [5(e)] (DRC); UNGA Res 58/196, [2(g)] (DRC); UNGA Res 57/338 (2003), [1] (Iraq); UNGA Res 57/230 (2003), [1] (Sudan); UNGA Res 56/173 (2002), [2]; UNGA Res 56/100 (2002), [3] (DRC); UNGA Res 55/116 (2000), [1(m)] (Sudan); UNGA Res 53/164 (1999), [11] (Kosovo), UNGA Res 53/165 (1998), [10] (Afghanistan); UNGA Res 53/160 (1998), [3] (DRC); UNGA Res 52/145 (1997), [12] (Afghanistan).
[771] See eg UNGA Res 31/64 (1976), [2] (calling for prohibition of conventional weapons that are 'excessively injurious'); UNGA Res 3255 A (XXIX) (1974), preamble (mindful that much civilian suffering to civilians could be avoided with accord on a prohibition of specific conventional weapons); UNGA Res 3076 (XXVIII) (1973), Preamble (calling urgently for a prohibition on weapons causing 'unnecessary suffering' including napalm).
[772] UNGA Res 50/193 (1995), [5].

As with other international crimes, the Assembly has not always been consistent or precise in its use of terminology, nor in explicitly drawing a connection between specific conduct and the occurrence of war crimes. The Assembly noted the military bombardment by El Salvadorian forces in civilian areas did not fulfill 'military objectives', without drawing a conclusion that such conduct constituted a war crime.[773] The Assembly condemned (without labelling them as crimes) the occurrence 'within the framework of the conflict in southern Sudan' of enforced or involuntary disappearance, the use child soldiers, forced conscription, forced displacement, arbitrary detention, torture and ill-treatment of civilians.[774] Similarly, in an emergency session, the Assembly 'deplore[d] the use of any excessive, disproportionate and indiscriminate force by the Israeli forces against Palestinian civilians': the explicit link to war crimes was not made but the implication of this finding seems clear.[775] On other occasions, the Assembly prefers to use the language of 'grave' or 'serious' violations of international humanitarian law, or 'grave breaches', rather than to declare explicitly that war crimes occurred.[776] By contrast, and perhaps depending on the situation and country under focus, more precise language within the framework of international humanitarian law is used. Thus, in the case of alleged violations by Israel, the Assembly has drawn a connection between the conduct and the occurrence of crimes: it once 'declare[d]' that 'Israel's grave breaches of the Geneva Convention are war crimes and an affront to humanity'.[777]

It is, as with other forms of quasi-judicial determinations, not always easy to appreciate the effect of Assembly resolutions in other legal regimes, but within the UN system itself they have been used considerably. For example, commission of inquiry reports have drawn from multiple Assembly resolutions determining the applicability of the laws of armed conflict to the Occupied Palestinian Territories, thereby underpinning findings on the occurrence of war crimes in these territories.[778] Outside of the UN, it is also apparent that the Assembly's war crime resolutions have been used in the ICC to support the opening of an investigation. Palestine thus relied upon a large number of Assembly resolutions adopted on alleged Israeli crimes over a 50-year period to support its claim that the Prosecutor had a 'reasonable basis to proceed with an investigation'.[779] The ICRC has also drawn extensively upon the Assembly's quasi-judicial practice in support of the formation of a set of customary norms of international humanitarian law.[780]

3.4 Aggression

Where the Assembly has found aggression to have occurred, such determinations have arisen in the context of identifying the consequences under the UN Charter or other sources of State obligations, rather than as a form of individual criminal responsibility. In an early example, the

[773] UNGA Res 38/101 (1983), [8]. See also eg UNGA Res 2918 (XXVII) (1972), preamble (condemned Portuguese forces for continuation of 'indiscriminate bombing of civilians, the wholesale destruction of villages and property and the ruthless use of napalm and chemical substances in Angola, Guinea (Bissau) and Cape Verde and Mozambique…').
[774] UNGA Res 55/116 (2000), [2].
[775] UNGA Res ES-10/20 (2018), [2].
[776] See eg UNGA Res 55/116 (2000), [2(ii)] (Sudan); UNGA Res 53/164 (1999), [8] (Kosovo); UNGA Res 50/193 (1995), preamble (Srebrenica); UNGA Res 49/198 (1994), [6] (Sudan); UNGA Res 40/161 D (1985), preamble, [5] (Occupied Palestinian Territories).
[777] UNGA Res 36/147 C (1981), [6]. See also UNGA Res 53/160 (1999), [12], [13] (DRC).
[778] UNHRC, Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements' (7 February 2013) UN Doc A/HRC/22/63, [14].
[779] ICC, 'Referral by the State of Palestine Pursuant to Articlesl3(a) and 14 of the Rome Statute' (15 May 2018) ICC-01/18-1-AnxI 24-05-2018 4/21 NM PT, fn 23.
[780] See generally Henckaerts and Doswald-Beck (n 528).

Assembly 'condemned' the Israeli attack on Iraqi nuclear installations as a 'premediated and unprecedented act of aggression in violation of the Charter of the United Nations and the norms of international conduct…'.[781] The Assembly also 'declare[d]' that Israel's decision to impose its laws on the occupied Syrian Golan Heights constituted an act of aggression in breach of Article 39 of the UN Charter.[782] Similarly, South Africa's conduct within other African states was noted to amount to a 'threat' or 'manifest breach of international peace and security', in an obvious reference to the collective security framework in the UN Charter.[783] However, the Assembly's focus on aggression under the framework of State responsibility does not make its determinations irrelevant to the enquiry here in terms of individual responsibility under international criminal law: both individual and State responsibility concepts of aggression rely on the same underlying wrongful conduct.[784]

The Assembly's efforts to develop a general definition of aggression were largely unsuccessful until the 1970s; but even before then it applied the concept to inter-state uses of force. Most prominently, with the passage of the Uniting for Peace resolution in 1950, the stage was set for the Assembly to pronounce upon the occurrence of acts of aggression, particularly in the case of Security Council deadlock. The text of Uniting for Peace noted it to be one of the Assembly's responsibilities under this mechanism to 'ascertain the facts and expose aggressors'.[785] Yet, the record of the Assembly using this mechanism to 'expose' aggressors was inconsistent. It did so in relation to the Korean conflict, finding that China had engaged in aggression in intervening in Korea 'by giving direct aid and assistance to those who were already committing aggression' and in 'engaging in hostile acts against United Nations forces'.[786] But it failed to do so in relation to other emergency sessions it called where the basis in which force was used was at least questionable, such as in Egypt (1956),[787] Hungary (1956),[788] or Afghanistan (1980).[789]

Still, the Assembly has amassed a body of practice in declaring that aggression occurred, particularly during the 1960s until the early 1990s. The Assembly has condemned the paradigmatic example of aggression: invasion.[790] This was so in relation to the methods used by Portugal and Israel, as colonial and occupying powers respectively, to quell rebellions.[791] It found on multiple occasions that South Africa's occupation of Namibia, and separately its territorial incursion into several other African States, constituted acts of aggression.[792] The Assembly also warned South Africa against annexing territory on this basis.[793] The Assembly also occasionally adjudged aggressors to be acting in contravention of its Definition of Aggression (Resolution 3314 (XXIX) (1974), annex).[794] This also included broad

[781] UNGA Res 36/27 (1981), [1]; UNGA Res 37/18 (1982), [5].
[782] UNGA Res ES-9/1 (1982), [2].
[783] UNGA Res 43/26 A (1988), [42]; UNGA Res 36/13 (1981), preamble.
[784] Indeed, art 3 of the Assembly's Definition of Aggression, which provides a definition within the framework of the UN Charter, has now been incorporated into ICC Statute (n 83), art 8*bis*.
[785] UNGA Res 377 (V) A (1950), preamble.
[786] UNGA Res 498 (V) (1951) (reiterated in UNGA Res 500(V) (1951); UNGA Res 712 (VII) (1953); UNGA Res 2132 (XX) (1965)).
[787] See UNGA Res 997 (ES-I) (1956), preamble (British and French armed forced were 'conducting military operations against Egyptian territory').
[788] UNGA Res 1004 (ES-II) (1956), [1] (Assembly called upon the USSR to 'desist forthwith from all armed attack on the people of Hungary', although did not directly reference aggression).
[789] UNGA Res ES-6/2 (1980), [2] ('Strongly deplores the recent armed intervention in Afghanistan').
[790] UNGA Res 37/3 (1982), preamble (Iran-Iraq conflict).
[791] UNGA Res 37/123 A (1982), [2] (Israel); UNGA Res 2795 (XXVI) (1971), preamble (Portugal) ('aggressive acts'); UNGA Res 3061 (XXVIII) (1973) (Portugal) ('repeated acts of aggression').
[792] UNGA Res 2508 (XXIV) (1969), [4]; UNGA Res 1899 (XVIII) (1963), [4]; UNGA Res S-9/2 (1978), [12].
[793] UNGA Res 1954 (XVIII) (1963), [4] (concerning independence of Bastuoland, Bechuanaland and Swaziland).
[794] UNGA Res 43/26 (1988), [4].

formulations, such as aggression occurring where there was encroachment 'upon their territorial integrity in *any way*' and 'military occupation, *however temporary*'.[795] The Assembly warned South Africa that any 'attempt' to annex territory as sufficient to establish aggression.[796] Recalling the Definition of Aggression, the Assembly has also implied that the sending of mercenaries into a territory to be used against movements of national liberation would constitute aggression.[797]

The UN Charter gives the Security Council a primary role in determining aggression, as does the Assembly's Definition of Aggression.[798] It might have been hoped that this would provide scope for dialogue between the Security Council and Assembly; the records do not reveal any obvious signs of this. Indeed, the Security Council has sometimes acted first in finding aggression to have occurred. Nine years after the Security Council first described South Africa's continued occupation of Namibia as 'an aggressive encroachment on the authority of the United Nations',[799] the Assembly in 1978 named the South African annexation of Walvis Bay as 'an act of aggression against the Namibian people', and indicated that 'South Africa's illegal occupation of Namibia constitutes a continued act of aggression'.[800] The Assembly would then condemn more generally 'the continuing acts of aggression committed by the apartheid regime against independent African states'.[801] Interestingly, by contrast, where the Assembly was first to determine that aggression occurred the Security Council did not follow suit.[802] This reflects differences in view between the two political organs on a variety of situations, such as in relation to Israel's occupation of the Syrian Golan Heights (1981) and on the nature of outside intervention in the various countries in Central America (1983).[803] Similarly, the Assembly deplored the acts of aggression by the Serbian forces against the territory of Bosnia and Herzegovina in 1992.[804] By contrast, the Security Council did not address aggressive acts in the Balkans nor establish the ICTY on the basis that it was to prosecute aggression.[805]

Despite the Assembly's considerable efforts over three decades to agree a definition, which eventually culminated in the Definition of Aggression, the plenary body has not consistently applied this definition and indeed has moved away from making aggression determinations. As already noted, the Assembly applied the Definition of Aggression to two situations in the 1980s, both pertaining to the Israeli and South African occupations.[806] In contrast to the Israel resolutions, the South Africa ones did not specify which provision of the Definition was being infringed. Although this was indirectly referring to Article 3(a) of the

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[795] UNGA Res 1817 (XVII) (1962), [6]; UNGA Res 3414 (XXX) (1975), preamble.
[796] UNGA Res 1899 (XVIII) (1963), [4].
[797] UNGA Res 31/34 (1976), preamble.
[798] UN Charter art 24(1); UNGA Res 3314 (XXIX) (1974), [4].
[799] UNSC Res 269 (1969), [3].
[800] UNGA Res S-9/2 (1978), [10]-[12]. The Assembly would later condemn the Security Council for failing to forestall aggression in Southern Africa: UNGA Res 36/121 A (1981), preamble.
[801] UNGA Res 36/172 C (1981), preamble.
[802] See further Page Wilson, *Aggression, Crime and International Security: Moral, Political and Legal Dimensions of International Relations* (Routledge 2009), 104.
[803] On Israeli occupation of the Syrian Golan Heights, compare UNGA Res ES-9/1 (1982), [2] ('constitutes an act of aggression') with UNSC Res 497 (1981), [1] (occupation was 'null and void'). In relation to Central America, compare UNGA Res 38/10 (1983) with UNSC Res 530 (1983).
[804] UNGA Res 49/10 (1994), Preamble; UNGA Res 47/121 (1992), Preamble and [2]; UNGA Res 48/88 (1993), Preamble; UNGA Res 46/242 (1992), Preamble, [1].
[805] See eg UNSC Res 859 (1993), preamble (Bosnia and Herzegovina has 'continued to be subject to armed hostilities', contravening Security Council resolutions); UNSC Res 787 (1992), preamble (which notes more generally the concern at the 'threats to the territorial integrity' of Bosnia and Herzegovina, without explicitly mentioning aggression).
[806] UNGA Res ES-9/1 (1982) (Israel); UNGA Res 37/233 A (1982), preamble, [7]; UNGA Res S-9/2 (1978) (South Africa).

Definition, the broader point here is the absence of a consistent approach in both citing and applying aggression norms, even more so given the Assembly's role in spearheading the promulgation of a definition over several decades. Be that as it may, the Assembly has now moved away from making any determinations that aggression occurred. Having previously done so in relation to the Israeli occupations, by 1992 it merely described such conduct as 'illegal' or even merely as a 'stumbling block' to regional peace.[807] Instead, relatively weaker language (e.g. 'outside intervention') tends now to be employed to address acts that could reasonably be seen as meeting the Definition of Aggression.[808] The lofty ambition of discharging the Assembly's function envisaged under Uniting for Peace in 'exposing aggressors' has therefore disappointed, but this is indicative of a broader trend in the UN collective security framework towards avoidance of the aggression label, also shared by the Security Council.[809]

There are likely a number of causes for this contemporary reticence to employ this label within the UN that cannot be explored fully here. As the above practice shows, the aggression label was used in the colonial context a good deal; it might have been that, as with genocide and crimes against humanity, the aggression label was used as a political instrument in delegitimising colonial authorities. It outlived its usefulness once self-determination of peoples was largely achieved. Be that as it may, the inclusion of the Assembly's Definition of Aggression in the ICC Statute opens the door for closer plenary engagement of the aggression question in future country situations, as a means to exert pressure on the Security Council to prompt an investigation at the ICC on such conduct.

4. Quasi-Judicial Practice: State Responsibility

4.1 Gross Human Rights Violations

Although there is a body of Assembly practice applying international criminal law or international humanitarian law, this is overshadowed by the more numerous determinations made that human rights violations had occurred, or might have occurred, in a given situation. Despite human rights law being the dominant framework that is applied by the Assembly in country situations, it is interesting to note that the application of international criminal law was applied first. In its third ever resolution in 1946, the Assembly applied norms from the nascent field of international criminal law so as to call for the extradition of those responsible for committing war crimes in World War II.[810] By contrast, it was not until much later when human rights determinations gathered momentum and became the dominant normative framework in which to assess the mistreatment of individuals; more so than international criminal law. This comparatively slow start for human rights might be explained by the early uncertainty as to their legal nature and, in particular, a lack of clarity on whether the human rights clauses of the UN Charter entailed any legal obligations.[811]

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[807] See eg UNGA Res 73/100 (2018), [1]; UNGA Res 73/98 (2018), [1]; UNGA Res 63/30 (2008), [1]; UNGA Res 63/97 (2008), [1]; UNGA Res 62/181 (2007), [3]; UNGA Res 62/84 (2007), [1]; UNGA Res 62/108 (2007), [1]; UNGA Res 61/26 (2007), [1]; UNGA Res 60/41 (2005), [1]; UNGA Res 59/32 (2004), [1]; UNGA Res 59/132 (2004), [1]; UNGA Res 58/99 (2003), [1]; UNGA Res 58/98, UNGA Res 53/55 (1999), [1]; UNGA Res 50/29 C (1996), [2]; UNGA Res 48/132 (1993), [2]; UNGA Res 51/133 (1997), [3]; UNGA Res 49/87 (1993), [1]; UNGA Res 48/59 (1993), [2]; UNGA Res 47/63 (1992), [2].

[808] See eg UNGA Res 55/174 (2001); UNGA Res 53/203A-B (1999); UNGA Res 50/159 (1995); UNGA Res 46/242 (1992); UNGA Res 43/20 (1988).

[809] See Wilson (n 802).

[810] See eg UNGA Res 3(I) (1946).

[811] Manley Hudson, 'Integrity of International Instruments' (1948) 42 AJIL 105.

This is not to say that there was no country-specific human rights practice in the early years of plenary activity, but this tended to be quite sporadic. An early example came in 1946, concerned with the treatment of persons of Indian origin in South Africa.[812] The Assembly referenced human rights albeit in moderate terms (there was no attribution of blame, for example) and merely requested the two governments concerned (India and South Africa) to report to a future Assembly session.[813] During these early stages, several powerful States were sympathetic to South Africa's contention that the Assembly lacked competence in addressing human rights (however, as already noted above, the construction of Article 2(7) is now settled).[814] Similarly, in 1949 the Assembly expressed 'its deep concern' at the grave accusations made against the governments of Bulgaria and Hungary regarding the suppression of human rights in those two countries.[815] However, the failure of these governments to address these concerns was framed in a later resolution as them being 'callously indifferent to the sentiments of the world community' rather than being in violation of any hard legal obligation.[816] In 1952, the Assembly also concerned itself with apartheid in South Africa, recalling one of the purposes of the UN to promote human rights but also specifying a duty to bring an end to apartheid in the 'high interests of humanity'.[817] The 1950s finished with the Assembly scrutinising Chinese practices in Tibet, with it expressing grave concern at reports 'to the effect that the fundamental human rights and freedoms of the people of Tibet have been forcibly denied them'.[818] Still, the focus on human rights records remained firmly on apartheid in South Africa and Israel into the 1960s. The Assembly thus noted that apartheid was contrary to the 'provisions of the Charter of the United Nations and [the UDHR]'.[819] This would also include an acknowledgment in the 1968 Proclamation of Tehran that apartheid constituted a gross denial of human rights *in addition* to being a crime against humanity, showing plenary recognition that such conduct engages with different regimes of responsibility, including international criminal law and international human rights law.[820] Even so, these first steps did not form a coherent system to define Assembly scrutiny of human rights situations, or a rational basis in which to decide to do so, beyond that of the 'usual suspects' – at this point South Africa and Israel.[821]

The 1970s, on the other hand, saw the seeds of a sustainable practice begin to be sowed, where the Assembly would broaden consideration from apartheid and Israeli occupations to a range of human rights issues in country situations. The emergence of this practice coincided with two important milestones in the history of international human rights law – indeed, it might be conjectured that these events acted as an important catalyst for the development of human rights as a benchmark for state conduct in the Assembly. In 1971, the ICJ opined that South Africa had violated its obligations under the UN Charter to observe and respect 'human rights and fundamental freedoms for all without distinction as to race'.[822] From this point, it was apparent that the human rights references in the UN Charter were not merely a guideline for UN action, but were to entail binding legal obligations for Member States.[823] On this basis,

[812] UNGA Res 44 (I) (1946).
[813] ibid [3].
[814] UN, *Yearbook of the United Nations* (1954), 86–8.
[815] UNGA Res 272 (III) (1949), [1].
[816] UNGA Res 385(V) (1950), [3].
[817] UNGA Res 616 (VII) A (1952), preamble.
[818] UNGA Res 1353 (XIV) (1959), preamble.
[819] UNGA Res 1567 (XV) (1960), [1].
[820] Proclamation of Tehran, Final Act of the International Conference on Human Rights (13 May 1968) A/CONF 32/41 3.
[821] Tomuschat, 'Human Rights' (n 36), 187-188.
[822] *Namibia* (Advisory Opinion) (n 108), 57.
[823] See Chapter 2, n 414.

it might have emboldened Member States of the Assembly to use and promote human rights as a framework for country-specific determinations. Second, the emergence of international mechanisms to monitor human rights arguably provided some impetus to Member States, who regarded the plenary to be in no less a position to also monitor state conduct. Of course, legal comparisons cannot be made in this respect: the Human Rights Committee, for example, was expressly authorised by treaty to examine State reports, unlike the Assembly. But politically a comparison was most evident: the main international plenary body could not possibly appear in a lesser position to that of a panel comprising a small number of experts (i.e. the Human Rights Committee).[824] On this basis, it may have been thought by protagonists in the Assembly that the UN should not remain silent on human rights abuses occurring within Member States while in the meantime bodies such as the Human Rights Committee ask searching questions of the exact same membership.[825]

Since the 1970s and 1980s, therefore, country specific analysis increased, both with respect to the range of countries monitored as well as the scope of enquiry. In 1974, the Assembly broadened the ambit of its country specific analysis beyond that of South Africa and Israel, expressing its 'deepest concern' that constant flagrant violations of human rights continued to be reported in Chile and repudiated 'all forms of torture and other cruel, inhuman or degrading treatment or punishment'.[826] Over the coming years, these calls for Chile to take action would be reiterated and expanded upon.[827] By the 1980s, the human rights situations in Bolivia,[828] Guatemala,[829] El Salvador,[830] and Afghanistan[831] would be scrutinised. With sustained scrutiny on these country situations, Christian Tomuschat has noted that the new course was definitively consolidated to the extent that, today, the Assembly's examination of the situation of human rights in a given country has become a matter of routine.[832] The Assembly's development of a country specific human rights 'jurisdiction' has had two major implications.

Firstly, the Assembly would increasingly draw the link between the abuse of human rights and armed conflict, which is certainly relevant in defining the standards to which parties to a conflict are to be held in determining criminal responsibility. This arose both in noting the continued applicability of the 'minimum standard of protection of human rights' during conflict and the application of dual accountability regimes – international human rights law and international humanitarian law - in evaluating the conduct of parties to a conflict.[833] Indeed, this reflected more generally an Assembly imperative to ensure the applicability of human rights in armed conflict.[834] In 1985, then, the Assembly noted that the prolongation of the conflict in Afghanistan increased 'the seriousness of the gross and systematic violations of human rights already existing in the country'.[835] This link was consolidated in the 1990s; the Assembly thus condemned 'all violations of human rights and international humanitarian law committed by parties to the conflict' in the former Yugoslavia.[836] Similarly, it condemned in

[824] Tomuschat, 'Human Rights' (n 36), 195.
[825] ibid.
[826] UNGA Res 3219 (XXIX) (1974), [2].
[827] See eg UNGA Res 32/118 (1977), [5]; UNGA Res 31/124 (1976), [2]; UNGA Res 3448 (XXX) (1975), [2].
[828] UNGA Res 35/185 (1980).
[829] UNGA Res 37/184 (1982).
[830] UNGA Res 37/185 (1982).
[831] UNGA Res 40/137 (1985).
[832] Tomuschat, 'Human Rights' (n 36), 195.
[833] See eg UNGA Res 50/191 (1995) (Iraq); UNGA Res 37/185 (1982), [1], [2] (El Salvador).
[834] UNGA Res 2675 (XXV) (1970), [1]; UNGA Res 2444 (XXIII) (1968). See further Chapter 2.
[835] UNGA Res 40/137 (1985), [5].
[836] UNGA Res 49/10 (1994), [11].

the 'strongest terms all acts of genocide and violations of international humanitarian law and all violations and abuses of human rights that occurred during the conflict in Rwanda'.[837]

Secondly, Assembly determinations of human rights abuse are often predicated on their being 'gross and flagrant', 'massive', 'serious' 'systematic', or 'grave'.[838] These various formulas do suggest, at least on their face, an overlap with international criminal law and international humanitarian law, even if the link is not always explicated. The Assembly has, in more recent times, drawn a more explicit link, noting the occurrence of breaches of international human rights law in Syria, '*some of which* may constitute war crimes or crimes against humanity'.[839] Even if an commission of inquiry report underpinning Assembly quasi-judicial resolutions is focused methodologically on finding human rights violations, these findings may also be relevant to future prosecutorial authorities in determining whether to open an investigation on the basis that the gravity of the human rights violations would also engage with the 'most serious crimes of concern to the international community'.[840]

4.2 Violations of the UN Charter

There is also a body of practice in which the Assembly has found Member States to have acted inconsistently with the UN Charter. Chapter 3 has already outlined instances in which the Assembly has interpreted provisions in the UN Charter and declared forms of conduct to presumptively violate its principles and purposes, as well as substantive provisions. In addition to this, the Assembly has also found Member States to be in violation of the UN Charter, some of which is tied to the alleged commission of atrocities. The Assembly thus considered that the USSR's violent repression in Hungary constituted 'a violation of the Charter of the United Nations'.[841] Israel's 'premeditated and unprecedented act of aggression' against Iraqi nuclear installations was also considered to be in 'violation of the Charter of the United Nations'.[842] The Assembly has also noted that the outbreak of hostilities and egregious human rights abuses have constituted a threat to international peace and security.[843] The commission of international crimes has also been held by the Assembly to constitute such a threat, as with the crime against humanity of apartheid and acts of aggression.[844] The human rights clauses of the UN Charter, and 'principles and purposes' in Chapter I, have also been applied to find inconsistencies.[845]

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[837] UNGA Res 49/206 (1994), [2].

[838] See eg UNGA Res 64/238 (2009), [1] (Myanmar); UNGA Res 57/228 A (2002), preamble (Cambodia); UNGA Res 50/197 (1995), preamble (Sudan); UNGA Res 49/196 (1994), [2] (Yugoslavia); UNGA Res 49/10 (1994), [11]; UNGA Res 37/184 (1982), [1] (Guatemala); UNGA Res 34/179 (1979), [6] (Chile); UNGA Res 3219 (XXIX) (1974), Preamble (Chile); UNGA Res 1353 (XIV) (1959), preamble (Tibet).

[839] UNGA Res 72/191 (2017), [33] (emphasis added); UNGA Res 72/188 (2017), [11] (North Korea).

[840] Being the formulation in the ICC Statute (n 83), preamble.

[841] UNGA Res 1005 (ES-II) (1956), preamble.

[842] UNGA Res 36/27 (1981), [1].

[843] UNGA Res 62/243 (2008), preamble (Azerbaijan); UNGA Res 47/121 (1992) (Bosnia); UNGA Res 46/242 (1992) (Bosnia); UNGA Res 40/64 B (1985), preamble (South Africa); UNGA Res 34/22 (1979), preamble (Cambodia).

[844] UNGA Res 32/12 (1977), preamble. The Security Council also drew this link but not until years later: UNSC Res 808 (1993); UNSC Res 955 (1994); Roscini (n 3), 334-335.

[845] See eg UNGA Res 45/170 (1990), [1] (Iraq); UNGA Res 39/15 (1984), [2] (South Africa); UNGA Res 2786 (XXVI) (1971), preamble (Apartheid); UNGA Res 2545 (XXIV) (1969), preamble ('Nazism and its present-day manifestations…are incompatible with the purposes and principles of the Charter of the United Nations…'); UNGA Res 2517 (XXIV) (1969), [3] (South Africa); UNGA Res 1131 (XI) (1956), [2] (Hungary); UNGA Res 820 (IX) (1954), [4] (South Africa); UNGA Res 272 (III) (1949), preamble (Bulgaria and Hungary). See also Chapter 3.

The Assembly has sometimes used the UDHR to further explicate the obligations under the UN Charter: a violation of the former in turn has given rise to a violation of the latter.[846]

The Assembly has also shown a willingness to determine whether a Member State has observed the terms of a UN resolution, although not consistently. The Assembly has drawn upon and interpreted Security Council resolutions to find that a State has not observed its obligations under them or violated the terms of such resolutions; this has led to a finding that the Member State concerned has breached the UN Charter and, specifically, Article 25.[847] The Assembly has also noted when a Member State has failed to implement its own recommendations. Sometimes the legal effect of such a finding is unclear, whereas on other occasions a failure to observe the recommendation is linked to an underlying inconsistency with the UN Charter: the plenary noted its 'deep regret' that South Africa 'repeatedly ignored' or 'completely disregarded' Assembly recommendations to end apartheid, which it regarded to compromise the purposes and principles of the UN Charter.[848] However, as with other areas where the Assembly has applied norms, there has been a lack of consistency in approach. As with the application of other sources of international law to a country situation, the use of the UN Charter to frame violations ultimately represents the choice of the resolution's sponsors and supporters. Nonetheless, it is apparent that the Assembly's identification of a Charter violation has often been part of a strategy to produce action within the UN system or to support the possible exercise of powers that totally or partially deprive a member of its rights in the Organisation.[849]

There is also the possibility that the Assembly's Charter violation findings also support decisions taken to deprive states of some or all of their rights of UN membership. Under Article 6 of the UN Charter, the Assembly is vested with the power to decide whether to expel a Member State who has 'persistently violated' the Charter, upon the recommendation of the Security Council.[850] Article 6 has never been applied, despite efforts on the part of the Assembly to exert pressure on the Security Council to make a recommendation as required under this provision in relation to apartheid South Africa.[851] However, it does not mean that the Assembly has been unable to support its Charter violation findings with a sanction on the rights exercised by Members. In the resolution establishing the UNHRC, the Assembly reserved a power for itself to remove a Member of this body 'that commits gross and systematic violations of human rights'.[852] It has exercised this power once, removing Libya's membership owing to these violations.[853] Similarly, the Assembly has the power to approve or reject the

[846] UNGA Res 1663 (XVI) (1961), [6] (South Africa's racial policies 'are a flagrant violation of the Charter of the United Nations and the [UDHR].').

[847] See eg UNGA Res 71/203 (2017) (Syria); UNGA Res 67/25 (2012) (Israel); UNGA Res 49/87 B (1994), [2] (Israel); UNGA Res 43/26 A, [46] (South Africa); UNGA Res 31/154 B (1976), [1] (Zimbabwe).

[848] See eg UNGA Res 1663 (XVI) (1961), preamble (South Africa); UNGA Res 1662 (XVI) (1961), [2] (South Africa); UNGA Res 1593 (XV) (1961), preamble (South Africa); UNGA Res 1179 (XII) (1957), [2] (South Africa).

[849] UNGA Res 1819 (XVII) (1962), [8] (Portugal's continued non-implementation of Assembly and Security Council resolutions was 'inconsistent with its membership of the United Nations'; UNGA Res 37/123 A (1982), [12] (Israel's 'record and action' - which includes occupation and aggression - 'establishes conclusively that it is not a peace-loving Member State and that it has not carried out its obligations under the Charter of the United Nations').

[850] UN Charter art 6; Certain Expenses (n 108), 163; *Namibia* (Advisory Opinion) (n 108), 50.

[851] The Assembly has recommended the Security Council to consider acting under art 6 on South African apartheid: UNGA Res 1761 (XVII) (1962), [8]. See further Chapter 7.

[852] UNGA Res 60/251 (2006), [9] ('…the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights').

[853] UNGA Res 65/265 (2011) (removing Libya's UNHRC membership). Such membership was reinstated with regime change: UNGA Res 66/11 (2011). Aside from removal, periodic elections for membership of the UNHRC provides its own check on Member State conduct. In 2016, Russia failed to receive enough votes in the Assembly

credentials of delegates from a Member State seeking to participate in the Assembly's work. Ordinarily, this is a procedural formality, although where there are claims by more than one entity to represent a Member State, then the Assembly has previously resolved to consider these credentials 'in light of the Purposes and Principles of the Charter and the circumstances of each case'.[854] Yet, even without competing claims the Assembly has exceptionally assessed the credential of the proposed delegation in light of the extent to which they have been true to Charter principles. It adopted this approach to reject the South African government's credentials, an approach that stood between 1974-1994.[855] The explanations of vote, as well as the text and structure of the relevant resolutions, made it clear that the rejection of these credentials was due to the continuing policy of apartheid and its incompatibility with the UN Charter.[856]

The Assembly's approach to credentials in the South Africa situation was not free from controversy, although it does serve as a precedent for an Assembly response against serious Charter violations in the future. Some regarded it as circumventing the precondition set out in Article 6 (i.e. Security Council recommendation) before the Assembly decides to expel a member.[857] This was particularly so given that the Security Council had failed to adopt a resolution recommending the Assembly to take a decision on South Africa under Article 6.[858] However, there are differences between expelling a Member State from the UN generally and denying credentials to a delegation to participate in the work of the Assembly (even if the Assembly is the main forum for the State's participation in the UN system).[859] Another criticism has been that the Assembly, in rejecting credentials due to the abhorrence of apartheid, went beyond the practice that treated approval as a formality unless there are competing claims (in which case an 'effective control' test would apply).[860] Yet, the fact remains that this credentials decision was maintained for 20 years, even if a minority of Members objected to it;

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to be re-elected to membership of the UNHRC primarily because of the blame it shared as a vetoing permanent member for the international crimes in Syria: Andrew Buncombe, 'Russia voted off UN Human Rights Council amid mounting allegations of Syria war crimes' *The Independent* (London, 28 October 2016).

[854] UNGA Res 396 (1950). See also UNSC, 'Letter dated 8 March 1950 from the Secretary General to the President of the Security Council Transmitting a Memorandum on the Legal Aspects of the Problem of Representation in the United Nations (1950)' (9 March 1950) UN Doc S/1466, 22-23 (Assembly 'should consider whether a claimant exercises 'effective authority within the territory of the State and is habitually obeyed by the bulk of the population'); UNGA, 'Statement by the Legal Counsel submitted to the President of the General Assembly at its Request (1970)' (11 November 1970) UN Doc A/8160. As to examples of the Assembly considering competing claims, as with China (1950s-60s), the Congo (1960s), Yemen (1962) and Kampuchea (1970s-80s), Liberia (1990s) and Sierra Leone (1990s), see Higgins, 'Development of International Law' (n 393), 152-8; Erasmus (n 73); Jhabvala (n 73).

[855] UNGA Res 3207 (XXIX) (1974); UNGA Res 2636(A) (XXV) (1970); Konstantinos Magliveras, *Exclusion from Participation in International Organizations* (Kluwer 1997), 203-229.

[856] See in particular: UNGA Res 3207 (XXIX) (1974) (noting that the credentials were rejected and tying this to South Africa's continued 'flagrant violation' of the UN Charter); UNGA, Twenty-fifth session, 1905th plenary meeting (13 November 1970) UN Doc A/PV.1905; Jhabvala (n 73), 637 (surmising that the credentials were rejected not due to an absence of effective control but due to an 'abhorrence of apartheid').

[857] UNGA, 'Statement by the Legal Counsel' (n 854); Yehuda Blum, *Eroding the United Nations Charter* (Martinus Nijhoff 1993), 47.

[858] UNSC, 'Draft resolution on the expulsion of South Africa from the United Nations' (24 October 1974) UN Doc S/11543; summarised in UN, *Yearbook of the United Nations* (1974), 109–15.

[859] See eg UNGA, Twenty-ninth session, 2281st plenary meeting (12 November 1974) UN Doc A/PV.2281, 854 (President of the Assembly interpreted the rejection of the South African credentials as 'tantamount to saying in explicit terms that the General Assembly refuses to allow the South African delegation to participate in its work'); cf 'Practice of the General Assembly with Regard to the Examination of Credentials submitted by Member States' (1985) UN Juridical YB 128, 129 (Assembly credential decisions provide 'authoritative guidance to other United Nations organs').

[860] UNGA, 'Statement by the Legal Counsel' (n 854) (rejecting the credentials where there is no question of a rival claimant would be a decision 'not foreseen by the UN Charter'); Halberstam (n 73), 184.

it seems reasonable to assert this to be established practice under which the Assembly is able to evaluate the credentials of delegations based upon their records of compatibility with the UN Charter.[861] Although it has not rejected credentials decision on this basis since then (despite attempt to apply the same principle to Israel due to its alleged Charter violations), this would not deprive Member States from advancing the reasonable interpretive claim that they are entitled to evaluate credentials on this basis, especially where Assembly resolutions have previously noted that the Member State bears responsibility for atrocity crimes.[862] Indeed, when assessing a challenge to the credentials of Myanmar's ruling military junta (albeit ultimately unsuccessful), a group of scholars noted that 'where a situation arises from internal or external repression … the Credentials Committee may consider other factors such as the legitimacy of the entity issuing the credentials, the means by which it achieved and retains power, and its human rights record'.[863]

The broader point here is that the Assembly has considered its Charter violation findings to be of consequence in supporting decisions that deprive the offending State of some of its rights of membership. It also shows that the Assembly has been versed, albeit rarely, in seeking creative solutions to address these violations, through its credentials' approval power, in light of permanent member vetoes that have prevented the use of Article 6.[864] Furthermore, removing a Member's credentials is best seen as an Assembly strategy to incentivise Members back into compliance through a powerful form of condemnation.[865] It is ultimately a matter of judgment whether this represents the appropriate strategy in relation to a particular Member State found to have violated the UN Charter; in relation to South Africa this approach was taken, according to the explanation of many Member States, because of the government's persistent failure to cooperate with the UN.[866] While, therefore, the credentials power offers a direct means for the Assembly to sanction members it remains underutilised and is necessarily qualified by strategic considerations that might justify a more conciliatory approach towards deviant Member States.

5. Quasi-Judicial Practice: 'Recognition' in International Affairs

Another form of Assembly quasi-judicial practice has been to establish 'facts' in international affairs that have occasionally produced some indirect effects in the field of international justice. Many of the studies concerned with the quasi-judicial identification of 'facts' have focused on

[861] As to the doctrine of established practice, see Chapter 3. It might also be justified as a countermeasure to induce South Africa back into compliance with its international obligations: ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) UN Doc A/56/10 (ARSIWA), 71-2 (draft art 22); Frederic Dopagne, 'Sanctions and Countermeasures by International Organisations' in Richard Collins and Nigel White (eds), *International Organisations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 185-6; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell 2009) 549. As to countermeasures, see further Chapter 7.

[862] See eg UNGA, 'Letter dated 82/20/22 from the Representatives of [43 Member States] to the United Nations addressed to the President of the General Assembly' (22 October 1982) UN Doc A/37/563.

[863] Christine Chinkin and others, 'Opinion: In re: United Nations Credentials Committee: Challenge to the Credentials of the Delegation of the State Peace and Development Council to represent Myanmar/Burma' (2019), 6. See also White, 'Law of International Organisations' (n 41), 124.

[864] See Christian Tams, 'Ch.II Membership, Article 6' in Simma (vol I) (n 8), 380 (credentials as part of a plenary 'strategy' to avoid art 6).

[865] UNGA, Twenty-fifth session, 1901st plenary meeting (11 November 1970) UN Doc A/PV.1901, 25 (Assembly President noting that the credentials decision would constitute 'very strong condemnation of the policies pursued by the Government of South Africa').

[866] ibid, 7 (Yugoslavia); UNGA, Twenty-ninth session, 1248th plenary meeting (30 September 1974) UN Doc A/PV.2248, 259; UNGA 2281st plenary meeting (n 859), 847-848 (Philippines). See also discussion in the Security Council: UNSC, Twenty-ninth session, 1808th meeting (30 October 1974) UN Doc S/PV.1808, 17–18.

the influence of the Assembly in defining questions of post-colonial Statehood and the legal authority of the UN to administer a territory in certain instances; the literature in this respect is generally cognisant of the Assembly's influential role on these issues.[867] But within the field of international justice the Assembly's quasi-judicial determinations have produced some effects also, even if this was not the intended purpose of these determinations. These include its pronouncements on whether the conditions for Statehood have been met; whether an entity purporting to represent a State is the lawful government of that State; to acknowledge and reaffirm international boundaries; and to acknowledge the rights of a peoples to occupy a defined territory. Although Assembly findings of such a nature do not often promote accountability for atrocities, they have done so indirectly in numerous instances.

Within the ICC, Assembly resolutions have been used to resolve contested jurisdictional issues. Article 12 of the ICC Statute outlines the preconditions to the exercise of jurisdiction which include a crime being committed on the territory of a relevant state (ICC States Parties or States which have accepted jurisdiction under Article 12(3)), or by a national of a relevant State. ICC organs have looked to Assembly pronouncements on issues that are material to determining jurisdiction. The Assembly adopted Resolution 67/19 (2012) recognising Palestine's 'right' to Statehood, according it non-member observer 'State' status in the UN. The Prosecutor treated Resolution 67/19 as '…*determinative* of Palestine's ability to accede to the [ICC] Statute', thereby supporting the opening of an investigation.[868] The Prosecutor noted that it was not appropriate for the ICC to take action that would be tantamount to recognising Palestine as a State (such as accepting its Article 12(3) declaration); rather 'there are other bodies, like the General Assembly, that should give Palestine that status first.'[869] A similar point can also be made in relation to the Prosecutor's preliminary examination into alleged crimes committed in South Ossetia, the issue being whether this territory was part of Georgia, a States Party; the Prosecutor drew upon multiple Assembly resolutions affirming this fact (although the PTC did not draw from these resolutions).[870] It is also likely that Assembly determinations in relation to Russian intervention in the Crimea will be material to the ICC's consideration of the Ukrainian government's declarations under Article 12(3) of the ICC Statute.[871] In this respect, pending preliminary investigation, the ICC will be assisted by Assembly Resolution 68/262 (2014) which declared the Crimea annexation by Russia to be of 'no validity'.[872] The ICC Prosecutor has relied on this finding so as to assert that the that the situation within Crimea and Sevastopol was a state of occupation, which in turn 'provide[d]

[867] Alvarez, 'International Organizations' (n 476), 430-432 (contrasting the success of Assembly quasi-judicial resolutions in relation to the self-determination claims of Palestine and Namibia).
[868] ICC, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine' (Press Release, 16 January 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>.
[869] Fatou Bensouda, 'The International Criminal Court: A New Approach to International Relations' David Rockefeller Lecture Series (21 September 2012) <https://www.cfr.org/event/international-criminal-court-new-approach-international-relations>. See also UN Office of Legal Affairs, 'Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties' (1949) UN Doc ST/LEG/7/Rev.1, [81]-[83].
[870] ICC-OTP, *Situation in Georgia*, 'Request for authorisation of an investigation pursuant to article 15' ICC-01/15 (17 November 2015), [54]; ICC-PTCI, 'Decision on the Prosecutor's request for authorisation of an investigation' ICC-01/15 (27 January 2016).
[871] ICC, 'Ukraine accepts ICC jurisdiction over alleged crimes committed between 21 November 2013 and 22 February 2014' (Press Release, 17 April 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr997&ln=en>.
[872] As also noted in ICC Prosecutor, 'Report on Preliminary Examination Activities 2018' (5 December 2018), [67] <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>. See also reliance on UNGA Res 62/243 (2008) to establish that the population expelled from Azerbaijan had a right to return, thereby supporting the finding of an interference with the right to peaceful enjoyment of possessions: *Chiragov v Armenia* App No 13216/05 (ECtHR, 16 June 2015), [67].

the legal framework for the Office's ongoing analysis of information concerning crimes alleged to have occurred'.[873]

The issue of UN membership of the Former Republic of Yugoslavia (Serbia and Montenegro) ('FRY') also raised jurisdictional questions at the ICTY; but in this case the significance of an Assembly resolution that might have deprived the tribunal of jurisdiction was downplayed.[874] The argument raised by the defence was that at the pertinent time - both at the adoption of the ICTY Statute in 1993 and the events charged in 1999 - the FRY was not a UN Member and therefore was not subject to the Security Council's Chapter VII resolutions on the ICTY.[875] There was some support for the defence argument in the form of Assembly Resolution 47/1 (1992) which considered that the FRY '*cannot automatically continue* the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations'.[876] This reflected Assembly policy to 'end the *de facto* working status of Serbia and Montenegro' in the UN.[877] The Trial Chamber, in rejecting the defence motion, noted that Resolution 47/1 did not purport to suspend or terminate FRY membership in the UN; on this basis, it 'did not deprive the FRY of all the attributes of United Nations membership: the only practical consequence was its inability to participate in the work of the General Assembly, its subsidiary organs, conferences or meetings convened by it.'[878] FRY's membership of the UN therefore had to be determined on an 'empirical' basis rather than solely by reference to an Assembly Resolution.[879] Given that the FRY continued to participate in other aspects of UN work, the Trial Chamber therefore concluded that it retained in effect its membership of the UN and thus was bound by the Chapter VII decisions.[880] Unlike the ICC, which was prepared to use an Assembly resolution to establish Palestinian Statehood, the ICTY would downplay Assembly resolutions that sought to deprive the FRY's status within the UN.

Assembly resolutions have also been noted to bear 'substantial authority' as background materials to which judicial notice can be taken to establish certain facts in judicial proceedings.[881] This has included to establish the background to the Balkans conflict, particularly on the existence of outside interference, or to establish as 'common knowledge' that genocide occurred in Rwanda.[882] Judges at the ECCC used Assembly resolutions to show that 'crimes committed during the Democratic Kampuchea period from 1975 to 1979 are still a matter of concern for Cambodian society'; the provisional detention of those charged was therefore necessary so as to avoid public disorder.[883] To establish the existence of an

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[873] ICC, 'Report on Preliminary Examination Activities' (4 December 2017), 20 <https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf>.

[874] Assembly resolutions have also been considered in terms of whether the Holy See was a State that incurred obligations to cooperate with the ICTY pursuant to UNSC Res 955 (1994) and also in using the name given to a State ('The former Yugoslav Republic of Macedonia') in the trial proceedings as identified in an Assembly resolution: *Prosecutor v Ngirabatware* (Holy See Order) ICTR-99-54-T (31 March 2010), [15]; *Prosecutor v Boskoski* (Provisional Release Decision) ICTY-04-82-AR65.1 (4 October 2005), fn 34.

[875] *Milutinović* (Jurisdiction) (n 344), [2].

[876] UNGA Res 47/1 (1992), [1] (emphasis added).

[877] UNGA Res 48/88 (1993), [19].

[878] *Milutinović* (n 343), [37].

[879] ibid, [38].

[880] ibid. Similarly, the ICJ held that 'Resolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court or to be a party to a dispute before the Court…': *Application for Revision in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Judgment) [2003] ICJ Rep 7, 31.

[881] *Čelebići* (Judgment) (n 185), [90].

[882] ibid; *Prosecutor v Stanišić* (Judicial Notice) ICTY-08-91-T (1 April 2010), 67 (citing UNGA Res 46/242 (1992)); *Prosecutor v Karemera* (Judicial Notice) ICTR-98-44-AR73(C) (16 June 2006), [35] (citing UNGA Res 49/206 and UNGA Res 54/188).

[883] Provisional Detention Extension, *Chea*, Case No 002/19-09-2007-ECCC-OCIJ (15 September 2009), [23]-[24]; Provisional Detention Appeal, *Chea*, Case No 002/19-09-2007-ECCC/OCIJ(PTC13) (4 May 2009), [40].

international armed conflict, the ICTY Trial Chamber took judicial notice of Resolution 46/242 (1992) to support its findings that the FRY exercised control over the Bosnian Serb Army, so as to meet the 'overall control' test.[884] Similarly, the ICTY Trial Chamber drew from Resolution 54/119 (1999) which noted the 'importance and urgency of the work of the International Tribunal as an element of the process of reconciliation'; 'accordingly', in attaching 'importance to these statements', the Trial Chamber indicated that it would give 'significant weight' to the guilty plea in sentencing given the positive impact it would have on the reconciliation process.[885] The European Court of Justice has also used the Assembly's characterisations on Palestine and Middle Eastern conflicts to establish certain facts, including displacement.[886]

6. Conclusion

This Chapter has traced the Assembly's quasi-judicial practice, noting a broad engagement with international norms related to the advancement of international justice. There is an established basis for the Assembly to evaluate Member State conduct, not only grounded in the practice explored in this chapter but also as an incident of its discursive functions under the UN Charter. There are few legal impediments on the Assembly choosing to condemn the conduct of a Member State in its resolutions, even if a minority of Members continue to maintain the illegality of such resolutions under Article 2(7). In the final analysis, whether a finding against a Member is valid ultimately turns upon it commanding the requisite support in the Assembly.

While the Assembly's deliberative process has not always safeguarded against the abuse or unsubstantiated use of quasi-judicial resolutions there has been a trend towards more precisely formulated resolutions drawing from international law. Evidence of abuse is perhaps apparent in the context of Assembly campaigns to condemn Portugal, South Africa and Israel, whereby resolutions used legal terms (such as genocide and crimes against humanity) out of context and made findings sometimes lacking in an evidentiary basis. To a certain extent, some legal mischaracterisations might be excused given that, at the relevant times, these laws were generally lacking in judicial interpretation and application until the international criminal law project was resurrected with the creation of the ICTY. The Assembly has been, like other international actors, an interlocutor in the development of international law and, like other bodies, tested and adapted their understanding of these norms over time. Furthermore, what might be regarded as a legal mischaracterisation by some represents an interpretive development of the norm by others. As noted, the Assembly's condemnation of apartheid in South Africa as a crime against humanity, immediately rejected by some members as a misuse the first time it was proposed, would come to support the crystallisation of this proscription in customary international law. There has also been a perceptible trend in recent years for the Assembly to base its quasi-judicial statements on the expert findings of commission of inquiry reports, as it has done in relation to the situations in the former Yugoslavia, Rwanda, DPRK, Syria and Myanmar. In turn, this trend suggests the greater integration of independent fact-finding into Assembly resolutions and presents a model for future quasi-judicial practice grounded in the evidence and legal conclusions of experts.

Although quasi-judicial resolutions in country situations have also been selective and inconsistent, there is some inevitably of this within a political organ; recent uses of commission

[884] *Prosecutor v Brdjanin* (Judgment) ICTY-99-36-T (1 September 2004), [152] (citing UNGA Res 46/242 (1992)).
[885] *Prosecutor v Plavšic* (Sentencing) ICTY-00-39&40/1 (27 February 2003), [79], [81] (citing UNGA Res 54/119 (1999), preamble).
[886] *Bolbol v BAH* (Judgment) Case C-31/09 (ECJ, 17 June 2010) 469, 473.

of inquiry reports, on the other hand, provide one way to obviate these political considerations. It is true that some atrocities have received disproportionate attention over many sessions (e.g. South Africa), others have been ignored (e.g. Cambodia for many decades) or have only been referenced sporadically with no attempt at follow up (e.g. Sabra and Shatila massacre). Within country situations scrutinised, there has also sometimes been a lack of even-handedness in focusing on one set of perpetrators to the exclusion of others (e.g. in Libya). Although this critique contains some element of truth, it is also overstated; there has been, over time, a trend of widening of country scrutiny in the Assembly from the 'usual suspects' (Israel and South Africa) to a variety of situations in different geopolitical and regional blocs. This cannot be accounted for on the basis of political interests alone but might more accurately reflect a need to support and respect the growing international architecture for the promotion of human rights and accountability for atrocity crimes. Furthermore, the selectivity critique has to be considered in light of the viable alternatives within the UN system. The Assembly 'advantage' is its near universal membership of states which has the potential to support the wider scrutiny of country situations than that in contrast to the other principal political organ, the Security Council, which is subject to closer control of the permanent members. In this regard, resolutions seeking accountability in DPRK, Myanmar and Syria occurred in the Assembly, which would be an impossibility in the Security Council due to likely shielding of these States by respective permanent members.

Quite apart from the asserted political impediments on the Assembly's quasi-judicial function, the emphasis given to condemnation of a Member State will also turn upon the desirability of this in light of peace and security considerations. In this regard, the exercise of the quasi-judicial function is ultimately a plenary strategy to coerce or incentivise Member States to conform with the Assembly's recommendations. In turn, the aim of engaging with a Member State to secure accountability for atrocity crimes might involve a conciliatory approach and the framing of resolutions that avoid any attribution of blame. This reflects the multiple, sometimes conflicting, functions and priorities of the Assembly, not only in promoting human rights (and accountability for atrocity crimes) but also maintaining international peace and security. Unlike a judicial entity that is mandated to specifically address legal issues and to attribute responsibility, the Assembly exercises its quasi-judicial functions in light of a collective evaluation on the most efficacious way to promote rule observance in a particular situation; that is precisely why the Assembly's function is 'quasi-judicial'. The broader point here is that inconsistency and selectivity in the exercise of this function should not be reduced solely to the explanation that the Assembly acts with a political bias. Another explanation is that the Assembly has devised a response to a situation that it regards to be the most appropriate strategy for securing engagement and compliance; one which might not always have accountability for violations at its centre.

It was also noted that the Assembly's quasi-judicial resolutions have been used to support the accountability of atrocity crimes; three correlations are worthy of note here. Firstly, the accumulated effect of some condemnatory resolutions has contributed to the formation of customary international law and the inclusion of such norms in treaties (as with the crime against humanity of apartheid and enforced disappearances). Although a quasi-judicial determination pertains to a specific 'case', its broader normative reach derives from the application of legal principle. Secondly, international courts have cited Assembly resolutions in support of its evidentiary findings and in taking notice of generally accepted facts (e.g. that genocide occurred in Rwanda). Although the basis to treat Assembly resolutions as 'evidence' might be circumspect, the value they hold is in often offering a contemporaneous account of accepted, corroborated, events and also in offering a succinct iteration of commission of inquiry reports. An unspoken assumption for a court's citation and approval of a quasi-judicial resolution might also be that it offers 'collective legitimation' for the decision arrived at, even

if the judges concerned reached this conclusion independently. Thirdly, Assembly resolutions have been used (and could be used) to resolve contentious 'recognition' issues that courts are unable to resolve by itself, such as Statehood (Palestine) or territorial disputes (Crimea and South Ossetia). Assembly resolutions on these issues are obviously not directly concerned with accountability for atrocity crimes, but an indirect effect is that they can pave the way for accountability.

Finally, it is also evident that the Assembly's quasi-judicial function can serve to facilitate the taking of more specific action within the UN system. In particular, an Assembly recommendation on a country situation, to be meaningful, will tend to require some determination to be made in relation to the underlying events that concern the recommendation (the range and nature of these recommendations considered in the next Chapter). While the quasi-judicial function therefore supports, at the very least, the Assembly in exercising its power to recommend, it can also be used for more. The Assembly rejected South Africa's credentials due to a collective abhorrence of apartheid; although an isolated example, it shows potential for quasi-judicial findings to be integrated into the responses that the Assembly can take within its powers against deviant Member States. Beyond this, as Chapter 7 shows, a quasi-judicial resolution might itself provide legal authority for Member States to take action against deviant states that might otherwise be inconsistent with international law.

CHAPTER 5: GENERAL ASSEMBLY RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY FOR ATROCITY CRIMES

1. Introduction

Where the Assembly makes a quasi-judicial finding it will often accompany this with a series of recommendations for action to be taken to bring the deviant behaviour to an end. In this regard, the following Chapter considers the range and effect of recommendations that have been adopted by the Assembly for the purpose of promoting accountability for atrocity crimes. 'Promote' is used here because, as is readily accepted, only the Security Council is vested with the power in the UN Charter to take 'enforcement action' against a deviant state.[887] By contrast, the Assembly is limited (at least textually) to making 'recommendations' to Member States and the Security Council for them to take action, including of a nature for the 'peaceful adjustment of any situation'. [888] The limited legal function of the Assembly in securing the enforcement of international justice is underlined further, as noted previously, given the orthodox understanding that the Assembly's resolutions are not generally binding. Despite these limitations, it remains instructive to consider the Assembly's recommendation practice as it relates to international justice. Doing so allows an evaluation to be made, alongside that from the previous Chapter, as to the record of the Assembly in seeking accountability action for atrocity crimes. This record can be reflected not only in the recommendations that the Assembly adopts but the influence of these recommendations on the actions of others.

Accordingly, the focus of enquiry here is on the practice of the Assembly in recommending action to advance accountability in atrocity situations. Having surveyed all Assembly resolutions relevant to the field of international justice, the following Chapter focuses on the four most common forms of action that has been sought by the Assembly: to investigate or prosecute; to cooperate; to explain or account; and to provide reparations to victims. These recommendations have been primarily directed towards Member States but also the Security Council, to the effect that it ought to exercise Chapter VII authority to implement what was recommended. Under the UN Charter, both of these subjects are the contemplated recipients of Assembly recommendations; for good reason. It is, fundamentally, through Member States that accountability for atrocity crimes will be achieved or at least enabled, be that in prosecuting suspects within its borders, or in cooperating with other States or entities in their criminal justice processes. The Security Council also possesses significant power to secure accountability for atrocity crimes, including (at its most extreme) to authorise the use of force, impose sanctions, establish *ad hoc* tribunals, or to refer situations to the ICC Prosecutor.[889] The extent to which the Assembly has sought to mobilise Member States and the Security Council into action to secure accountability, or otherwise support their responses to these crimes, is therefore a worthwhile enquiry.

While this recommendations practice can be readily discerned from Assembly sessions, a more challenging matter is seeking to identify the 'effects' of these

[887] UN Charter, arts 5, 11(2), 41, 42, 50, 53(1).
[888] ibid, arts 10, 14.
[889] See generally Roscini (n 3).

recommendations. The most direct effect is that a Member State or the Security Council implements the recommendation; however, such causality is often difficult to establish even where these actors take action following such recommendation. Equally problematic is that attempts to secure accountability for atrocity crimes often fail despite multilateral efforts, as some Member States have lamented.[890] Nonetheless, a recommendation might produce certain effects internal to the Assembly. At the very least, it might lead deviant Member States to justify its conduct within the Assembly and other UN processes, thereby offering some form of accountability. A Member State's failure to implement a recommendation could lead in particular to a condemnation and a strengthening of language in later recommendations. A hardening stance might not change the behaviour of a recalcitrant Member State but it could support a collective narrative in the UN that contributes towards an institutional position and the marginalisation of this deviant Member's position. The same can also be said about Security Council failures to implement Assembly recommendation; while the Council is not obliged to, not doing so allows the Assembly to form a judgment that the Council and their Members have failed to perform the functions entrusted to it. Repeated failings of both Member States and the Security Council might in turn prompt the Assembly to consider creative solutions to secure accountability. In this regard, Chapter 4 already noted the inventive use of the credentials-approval power as a means for the Assembly to sanction a Member State, which in turn has imposed 'symbolic damage to a regime'.[891] Other creative solutions open to the Assembly in response to recalcitrance, as Chapters 6 and 7 develop, might include the establishment of subsidiary organs with quasi-prosecutorial or judicial powers, or resolutions that provide legal authority for sanctions.

Finally, although the orthodox view is that Assembly recommendations are not binding, it nonetheless remains instructive to consider whether they entail some form of a requirement on Member States to meet. Blaine Sloan famously argued that even a recommendation entails mandatory elements and can acquire a binding character through practice.[892] It has already been noted that Assembly resolutions can contribute towards the 'established practice' in the interpretation of the UN Charter; yet, there has been no attempt in the scholarly literature so far to consider practice into any perceived mandatory force of recommendations, not least in the context of the present study into international justice. It is therefore useful to consider whether, in the present context, the Assembly has developed its recommendatory powers to entail any form of legal requirement of compliance, or whether there are at least any signs of latent potential in this regard. Yet, even if recommendations practice has not developed in the direction of imposing requirements, it is useful to re-examine the arguments made by scholars and jurists that there are some minimum requirements on Member States to act upon recommendations, grounded in the text of the UN Charter and the principle of good

[890] UNGA 80th plenary meeting (1999) (n 80), 17 (Jordan).
[891] Matthew Griffin, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through its Accreditation Process, and Should It' (2000) 32 NYU J Intl L & Policy 725, 732 ('The international community will likely take steps to isolate the regime. International organisations may withhold financial assistance. The loss of accreditation may result in the loss of jurisdictional immunities and the right to sue in the name of the Member State in domestic as well as international tribunals. Other states can freeze assets of the Member State abroad and provide assistance to the opponents of the regime. The momentum generated by delegitimating a government may prompt the Security Council and individual Member States to impose sanctions. Regional organisations may take actions pursuant to the General Assembly vote. In sum, disaccreditation is powerful medicine.') See also Chinkin, 'Opinion' (n 863), 5.
[892] Sloan, 'Binding Force' (n 31), 50.

faith.

2. Practice of Recommendations to Member States

The Assembly frequently makes recommendations to Member States to take steps to address atrocity crimes; these have been directed at the territorial State in which the alleged violations occurred, or to all States to take measures against recalcitrant States.

2.1 Investigate and Prosecute

A common form of recommendation made is for relevant Member States, or the respective parties to a conflict, to conduct an investigation and to prosecute those responsible for atrocity crimes. Recommendations of this nature have occurred since the first session, where the Assembly called for the prosecution (and extradition) of Nazi fugitives in 1946.[893] It has since called for the investigation and prosecution of a variety of relevant violations of international law. Sometimes this has been expressed in general terms in a situation, other times a recommendation has been focused on a particular violation (such as crimes against women), or in relation to specific incidents (e.g. the excessive use of force against 'eleven Africans' by the South African authorities in South West Africa).[894] The Assembly has also called for repeal of laws that inhibit effective prosecutions, such as legislation granting immunity from prosecution for international crimes in Cambodia.[895] That said, the Assembly has recognised modest latitude for domestic prosecutions to embrace 'participatory justice', provided that this is in conformity with international law.[896] Other resolutions are more wide ranging in calling for reform or strengthening of the basic State apparatus to make an effective investigation possible, particularly the efficacy of the judicial system; it thus 'demanded' that Iraq 'restore the independence of the judiciary' during the height of the repressive practices of the Saddam Hussein regime.[897] In instances where the territorial State has failed to comply, the Assembly has also invited other Member States to conduct investigations where feasible: for example, it encouraged states to 'prosecute crimes within their jurisdiction committed in the Syrian Arab Republic'.[898]

The duty to prosecute or investigate alleged violations can be found in multiple treaties, including custom; it has also found expression in Assembly declarations as discussed in Chapter 2 (including Resolution 3074 (XXVIII) (1973)).[899] To those seeking to strengthen international responses to impunity, it might therefore be hoped that these underlying obligations would be integrated and emphasised in Assembly recommendations. There is some evidence that recommendations have done so,

[893] UNGA Res 3(1) (1946).
[894] UNGA Res 1567 (XV) (1960), [1].
[895] UNGA Res 52/135 (1997), [9]. Conversely, it has also called for the non-prosecution of crimes related to conflict except for crimes against humanity, war crimes and other crimes covered by international law: UNGA Res 53/164 (1998), [15] (Kosovo).
[896] UNGA Res 54/188, [11] (Rwanda).
[897] UNGA Res 50/191 (1995), [8]. For similar iterations, see UNGA Res 55/112 (2000), [21] (Myanmar); UNGA Res 53/160 (1998), [2] (DRC); UNGA Res 41/161 (1986), [9] (Chile).
[898] UNGA Res 72/191 (2017), [36].
[899] See Chapter 2; Kai Ambos, 'Principle 19: Duties of States with Regard to the Administration of Justice' in Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity* (OUP 2018), 208-210; UNGA Res 3074 (XXVIII) (1973), preamble ('declares', war crimes and crimes against humanity 'shall be subject to investigation' and suspects 'shall be subject to tracing, arrest, trial, and if found guilty, to punishment').

although not always consistently and precisely. Many recommendations in a country situation simply 'recall' a series of generally applicable laws in the preamble and do not apply specific provisions from them in the operative paragraphs, nor in the specific context here of investigation or prosecution.[900] Sometimes phrases that derive from the treaty obligations are used without reference to the source.[901] Resolution 3074 (XXVIII), an Assembly declaration that underscores the importance of investigation and prosecution, has also seldom been referenced in later recommendations.[902] More specificity can be seen in relation to the Myanmar situation, where Resolution 74/246 (2019) reminded Member States of their responsibility 'to comply with their relevant obligations, to prosecute those responsible for violations of international law, including international humanitarian law, international human rights law, international criminal law'.[903] An even more specific formulation can be found in the Syria situation, where Resolution 74/169 (2019) called upon 'all States parties to the Convention [Against Torture] to comply with any relevant obligations under the Convention, including with respect to the principle of extradite or prosecute contained in article 7 of the Convention'.[904]

All of this raises the question whether the incorporation of these underlying obligations to investigate and prosecute has led to a strengthening of language in recommendations. For example, there are numerous instances in which the Assembly has 'demanded' a Member State to comply with an enumerated international obligation.[905] However, this is generally absent in relation to the subject of investigation and prosecution. In the context of the conduct of Mandatory powers, the Assembly has 'request[ed] that steps be taken to investigate and prosecute violations.[906] The use of 'request' here might have been underpinned by the obligations a Mandatory Power generally had to the UN, although this was unstated.[907] This context aside, even where obligations have been noted in general terms, the Assembly's most common formulation has been to 'call upon', 'urge' or 'encourage' the Member State concerned

[900] See eg UNGA Res 49/198 (1994), preamble (Sudan) ('Reaffirming that all Member States have an obligation to promote and protect human rights and fundamental freedoms and to comply with the obligations laid down in the various instruments in this field…'); UNGA Res 49/206 (1994), preamble (Rwanda).

[901] UNGA Res 50/189 (1995), [6] (Afghanistan) ('Calls upon the Afghan authorities to investigate thoroughly the
fate of those persons'); Additional Protocol I (n 225), art 32 (right to families to 'know the fate' of their relatives).

[902] For one such example, see: UNGA Res 49/205 (1994), preamble, [8] ('recalling' UNGA Res 3074 (XXVIII) (1973) and urging Member States to 'bring to justice' suspected perpetrators of international crimes).

[903] UNGA Res 74/246 (2019), preamble. See also commission of inquiry report: DPRK Report (n 70), [1199] (DPRK authorities were unwilling to investigate and prosecute crimes against humanity 'as required by international law'). See also an earlier formulation: UNGA Res 54/186 (1999), [15] ('Strongly urges the Government…to fulfil its obligation to end the impunity of perpetrators of human rights violations, including members of the military, and to investigate and prosecute alleged violations committed by government agents in all circumstances').

[904] UNGA Res 74/169 (2019) (Syria), [18].

[905] See, for example, UNGA Res 49/205 (1994), [3] ('Demands that those involved immediately cease those outrageous acts, which are in gross violation of international humanitarian law, including the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto, of 1977').

[906] UNGA Res 1567 (XV) (1960), [5] (South West Africa). 'Request' being common institutional parlance for an expectation of compliance often directed at the secretariat or subsidiary organs.

[907] As to the nature of these obligations, see eg *Namibia* (Advisory Opinion) (n 108).

to investigate and prosecute the violations of international law.[908] Even in the Syria situation, where the Assembly made specific 'demands' for compliance with international obligations in other areas (such as civilian protection), the imperative for investigation and prosecution was 'emphasize[d]'.[909] On other occasions, such a failure to investigate and prosecute has only been expressed as a 'concern' without any clear reference to underlying international obligations.[910] That being said there are instances in which a failure to investigate and prosecute has been recognised as conduct that would be inconsistent with international obligations; thus, in the context of 'crimes against women', an Assembly recommendation noted that Member States 'have an obligation to exercise due diligence' to investigate and punish; conversely, 'not doing so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms'.[911] Similarly, it expressed its 'alarm' at the 'continuing failure of the Sudanese authorities to investigate human rights violations and abuses brought to their attention over the past years'.[912]

In short, although there is considerable practice of the Assembly recommending investigation and prosecution, the language used and the stress placed on underlying international obligations has not always been so consistent. This inevitably reflects the priorities of the drafters of the recommendation, although there might be other rationale for not emphasising investigation and prosecution. It might be that, on occasions, the Assembly does not want to be confrontational so avoids specifying particular obligations that a Member State must observe within its jurisdiction; this is especially so where the Assembly has already commended a Member State for commencing an investigation or otherwise being cooperative.[913] There might also be a preference to emphasise other obligations in recommendations that might be considered more pressing, for example, where there is an escalating humanitarian crisis. Nonetheless, this section has shown there to be room for more specific incorporation of the international obligations to investigate and prosecute in future recommendations, with a corresponding strengthening of language in the recommendation to convey the importance of this obligation.

2.2 Cooperate

The creation of commissions of inquiry and international criminal tribunals - within the UN and elsewhere – has prompted the Assembly to recommend Member States to cooperate and assist the work of these mechanisms. The Assembly has adopted recommendations that Member States cooperate with the ICC, including to refer a

[908] 'Call upon': UNGA Res 50/189 (1995), [6] (Afghanistan); UNGA Res 57/230, (2002), [4] (Sudan); UNGA Res 56/173 (2001), [4] (DRC). 'Urge': UNGA Res 74/9 (2019), preamble (Afghanistan); UNGA Res 74/166 (2019), [17] (DPRK); UNGA Res 50/197 (1995), [2] (Sudan)); UNGA Res 37/185 (1982), [10] (El Salvador); UNGA Res 53/163 (1998), [35] (former Yugoslavia); 'Encourage': UNGA Res 49/199 (1994), [10] (Cambodia); UNGA Res 49/206 (1994), [7] (Rwanda).

[909] In UNGA Res 74/169 (2019) compare [32] with [1], [2], [9], [27], [28], [29], [30], [31], [42], [47], and [53]. See also UNGA Res 67/262 (2013) (Syria), [4] ('demands' to end violations of international humanitarian law, contrast with, in the same paragraph a 'call' for investigation and prosecution).

[910] UNGA Res 38/79 H (1983) (Palestine), [1] (expresses 'deep concern' that Israel 'has failed for three years to apprehend and prosecute the perpetrators of the assassination attempts').

[911] UNGA Res 57/179 (2002), preamble.

[912] UNGA Res 50/197 (1995), preamble (Sudan).

[913] UNGA Res 49/206 (1994) (Rwanda), [7] ('encourages the Government of Rwanda to ensure investigation and prosecution of those responsible…and welcomes the commitments of the [Government] in this regard').

situation to the Prosecutor or to accept the Court's jurisdiction on an *ad hoc* basis.[914] The Assembly has demanded that Member States cooperate with the *ad hoc* tribunals established by the Security Council, including to transfer indicted persons to these tribunals.[915] A particular focus of recommendations has been in exhorting the membership to assist the work of commission of inquiries. Such recommendations have included to allow 'unfettered access' to UN investigators to the territory where crimes have allegedly been committed,[916] permitting witnesses to appear before an inquiry,[917] and to provide relevant information and documentation.[918] Member States have also been recommended to supply relevant evidence in their possession to UN investigations.[919]

The language used in recommendations to cooperate, and the extent to which they convey an underlying obligation, has also varied. There are resolutions that employ terminology proximate to the ordinary meaning of 'recommendation', such as to 'call upon', 'encourage', 'urge', or 'strongly urge'.[920] But there are also numerous instances where the Assembly frames a cooperation recommendation in much stronger terms, 'requests' or 'demands', with such cooperation stated to arise 'fully and immediately' and 'unreserved[ly]'.[921] Some of these 'demands' have been consistent across sessions on a situation, as upon Syria over many sessions to provide 'unhindered' or 'unfettered access' to a commission of inquiry.[922] However, language is not always consistent, even on the same situation: what was a 'demand' in one recommendation could be later diluted to a 'call' to cooperate in the next, or even dropped entirely as priorities in the Assembly change.[923] Nor can much predictability on the use of mandatory language be

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[914] See eg UNGA Res 70/264 (2016), [2], [10]; UNGA Res 71/253 (2017), [17]. Relatedly, the UNHRC has called upon the 'parties concerned to cooperate fully with the preliminary examination' of the ICC into the Palestinian situation: UNHRC Res 34/L.38 (2017), [6].

[915] See eg UNGA Res 50/200 (1995), [8] (Rwanda); UNGA Res 54/184 (1999), [6], [37] (Former Yugoslavia).

[916] UNGA Res 67/262 (2013), preamble, [7] (Syria).

[917] UNGA Res 38/79 D (1983), [16] (Occupied Palestinian Territories) (here the Assembly did not request that Israel allow witnesses to appear before the UN mechanism, but did 'condemn' its refusal to permit persons from the occupied territories to so appear).

[918] UNGA Res 72/191 (2017), [33] (Syria).

[919] See eg UNGA Res 385 (V) (1950), [5] (Bulgaria, Hungary and Romania).

[920] UNGA Res 74/177 (2019), [17]; UNGA Res 71/205 (2016), [4]; UNGA Res 71/202 (2016), [14]; UNGA Res 70/233 (2015), [18]; UNGA Res 54/171 (1999), [11]; UNGA Res 33/172 (1978); UNGA Res 1454 (XIV) (1959), [2].

[921] UNGA Res 67/262 (2013), preamble, [7] (*'Demands'* that Syria provide *'unfettered access'* to the COI); UNGA Res 49/205 (1994) (Former Yugoslavia), [5] ('demands that immediate and unimpeded access be granted' to various UN investigators); UNGA Res 49/204 (1994), [4] (*'Demands'* the authorities of the Federal Republic of Yugoslavia to *'cooperate fully and immediately with the Special Rapporteur…'*); UNGA Res 49/198 (1994), [12] (Sudan); UNGA Res 3114 (XXVIII) (1973), [3] *('Requests Portugal to cooperate with the Commission of Inquiry and to grant it all necessary facilities to enable it to carry out its mandate'* in Mozambique) – check citation; UNGA Res 1628 (XVI) (1961), [5] (*'Requests'* all parties concerned to *'extend their full co-operation and assistance'* to the Commission established to investigate the death of former UN Secretary General, Dag Hammarskjold); UNGA 1596 (XV) (1961), [6] ('requests' State members of the UN to extend to the Committee on South West Africa such assistance as it may require in the discharge of its tasks); UNGA Res 1130 (XI) (1956), [4] (Hungary) ('Requests' Member States to cooperate with the SG's named representatives 'and providing such facilities as may be necessary for the effective discharge of their responsibilities.')

[922] UNGA Res 74/169 (2019), [27]; UNGA Res 73/182 (2018), [23]; UNGA Res 72/191 (2017), [26]; UNGA Res 71/203 (2016), [22]; UNGA Res 70/234 (2015), [12]; UNGA Res 69/189 (2014), [10]; UNGA Res 68/182 (2013), [8]; UNGA Res 67/262 (2013), preamble, [7]; UNGA Res 67/183 (2013), [7]; UNGA Res 66/253 B (2012), [10]; UNGA Res 66/253 A (2012), [3]; UNGA Res 66/176 (2011), [5].

[923] See eg the climbdown in the Hungarian situation in 1956: UNGA Res 1004 (ES-II) (1956), [5]; UNGA Res 1130 (XI) (1956), [2]; UNGA Res 1131 (XI) (1956), preamble, [2]; UNGA Res 1132 (XI) (1957),

gauged based upon the scale or gravity of the alleged crimes committed. In Syria the alleged crimes have been noted to be of particular gravity, as they have in Myanmar; yet the language used in respective recommendations has been quite different.[924] Despite the Assembly noting the possibility of genocide occurring in Myanmar, it still has only 'urge[d]' the authorities there to cooperate with a commission of inquiry.[925]

Leaving this inconsistency aside, the instances in which ostensible mandatory language has been used raises the question whether it is designed to reflect any underlying obligation, or indeed has served to develop interpretive practice towards a general agreement amongst the membership on such an obligation under the UN Charter. The use of mandatory language in some recommendations can indeed be reasonably explained as reflecting an underlying obligation in the UN Charter, such as to cooperate with *ad hoc* tribunals established by the Security Council under Chapter VII.[926] However, there are numerous instances where the Assembly has 'demanded' Member States to cooperate with UN commissions of inquiry established outside the framework of Chapter VII, often in instances where there has been repeated failure to cooperate.[927] The basis for such a 'demand', to the extent that it reflects an underlying obligation, would be questionable to many, the orthodox view being that cooperation with non-Chapter VII mechanisms is voluntary under the UN Charter.[928] Nonetheless, there is one instance in which the connection between 'demand' and an underlying legal obligation was made explicit: numerous resolutions have 'demanded' Israel to cooperate with the Assembly's Special Committee as required 'in accordance with its obligations as a State Member of the United Nations'.[929] Although this might be used to support the evolution of a Charter duty to cooperate with UN inquiries in the future, it is unlikely to support a precise duty as of yet. These resolutions specifying 'demands' on Israel continue to receive a large number of abstentions meaning it is unlikely to be considered to reflect the 'general agreement' of the membership on a duty to cooperate.[930]

There is also a general lack of recognition or awareness of an underlying legal obligation in explanation of votes on recommendations that address cooperation with non-Chapter VII commissions.[931] An interesting example of where some Member

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[2]. See also UNGA Res 3114 (XXVIII) (1973), preamble, [3]; UNGA, 'Decision of the General Assembly' (13 December 1974) UN Doc A/9631, 117.

[924] In relation to Syria, 'demands' for cooperation have been fairly consistent over several sessions: UNGA Res 74/169 (2019); UNGA Res 73/182 (2018); UNGA Res 67/262 (2013), preamble, [7]; UNGA Res 72/191 (2017), [26]; UNGA Res 71/203 (2016), [22]; UNGA Res 70/234 (2015); UNGA Res 69/189 (2014), [10]; UNGA Res 68/182 (2013), [8]; UNGA Res 67/262 (2013), [7]; UNGA Res 67/183 (2013), [7]; UNGA Res 66/253 B (2012), [10]; UNGA Res 66/253 A (2012), [3]; UNGA Res 66/176 (2011), [5]

[925] See UNGA Res 74/246 (2019), [4] ('urging' Myanmar to cooperate); UNGA Res 73/264 (2018), [1] (expressing grave concern about the credible allegations of genocide occurring in Myanmar).

[926] See eg UNGA Res 54/184 (1999), [6] (ICTY); UNGA Res 50/200 (1995), [8] (ICTR); UNGA Res 49/204 (1994), [4] (Special Rapporteur on Kosovo).

[927] Consider the ostensibly mandatory language used in relation to cooperating with the following (non-Chapter VII) entities: UNGA Res 67/262 (2013), preamble, [7] (UNHRC-established COI on Syria); UNGA Res 62/169 (2007), [3] (HRC on Belarus); UNGA Res 49/204 (1994), [4] (Special Rapporteur on Kosovo); UNGA Res 42/160(D) (1987), [3] (Special Committee on Israel); UNGA Res 38/79 D (1983), [3] ('Demands' that Israel allow access to the Palestinian occupied territory). See also UNGA Res 1627 (XVI) (1961), [2] ('Requests' COI to visit scene in Burundi immediately).

[928] See analysis in Ramsden, 'Accountability for Crimes Against the Rohingya' (n 704).

[929] UNGA Res 74/87 (2019), [2]; UNGA Res 73/96 (2018), [2]; UNGA Res 72/84 (2017), [2] (Special Committee on Israel).

[930] For example, UNGA Res 74/87 (2019) was adopted by 83 votes to 10, with 77 abstentions.

[931] Indeed, Security Council involvement in establishing commissions and also to threaten sanctions for non-cooperation have had an impact, see: UN, 'Security Council Declares Intention to Consider

States sought to push a legal obligation came following the USSR's repeated failure to permit observers into Hungary after its intervention in 1956. After numerous recommendations, an impatient Assembly made a specific 'request' in Resolution 1130 (XI) to the USSR that it 'communicate to the Secretary-General, not later than 7 December 1956, their consent to receive United Nations observers'.[932] The tone of this resolution, in setting a deadline and carrying an expectation of compliance, was highly aberrant in Assembly practice at that point (and indeed since); Members requested a vote specifically on this paragraph (which passed with 44 votes to 13, with 13 abstentions).[933] The deadline paragraph also caught the attention of the international media; the *New York Times* indicated that more drastic measures would be taken if not met.[934]

The text of Resolution 1130 (XI) (1956) prompted some discussion prior to its adoption. Uruguay considered it 'undeniable that this world parliament possesses full authority to cross the borders of any Member State for the purpose of finding out whether or not crimes have been committed against international law and order'.[935] A corollary of this argument might be that granting entrance to an Assembly-mandated inquiry was obligatory. India, too, suggested there to be some duty to accept the presence of an inquiry, but stated this as 'not a legal, but a moral duty'.[936] The Dominican Republic asserted that the USSR was both 'legally and morally' bound to cooperate.[937] China regarded the Secretary-General's entrance into Hungary to conduct an inquiry was 'part of the minimum obligations of the United Nations towards the Hungarian people'.[938] In focusing on the consequence of non-cooperation, Nepal also observed that the USSR's failure to 'comply' with Assembly resolutions 'shows their lack of faith and trust in the Purposes and Principles of the Charter'.[939] India, similarly, felt Soviet recalcitrance was a 'lack of courtesy' and a 'violation of the spirit of the Charter'.[940] However, the fruits of this interesting discussion, even if some of it was lacking in legal precision, did not inform subsequent recommendations; in fact, the Assembly soon backed down from its demand and used weaker language in subsequent recommendations exhorting the USSR to cooperate.[941]

Another vantage point to assess the force of recommendations to cooperate is the response by the Assembly in instances where the Member State fails to take the recommended course of action. Such failures have prompted the Assembly to 'strongly regret', 'deplore', 'condemn', or express a 'deep concern'.[942] This disapprobation,

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Sanctions to Obtain Sudan's Full Compliance with Security, Disarmament Obligations on Darfur' (18 September 2004) UN Doc. SC/8191 <http://www.un.org/press/en/2004/sc8191.doc.htm>.

[932] UNGA Res 1130 (XI) (1956), [2]. See earlier calls that were weaker in tone: UNGA Res 1004 (ES-II) (1956), [5].

[933] UNGA, Eleventh session, 608th plenary meeting (4 December 1956) UN Doc A/PV.608, 526.

[934] ibid 518.

[935] ibid 520.

[936] ibid 522 (India).

[937] ibid 529 (Dominican Republic).

[938] ibid, 517 (China).

[939] ibid, 521 (Nepal).

[940] ibid, 522 (India).

[941] See n 923.

[942] See eg UNGA Res 74/246 (2019), preamble ('Condemning' the 'ongoing non-cooperation' of Myanmar with UN mechanisms); UNGA Res 73/264 (2018) ('Strongly regretting' the Myanmar government's discontinuance of cooperation); UNGA Res 62/169 (2007), [1] ('Expresses deep concern' that Belarus failed to cooperate with all HRC mechanisms); UNGA Res 53/160 (1998), [14] ('Regrets the lack of cooperation' of the DRC); UNGA Res 49/196 (1994), [5] ('Condemns the continued refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Bosnian Serb authorities to

however, is generally not tied to an underlying violation of the UN Charter or other source of legal obligation.[943] The exceptions are some resolutions on South Africa and Portugal, in the colonial context, where the Assembly condemned repeated failure to comply with Assembly resolutions, which included a failure to cooperate with inquiries, as 'inconsistent with its membership' of the UN.[944] Repeated failures ultimately led the Assembly to recommend Member States to impose sanctions (see Chapter 7). Nonetheless, the Assembly's condemnatory practice in this respect is inconsistent; sometimes failures to cooperate, given emphasis in one session, receive little or no attention in the next, despite the failures being ongoing. An opportunity to consider this issue more closely arose following the release of the DPRK commission of inquiry report in 2014. It reasoned that the DPRK, in refusing to cooperate, was acting in 'open defiance of the United Nations' which justified the Security Council in taking enforcement action.[945] Despite endorsing the report and drawing upon some of its findings (e.g. on crimes against humanity), no Assembly recommendation sought to elucidate upon the proposition that the DPRK, in refusing to cooperate, had acted inconsistently with its obligations under the UN Charter.[946]

2.3 Explain or Account

There are also some recommendations that specifically call upon Member States to explain their conduct or to account for a situation to the Assembly or another UN organ.[947] This can be seen in the 1946 'request' that South Africa and India 'report' to the next session on 'measures adopted' to give effect to the recommendation.[948] Similarly, the failure of prospective UN members (Bulgaria, Hungary and Romania) in 1950 to explain alleged occurrence of atrocities led the Assembly to conclude in a resolution that these States did not offer a 'satisfactory refutation' of accusations.[949] In the context of alleged atrocities in Angola, the Assembly also 'requested' Portugal to submit a report to a designated future plenary session 'on the measures it has undertaken in the implementation of the present resolution'.[950] There are a group of

permit the Special Rapporteur to conduct investigations in territories under their control'); UNGA Res 33/113 C (1978), [2] ('Deplores the continued refusal by Israel to allow the Special Committee access to the occupied territories'); UNGA Res 31/124 (1976), [3] ('deplores' the fact that Chile refuse entry to the *Ad Hoc* Working Group); UNGA Res 1742 (XVI) (1962), preamble ('deplor[ed]' Portugal's failure to cooperate with a subcommittee it established to look into 'recent disturbances and conflicts in Angola'); UNGA Res 1603 (XV) (1961), preamble; UNGA Res 1312 (XIII) (1958), [3] *('Deplores the* continued refusal' of the USSR to cooperate); UNGA Res 1312 (XIII) (1958), [3]; UNGA Res 917 (X) (1955), [2] ('Notes with regret' that South Africa 'again refused to cooperate').

[943] Although Member States have not regarded the use of strong language to condemn non-cooperation - 'deploring' – to amount to an interference in the relevant state's internal affairs, see UNGA, Fiftieth session, 99th plenary meeting (22 December 1995 UN Doc A/50/PV.99, 12 (Sudan, invoking internal affairs, unsuccessfully sought a vote against UNGA Res 50/197 (1995), [12] that deplored their non-cooperation with a commission).

[944] UNGA Res 1819 (XVII) (1962), [8].

[945] DPRK Report (n 70), [1672].

[946] UNGA Res 69/188 (2014), preamble, [2] ('very serious concern' at non-cooperation); UNHRC Res 25/25 (2014), preamble ('deeply regretting' the refusal to cooperate).

[947] This burden of explanation has arisen in other areas: UNGA Res 1536 (XV) (1960), [4] (on the administration of non-self governing territories); UNGA Res 1402 (XIV) B (1959), [2] (on outcome of nuclear disarmament negotiation).

[948] UNGA Res 44 (I) (1946), [3] (treatment of Indians in South Africa).

[949] UNGA Res 385 (V) (1950), [4]. Indeed, their membership of the UN did not occur until 1955: UNGA Res 995 (X) (1955).

[950] UNGA Res 1742 (XVI) (1962) (Portugal), [9].

recommendations, in the enforced disappearance context, where the Assembly has 'requested' or 'called upon' the Member States concerned to 'clarify the fate' of those who disappeared or were unaccounted for.[951] Citing Article 27 of the Fourth Geneva Convention, concerning the protection of civilians, the Assembly also 'demanded' that Israel inform the Secretary-General of the 'results of the investigations' with respect to political assassination attempts.[952]

There are three brief points worth noting about the nature of recommendations to 'explain or account'. First, a recommendation to cooperate with a UN organ (above) would also implicitly entail an expectation that Member States would explain or account for events in their territory. Similarly, it seems reasonable to imply that a recommendation to conduct an investigation or prosecution will also bring with it a need to explain the outcome.[953] The Assembly's 'explain or account' practice is therefore more extensive where this related practice is also taken into account. Second, this type of recommendation is of particular use where access to evidence is problematic, or where the substantiation of an allegation turns upon establishing an understanding as to the intention underlying the Member State's conduct. The Assembly's recommendation that Sudan 'explain without delay the circumstances of the repeated air attacks on civilian targets in southern Sudan', is one example of this.[954] Third, the Assembly has generally failed to articulate any legal basis for a duty that underpins its 'explain or account' recommendations. Where it has used mandatory language (see the paragraph immediately above), it has seldom sought to connect this to an underlying legal requirement. It has sometimes condemned Member States for 'ignoring' Assembly recommendations as inconsistent with the UN Charter, although this practice is not widespread.[955] Despite lacking recognition in the text of recommendations to date, it is arguable that there exists some requirement in the UN Charter for Member States to explain their conduct where the Assembly recommends that they should do so, as developed in section 4 below.

2.4 Reparations

Another major category of recommendations directed towards Member States in the field of international justice concern reparations for internationally wrongful acts. A call to provide reparations, in this respect, might include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[956] As the Assembly's Reparation Principles make clear, upholding the interests of victims of international crimes and gross human rights abuse requires the availability of adequate, effective, prompt and appropriate remedies, including reparations.[957] The Assembly has further

[951] UNGA Res 38/100 (1983), [6] (Guatemala); UNGA Res 37/183 (1982), [5] (Chile). See also UNGA Res 49/203 (1994), [5]; UNGA Res 40/140 (1985), [6] (Chile); UNGA Res 33/175 (1978), [2] (Chile). A duty to clarify the fate of victims would be enshrined in Enforced Disappearances Convention art 24(2).
[952] UNGA Res 38/79 H (1983), [2] (repeated in UNGA Res 39/95 H (1984), [1]).
[953] Sometime the link is made explicit, see eg UNGA Res 48/147 (1993), [11] (Sudan) (called upon Sudan 'to investigate and explain without delay the circumstances behind the air attacks on 12 and 23 November 1993').
[954] UNGA Res 49/198 (1994), [6].
[955] See eg UNGA Res 1663 (XVI) (1961), preamble (South Africa); UNGA Res 1662 (XVI) (1961), [2] (South Africa); UNGA Res 1593 (XV) (1961), preamble (South Africa); UNGA Res 1179 (XII) (1957), [2] (South Africa).
[956] 'Reparations' here means that described in ARSIWA (n 861), art 34 ('restitution, compensation and satisfaction, either singly or in combination…').
[957] UNGA Res 60/147 (2005), [18].

underlined the need for reparations in the abstract in relation to specific violations of international law, including enforced disappearances,[958] torture,[959] sexual violence,[960] and extrajudicial killings.[961] Despite these abstract commitments, Assembly recommendations addressing an atrocity situation have not always included a call to secure reparations for victims, or if they have, this has not tended to be given much emphasis.

Nonetheless, there is a body of reparations recommendation practice that can be discerned from Assembly sessions. At its most general, this has included a call to provide 'redress for the victims of human rights abuses',[962] or stressing the importance of facilitating 'the provision of efficient and effective remedies to the victims'.[963] At its most specific, the Assembly has called for 'the immediate closure of all detention facilities not in compliance with the Geneva Conventions' in the former Yugoslavia and 'demand[ed]' that South Africa release prisoners of war forthwith.[964] The plight of forcibly displaced persons has also garnered attention, with the Assembly noting, for example, the right of victims of 'ethnic cleansing' in the former Yugoslavia to receive 'just reparation for their losses'.[965] In this regard, a major component of this practice concerns compensation for internationally wrongful acts. The Assembly thus 'demand[ed] that Israel 'in view of its international responsibility for its act of aggression, pay prompt and adequate compensation for the material damage and loss of life suffered as a result of that act'.[966] Citing the ICJ's *Wall* opinion, the Assembly has similarly 'demand[ed] Israel 'make reparation for all damage caused by the construction of the wall'.[967] It also 'request[ed]' South Africa, when a mandatory power, to 'provide adequate compensation to the families of the victims'.[968] Other variations on this language in other country situations has been to 'declare', 'reaffirm' and 'affirm the right of' victims to receive appropriate compensation.[969] The Assembly has also acted in tandem with Security Council mechanisms on the topic of reparations for victims, for example, in calling for Iraq to 'pay appropriate compensation' to those prisoners who died in its custody and to which it bears responsibility.[970]

A couple of general points can be made about this practice. Firstly, while the Assembly has, in the abstract, noted reparations to arise as a matter of international obligation, these obligations have not tended to be incorporated into the Assembly's

[958] UNGA Res 59/200 (2004), [6]
[959] UNGA Res 65/205 (2010), [19].
[960] UNGA Res 62/134 (2007), [1].
[961] UNGA Res 65/208 (2010), [3].
[962] UNGA Res 58/238, [15] (Guatemala).
[963] UNGA Res 64/11, [34] (Afghanistan).
[964] UNGA Res 48/153 (1994), [15]; UNGA 33/182 (A) (1982), [17]. See also UNGA Res 44/143 (1989), [4]; UNGA Res 40/161 A (1985), [4] (Israel/Occupied Palestinian Territories); UNGA Res 40/64 B (1985), [7] (South Africa); UNGA Res 36/137 (1981), [2] (Israel/Occupied Palestinian Territories); UNGA Res 35/227(A) (1981), [20] (South Africa/Namibia); UNGA Res 32/122 (1977), [4] (Israel and South Africa); UNGA Res 1600 (XV) (1961), [4] (Rep Congo).
[965] UNGA Res 48/153 (1994), [13]. See also UNGA Res 74/83 (2019), [1] (repatriation or compensation of Palestinian refugees).
[966] UNGA Res 37/27 (1981), [6]. See also UNGA Res 38/144 (1983), [7]; UNGA Res 37/68 (1982), [8] ('demands' that South Africa 'pay full compensation to Angola and other independent African States for the damage to life and property caused by its acts of aggression').
[967] UNGA Res 70/90 (2015), [11].
[968] UNGA Res 1567 (XV) (1960), [5].
[969] UNGA Res 50/193 (1995), [12] (former Yugoslavia); UNGA Res 41/39 A (1986), [7], [59] (South Africa/Namibia); UNGA Res 41/38 (1986), [4] (Libya); UNGA Res 41/12 (1986), [3] (Iraq).
[970] UNGA Res 49/203 (1994), [5]. Still, there is nothing in this resolution about holding the perpetrators criminally responsible; victim satisfaction meant monetary compensation.

specific recommendations towards Member States to provide reparations.[971] Nonetheless, the Assembly has tended to use mandatory language, 'demanding' or 'requesting' reparations, where it has made a prior finding that a Member State has committed an internationally wrongful act.[972] This connection is logical given that an obligation to make reparations flows from an internationally wrongful act.[973] Secondly, as already alluded, the Assembly has not been consistent in recommending that a responsible Member State provide reparations in atrocity situations, even in instances where it has noted the 'ongoing suffering' of victims.[974] This reflects the context of each situation, including other immediate priorities in a situation and the feasibility of achieving reparations on the ground. Some recommendations to secure the interests of victims are therefore not directed at the responsible Member State but more generally at the international community.[975] In this regard, some jurists have suggested that the Assembly could play a greater role in facilitating and coordinating reparations schemes, such as in establishing a victim compensation fund, with the responsible Member State being required to pay such amounts into the fund.[976] However, this proposal has yet to receive any traction in the Assembly.

2.5 Effectiveness of Recommendations to Member States

Having considered four types of Assembly recommendations in the field of international justice, this section will now briefly analyse their possible 'effects'. Given the extensiveness of this practice, it is impossible to provide a comprehensive analysis of their effects here. Rather, the purpose of this section is to identify broad fields of enquiry in which to assess the influence of the Assembly's recommendations, and in which to provide a focal point for future research, drawing upon the existing literature and primary materials in which such effects have been observed.

Most directly, this would take the form of the Member State concerned implementing the recommendation. The likelihood of this occurring will depend upon various factors, including perceptions as to the UN's authority in a particular situation, the extent of support for a recommendation, and the emphasis given to this issue by the Assembly.[977] Recommendations directed towards a 'friendly' Member State will have a much higher chance of being implemented compared to one that challenges the legitimacy of the Assembly's inquiry into their internal affairs.[978] The prospects of a

[971] GA Res 60/147 (2005), annex, [15].
[972] However, the language used is not always mandatory, see eg UNGA Res 52/147 (1997), [7] ('calls for the perpetrators of rape to be brought to justice'); UNGA Res 52/141, [3] ('calls upon' Iraq to pay compensation); UNGA Res 48/147 (1993), [10] ('calls upon' Sudan to provide compensation).
[973] See ARSIWA (n 861).
[974] UNGA Res 51/114 (1996), [3] (Rwanda).
[975] See eg UNGA Res 48/159 (1993), [13] ('Appeals to the international community to increase humanitarian and legal assistance to the victims of apartheid, to the returning refugees and exiles and to release political prisoners'; UNGA Res 62/96 (2007); UNGA Res 51/115 (1996), [7]; UNGA Res 41/123 (1986), [2].
[976] UNHRC, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48, [1971(b)]. Pursuant to UNGA Res 36/151 (1981), the Assembly has also established the 'Voluntary Fund for Victims of Torture', with a mandate to support torture survivors and their families; it does so by awarding grants to civil society organisations to deliver medical, psychological, legal, social and other assistance.
[977] Igor Lukashuk, 'Recommendations of International Organisations in the International Normative System' in William Butler (ed), *International Law and the International System* (Springer 1987), 40.
[978] See eg DPRK Report (n 70) [11], [25]. The overthrow of a friendly government with one hostile to Assembly pressure has also been noted to affect the extent of compliance with recommendations: Robert

recommendation being implemented also turn upon the Assembly's own commitment to this cause; as noted in Chapter 4, the Assembly's interest sometimes waned or their priorities in a given situation changed from ones that emphasised accountability towards other broader imperatives such as peace and reconciliation. While there are a lack of detailed studies into the direct influence of recommendations on Member State action, the speeches of many delegations in the Assembly have noted that their recommendations have 'moral force' or exert 'political pressure'.[979] There are also instances in which delegates have explained the measures that their State have taken to implement a recommendation.[980] Even where a Member State has not attributed the action it has taken to a recommendation, scholars have sometimes noted the important role such recommendations have played in exerting pressure on national authorities.[981] On the other hand, there are situations where recommendations were repeatedly ignored, as in the South African and Israeli situations, showing the lack of effectiveness of recommendations in 'hard cases'.[982] In these situations, some Member States have regarded recommendations to be a 'dead letter' without the ability to impose binding sanctions. [983]

Even if Assembly recommendations are not implemented by the Member State concerned this does not discount their value in contributing towards the international discourse on a situation. Assembly condemnations, as a 'mobiliser of shame', can contribute towards the delegitimating and marginalising of an abusive regime; a regime's failure to comply with a recommendation contributes towards the legitimacy narrative. Some Member States have noted that Assembly recommendations have served to allow the membership to articulate with a 'universal voice' an institutional position on a crisis, ensuring that the UN remains engaged and meets the expectations incumbent upon them.[984] The anticipation has been that Assembly recommendations have a deterrent effect in sending a 'clear warning' to perpetrators and would-be perpetrators; conversely a failure to support a recommendation has been noted in debate to be tantamount to 'active support for the regime's brutal policies'.[985] Some Member States have also emphasised the importance of Assembly recommendations in reviving an inclusive political dialogue and providing a basis for the cessation of hostilities.[986] Others have emphasised the utility of recommendations in ensuring that perpetrators

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Miller, 'United Nations Fact-Finding Missions in the Field of Human Rights' (1970-1973) 40 Aust YBIL 40, 42; UNGA, Eighteenth session, 1239th plenary meeting (11 October 1963) UN Doc A/PV.1239, 18 (South Vietnam).

[979] See Sloan, 'Changing World*'* (n 54*)*, 42 (and UN speeches cited there). UNGA, 73rd plenary meeting (2017) (n 588), 27 (Russia); UNGA, Sixty-second session, 76th plenary meeting (18 December 2007) UN Doc A/62/PV.76, 35 (Belarus); UNGA, 71st plenary meeting (n 646), 18 (Hungary).

[980] See eg UNGA, Seventy-third session, 65th plenary meeting (21 December 2018) UN Doc A/73/PV.65, 10 (Myanmar); UNGA, 1196th plenary meeting (n 662), [81]-[83] (Portugal).

[981] Yihdego (n 644), 53.

[982] See eg UNGA, 'Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People' (9 November 2018) UN Doc A/73/499, [6], [89]. See also UNGA Res 74/168 (2019), [1] ('deplores the failure' of Russia 'to comply with the repeated requests and demands' of the Assembly).

[983] UNGA, Sixtieth session, 58th plenary meeting (30 November 2005) UN Doc A/60/PV.58, 27 (Libya). On the extent of the Assembly's power to authorise sanctions, see Chapter 7.

[984] See eg UNGA, Seventy-first session, 58th plenary meeting (9 December 2016) UN Doc A/71/PV.58, 14 (US) (Assembly 'must stand with' the people of eastern Aleppo); UNGA, 76th plenary meeting (2011) (n 649), 9 (Hungary) (Assembly has sent a 'powerful message to the world' on Libya); UNGA, 71st plenary meeting (n 671), 21 (Iran).

[985] ibid (76th plenary meeting), 7 (US), 5 (Mauritius); UNGA 80th plenary meeting (2013) (n 646), 7 (US).

[986] UNGA 66th plenary meeting (n 642), 32 (Indonesia).

'do not go unnoticed in history'.[987] Some might reject dialogue of this kind as having no extrinsic effect. However, the building of an international consensus on what should be done is by no means inaction.[988] It has led Member States under scrutiny to either defend alleged crimes that have occurred in their territory, or to acknowledge the need for action to be taken.[989] Obtaining small concessions over time might be constructive towards the eventual implementation of the recommendations in some form. Even if the Member States defies recommendations this itself can supply the imperative for the Assembly to respond with creative solutions, such as to create quasi-prosecutorial organs (see Chapter 6).[990]

3. Recommendations to the Security Council

The Assembly has sought to interact with the Security Council in the exercise of their powers in various ways. First, the Assembly has supported Chapter VII action by calling upon Member States to observe Security Council resolutions.[991] Second, the Assembly has made recommendations to the Security Council to exercise its enforcement powers under Chapter VII powers, as indeed is envisaged in the UN Charter.[992] It has recommended that the Security Council take various forms of enforcement action, such as to establish an *ad hoc* tribunal, impose sanctions and to make a referral to the ICC.[993] It has also recommended that the Security Council consider 'all the measures laid down in Article 41 of the Charter', including to impose 'mandatory oil and arms embargoes' and 'comprehensive and mandatory sanctions'.[994]

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[987] GA 80th plenary meeting (2013) (n 646), 6 (Saudi Arabia).
[988] UNGA 58th Plenary Meeting (2016) (n 984), 12 (Brazil).
[989] Compare UNGA, 65th plenary meeting (2018) (n 980), 10 (Myanmar) with previous debates on proposed resolutions on Myanmar. See also eg UNGA 62nd plenary meeting (n 698), 4 (Saudi Arabia); UNGA, Fifth session, 303rd plenary meeting (3 November 1950) UN Doc A/PV.303, [23] (Poland, defending the human rights records of Hungary, Bulgaria and Romania); UNGA, 1196th plenary meeting (n 662), 1163 (Portugal, in relation to alleged atrocities in Angola); UNGA, 1183rd plenary meeting (n 642), 965-972 (Portgual).
[990] Assembly recommendations in international justice can serve as a precedent for other international bodies; they are also frequently referred to in commission of inquiry reports and observance of them is sometimes part of the list of recommendations in such reports: See eg DPRK Report (n 70), [1220]; UNHRC, 'Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory' (6 March 2019) UN Doc A/HRC/40/74, [125] (to implement UNGA Res 60/147 providing effective remedies to victims).
[991] UNGA Res 71/130 (2016), [5] (Syria). See also UNGA Res 2054 (XX) A (1965), [8] (South Africa); UNGA Res 2506 (XXIV) (1969), [6] (South Africa).
[992] UN Charter, art 11(3) entitles the Assembly to call to the Security Council's attention a matter that endangers peace and security. This provision is occasionally invoked: eg UNGA Res 1663 (XVI) (1961), [4]. See also Higgins, 'Oppenheim's International Law' (n 414), 961 (noting that 'the number of General Assembly resolutions directed at the Security Council, or its members, has increased exponentially between the UN's early years and now.')
[993] UNGA Res 74/246 (2019) (on Myanmar, 'call[ing] the continued attention of the Security Council to the situation … with concrete recommendations for action'); UNGA Res 71/202 (2017), [9] (DPRK); UNGA Res 71/203 (2017), preamble (Syria); UNGA Res 69/189 (2014), preamble (Syria); UNGA Res 47/121 (1992), [10] (FRY); UNGA Res 31/61 (1976), [6] (requested the Security Council to 'take effective measures' for the 'implementation of all relevant resolutions of the Council and the General Assembly on the Middle East and Palestine'). If not containing a recommendation for a particular course of action to be taken, some Assembly resolutions merely draw a situation to the attention of the Security Council, see eg UNGA Res 2022 (XX) (1965), [13].
[994] See UN Charter, art 11(2), (the Assembly shall refer any question 'on which action is necessary' to the Security Council). Scholars have noted that a recommendation of this nature pertains to mandatory enforcement action: Klein (n 8), 473; Higgins, 'Oppenheim's International Law' (n 414), 972; Andrassy

The Assembly has also recommended the Security Council to consider exercising their power under Article 6 so as to support the expulsion of South Africa's UN membership.[995] Assembly recommendations have even extended to the Security Council's subsidiary organs; one recommendation encouraged the ICTY to give 'due priority' to the prosecution of the crime of rape in armed conflict.[996] It might also be imagined that the Assembly's detailed explication of evidence in a country situation (as a quasi-judicial resolution), in promoting a narrative that is collectively supported by Member States, has also served a purpose of exerting pressure on the Security Council to take enforcement action in light of these documented atrocities. The Assembly has sought to exert pressure on the Security Council to take action by pointing out that it has been reticent in addressing a particular issue, or that one of its permanent members has misused its veto power or failed to properly exercise its functions.[997] For example, the Assembly encouraged the Security Council to consider a referral to the ICC of the situations in the DPRK and Syria, in the latter situation 'regretting' that a draft resolution was not adopted despite 'broad support from Member States'.[998]

Judge Lauterpacht once observed that Assembly recommendations offer 'a measure of supervision' over the Security Council.[999] However, measuring the effect of Assembly recommendations on Security Council action, as with Member States (above), is not easy to establish. Nonetheless, there are certain instances where the Security Council has taken action in situations where the Assembly had recommended them to do so. For example, in regard to apartheid in South Africa, the Security Council imposed a mandatory arms embargo after more than a decade of sustained pressure in the Assembly for Chapter VII measures to be adopted.[1000] Outside of the context of atrocity crimes accountability, the Security Council established a no-fly zone in Bosnia and Herzegovina, following the Assembly's call for Chapter VII measures to be taken

(n 77) 567-8. As to some of this practice, see: UNGA Res 41/35 H (1986), [6] (South Africa); UNGA Res 38/39A-K (1983); UNGA Res 36/172 A-O (1981); UNGA Res 32/116 B (1977); UNGA Res 2508 (XXIV) (1969), [14] (South Africa).

[995] UNGA Res 1761 (XVII) (1962), [8].

[996] UNGA Res 49/205 (1994), [7].

[997] See eg UNGA Res 66/253 B (2012), preamble ('deploring the failure of the Security Council to agree on measures to ensure the compliance of Syrian authorities with its decisions'); UNGA Res 42/14 A (1987), preamble (noting with 'grave concern that the Security Council has been prevented, on account of vetoes cast by two if its Western permanent members, from carrying out its responsibility under Chapter VII of the Charter'); UNGA Res 41/38 (1986), preamble ('[n]oting with concern that the Security Council has been prevented from discharging its responsibilities owing to the negative votes of certain permanent members'); UNGA Res 37/123 A (1982), [8] ('strongly deplores the negative vote by a permanent member' to prevent action against Israel); UNGA Res ES-9/1 (1982), preamble ('noting with regret and concern that the Security Council…failed to take appropriate measures against Israel'); UNGA Res 36/172 A (1981) ('noting with indignation' the vetoes of western permanent members on mandatory sanctions against apartheid South Africa); UNGA Res 3116 (XXVIII) (1973), [9] (vetoes 'continued to obstruct the effective and faithful discharge by the Council of its responsibilities under the relevant provisions of the Charter' in relation to the situation in Southern Rhodesia); UNGA Res 2506 (XXIV) (1969), preamble (Security Council 'has not considered the problem of apartheid since 1964'); UN, *Yearbook of the United Nations* (1974), 113 (African National Congress described Security Council permanent members as 'accomplices of a regime which had committed atrocities and crimes against humanity').

[998] UNGA Res 71/203 (2017), preamble; UNGA Res 71/202 (2017), [9]; UNGA Res 69/189 (2014), preamble.

[999] See observations in *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa* (Advisory Opinion) [1955] ICJ Rep 67 (Separate op Judge Lauterpacht), 119.

[1000] UNSC Res 418 (1977).

to establish safe areas in this territory.[1001] Relatedly, the Security Council even endorsed a quasi-judicial resolution of the UNHRC, that detailed the possible occurrence of atrocity crimes in the Libyan situation, as a basis to support a referral to the ICC Prosecutor.[1002] Still, these examples of successful cooperation are countered by the limitations of plenary influence at the sharp end of permanent member politics; despite a campaign in the Assembly to secure a referral of the situation in Syria to the ICC Prosecutor, it failed because of the negative votes of the PRC and Russia in the Security Council.[1003] In such 'hard cases', the best that can be hoped for is that Assembly resolutions help build momentum towards the eventual consideration of the issues in the Security Council. For example, Resolution 69/189 (2014) drew upon findings in a commission of inquiry report that called for the Security Council to refer the situation in DPRK to the ICC Prosecutor.[1004] Although no resolution was drafted or vote taken, the Assembly's call to address impunity there prompted the Security Council to meet in closed session to consider it, being a small but necessary step for it broadening consideration of enforcement action in relation to the DPRK from disarmament to humanitarian issues.[1005]

Finally, even if recommendations are ignored by the Security Council this does not mean that they are therefore irrelevant or ineffective. Such recommendations allow the membership to take an institutional position which, if blocked in the Security Council, would supply the imperative to explore creative solutions. Once the Security Council failed to act upon an Assembly recommendation to consider action under Article 6 of the UN Charter to expel South Africa, the Assembly creatively used their power to reject credentials so as to deprive this State of some of its rights of membership.[1006] One of the boldest creative solutions, action under Uniting for Peace, considered in Chapters 6 and 7, is itself premised upon showing Security Council 'failure'. Where the Security Council fails to implement an Assembly recommendation this in turn can be used to trigger powers under the Uniting for Peace mechanism.[1007]

4. 'Recommendations' to Member States: A Minimum Legal Requirement?

The previous section provided a survey of Assembly recommendations that have addressed the imperative of accountability for atrocity crimes. Even though some of these recommendations used language that appeared to be mandatory in its terms ('demand' or 'request'), this practice has not developed anywhere near to the point that it would support the proposition that a recommendation is capable of being legally binding on Member States.[1008] While the orthodox position as to the non-binding character of recommendations is accepted in this dissertation, and is evident in the practice surveyed above, it still remains instructive to consider whether recommendations, or more accurately the legal framework that underpins them,

[1001] See UNSC Res 819 (1993); UNSC Res 781 (1992); UNGA Res 47/121 (1992).
[1002] UNSC Res 1970 (2011), preamble, [4] (citing UNHRC Res S-15/1 (2011)). See also UNSC Res 2040 (2012), preamble; UNSC Res 2000 (2011), preamble. The Security Council has also endorsed the work of commission of inquiries established by the UNHRC: UNSC Res 2140 (2014), [6]; UNSC Res 2134 (2014), [19]; UNSC Res 1975 (2011), [8].
[1003] UNSC, Sixty-ninth year, 7180th meeting (2 May 2014) UN Doc S/PV.7180, 4.
[1004] UNGA Res 69/189 (2014).
[1005] Ramsden and Hamilton (n 4), 900; Schmidt, 'UN General Assembly' (n 8), 27–80.
[1006] See Chapter 4.
[1007] Carswell (n 76).
[1008] See Chapter 4.

produce any legal requirements upon Member States. The practice above alluded to a general expectation that Member States at least engage with the Assembly on a situation; in numerous situations, as noted, a failure to do so has been characterised as incompatible with UN membership. The purpose of this section therefore is to consider the nature and extent of legal requirements that arise under the UN Charter from the Assembly's adoption of a recommendation. The general nature of the argument here not only supports recommendations enjoying a stronger legal impetus in the specific field of atrocity crime accountability, but in other fields too.

4.1 Consider and Explain

There is authority to support a requirement that Member States give a good faith consideration to the contents of a recommendation and to furnish reasons where it is minded to reject it. This principle finds roots in domestic systems of administrative law, which impose a requirement upon a public authority to take into account all relevant considerations before making a decision and to furnish reasons.[1009] This administrative law concept shares the same normative root with the 'good faith' principle, being a general principle of treaty interpretation.[1010] Article 2(2) of the UN Charter defines this duty to apply to the fulfilment of 'obligations assumed by them in accordance with the present Charter'. It might be said that as recommendations are not 'obligations' there is no duty to act in good faith. But it is reasonable to consider the good faith principle as applying to all aspects of the Member States' relations with the UN, including in its consideration of Assembly recommendations.

Even without a great deal of Assembly practice, there are good reasons to support the view that such a duty to 'consider and explain' is concomitant of the duty to act in good faith under the UN Charter. There are hints of this reasoning in the Assembly's Fact-Finding Declaration, which notes that any 'request' for a Member State to receive a mission 'should' be given 'timely consideration' and 'reasons' where they refuse entry.[1011] ICJ judicial opinions have been more explicit. In 1955, Judge Lauterpacht, when considering the duty in administering trust territories, observed that '[a] Resolution recommending to an Administering State a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision.'[1012] While it is inherent in the notion of a 'recommendation' to respect the subject's freedom to accept it, according to Judge Lauterpacht the good faith principle shows that this is 'not a discretion tantamount to unrestricted freedom of action'.[1013] The relevant Member was 'bound to give it due consideration in good faith' and 'reasons' where it disregards the recommendation.[1014] Echoes of this reasoning can also be seen in the ICJ's 2014 decision in *Whaling*, in the context of the International Whaling Convention.[1015] There the ICJ noted that Japan was under 'an obligation to give due regard to…recommendations' adopted by the International Whaling Commission (IWC).[1016]

[1009] These principles recur in comparative administrative law studies, for example: Swati Jhaveri and Michael Ramsden (eds), *Judicial Review of Administrative Action across the Common Law World: Origins and Adaptations* (CUP 2020).
[1010] VCLT (n 108), art 26.
[1011] UNGA Res 46/59 (1991), [19], [20].
[1012] *South West Africa* (Advisory Opinion) (Separate op Judge Lauterpacht) (n 999), 119.
[1013] ibid 120.
[1014] ibid.
[1015] *Australia v Japan* (Merits) (n 448).
[1016] ibid 269-270.

The ICJ did not explicate upon the basis of such a duty, except to note that Japan accepted it and that it flowed from a 'duty to co-operate'.[1017] *Ad hoc* Judge Charlesworth was more explicit in noting that IWC resolutions 'when adopted by consensus or a large majority vote…represent an articulation of the shared interests at stake'; parties are 'thus required to consider these resolutions in good faith'.[1018] In the context of the UN Charter, the same can be said about Assembly recommendations.

It might be queried whether this is a rule of much content. It is a principle that cannot be easily enforced against a Member State in a UN judicial forum, given the limitations of the ICJ's jurisdiction (although it would be open to the Assembly to request an advisory opinion on this legal question).[1019] Furthermore, Member States on the receiving end of recommendations will also often explain the reasons as to why they reject it. Member States condemned for failing to address atrocity crimes will often, for example, challenge the veracity of these accusations and therefore why it will not heed to specific recommendations.[1020] In this regard, the Assembly is the ultimate judge as to whether a Member State has given a good faith consideration to its recommendations. But it seems plain that a persistent disregard of recommendations would support a conclusion by the Assembly that the Member State concerned has failed to act in good faith. As Judge Lauterpacht opined, 'the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter'.[1021] The Judge went on to note that where the recommendation approximates unanimity, the Member State at the wrong side of it 'may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right.'[1022] In these instances, the Assembly is entitled to take action to remedy such recalcitrance, be that in rejecting the credentials of the State's representatives or in exploring other creative solutions for compliance.[1023] At the very least, a closer and more sustained articulation of this duty to consider and explain in Assembly resolutions would serve to exert more pressure on the Member State concerned to engage or take the suggested action, or otherwise serve to marginalise their position within the UN system.

4.2 Cooperate

Cooperation is one of the UN Charter's organising concepts, raising an issue whether this concept supports more specific requirements upon the membership to act upon the adoption of Assembly recommendations. Article 1 explicates that, amongst the UN purposes, is to 'achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character…' and to be a 'centre for harmonizing the actions of nations in the attainment of these common ends'. Pursuant to Article 56, '[a]ll Members pledge themselves to take joint and separate action in co-

[1017] ibid 257. The relevant provision at issue, art VIII of the Convention, was also not so explicit.
[1018] ibid (Separate op Judge Ad Hoc Charlesworth), 457-458.
[1019] See Akande, 'Judicial Control of the Political Organs' (n 484), 334; Tzanakopoulos, 'Disobeying the Security Council' (n 484), 59.
[1020] See, for example, allegations against Myanmar in relation to crimes against its Rohingya population: UNGA 65th plenary meeting (2018) (n 980), 10; Ramsden, 'Accountability for Crimes Against the Rohingya' (n 704).
[1021] *South West Africa* (Advisory Opinion) (Separate op Judge Lauterpacht) (n 999), 120.
[1022] ibid.
[1023] See further Chapter 4.

operation with the Organization' to achieve a myriad of human rights and socio-economic purposes set out in Article 55. Furthermore, specific forms of cooperation are also envisaged whenever 'action' is taken. Under Article 2(5), all Member States shall give 'every assistance in *any* action' the UN takes 'in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action'.[1024] Although in general terms, these principles have been used to support arguments in favour of more specific requirements for Member States to cooperate with the Assembly and its subsidiary organs.

Blaine Sloan in particular has argued that this cooperation imperative entails a duty to 'consult together' with the UN in good faith.[1025] If a Member State, after considering a recommendation, concludes in good faith that it is unable to comply, it has a duty to consult with the UN on ways to achieve the Organization's object and purpose, the fulfilment of which is the aim of the Assembly recommendation.[1026] Support for this principle can be seen in the ICJ's advisory opinion concerning the regional office agreement between the WHO and Egypt.[1027] There the ICJ noted a requirement for Member States and the UN to 'consult together in good faith', not only grounded in the WHO-Egypt agreement but based on the 'very fact' of membership of an international organization that 'entails certain mutual obligations of co-operation and good faith'.[1028] The same can also reasonably be said about the UN Charter and the role of Assembly recommendations as an expression of action to be taken by Member States that is necessary to achieve the purposes and objectives of the Organization. If the Member State is minded to reject the recommendation then the duty to 'consult together in good faith' nonetheless requires further cooperation to find a means for the Organization's object and purpose to be met. This principle might govern Assembly-Member State interactions in many different ways in the atrocity crimes accountability context, including, for example, for Member States to consider domestic prosecutions where it rejects a recommendation to cooperate with a UN commission of inquiry. The 'consult together' principle therefore requires the Member State concerned to continue to remain engaged in dialogue to find a solution to that which has prompted Assembly attention, even where it disagrees with a particular recommendation. That all said, the Assembly has not expressly sought to supervise Member State conduct according to this 'consult together' principle, there being room for a more sustained practice to develop in the Assembly in the future.

4.3 Legal Significance of Reference to Pre-Existing Obligations

If the good faith and cooperation principles in the UN Charter support some requirements upon Member States to engage with Assembly recommendations, the question is whether a recommendation can ever be regarded as legally binding. As the recommendations practice considered above indicated, sometimes the Assembly has expressed recommendations in language that would suggest its implementation to be mandatory. Similarly, there have been occasions in which the Assembly has condemned non-compliance with its recommendations in strong terms and also tied such

[1024] Emphasis added.
[1025] Sloan, 'Changing World' (n 54), 31.
[1026] ibid.
[1027] *Interpretation of the Agreement between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, 95, 97.
[1028] ibid 93, 95.

recalcitrance to an underlying incompatibility with the UN Charter. On the one hand, this use of muscular language does not seem to be particularly consistent with a mere 'recommendatory' function and suggests something more. Yet, on the other hand, this practice is not sufficiently consistent to support the proposition that there has been an institutional shift in position from the orthodox understanding as to the non-binding nature of Assembly recommendations. It is always possible for the Assembly to aggregate to itself over time more significant powers in monitoring atrocity crime accountability, but any attempt to do so would come up against the significant objection that a binding function is not reflected in the Charter or in a significant enough body of UN practice.[1029]

Nonetheless, it is theoretically possible for Assembly recommendations pertaining to atrocity crime accountability to have a legal effect within distinct treaty regimes outside of the UN Charter; provided that these distinct regimes recognise this legal effect. One such example is the Peace Treaty with Italy, the major post-War powers agreeing that, in the event that they were unable to arrive at agreement on the future of Italian colonies, then the matter should be 'referred to the General Assembly of the United Nations for a recommendation, and the Four Powers agree to accept the recommendation and to take appropriate measures for giving effect to it'.[1030] The Peace Treaty in turn formally recognised the competence of the Assembly to make a determination (i.e. quasi-judicial) and to recommend measures that the parties agreed to implement. The inclusion of an Assembly role to monitor State compliance with a treaty and to furnish binding recommendations under that particular regime offers a potential means to strengthen treaty commitments by endowing an oversight function in the Assembly. The obvious difficulty here is that none of the existing treaty regimes concerned with atrocity crimes recognise a monitoring role for the Assembly, nor its recommendations as authoritative. Nor does the text of proposed future conventions, such as the Draft Convention on Crimes Against Humanity.[1031]

Even so, the Assembly has still regularly, in its recommendations, drawn from international obligations and called for Member States to observe these obligations (what are labelled *norm-implementing* recommendations here for convenience). Where the Assembly incorporates and specifies obligations in its recommendations this is often accompanied by language that expresses a greater expectation of compliance ('demand' or 'request') compared to those recommendations that are not so clearly anchored in an underlying international obligation. One prominent example is South Africa's 'failure to comply with repeated requests and demands' of the Assembly to 'revise its racial polices' meant that it was disregarding both applicable resolutions *and* its obligations

[1029] The ICJ has appeared to endorse the proposition that the Assembly may enjoy authoritative competencies, noting that 'it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operation design.': *Namibia* (Advisory Opinion) (n 108), 50 (emphasis added).

[1030] Annex XI, Peace Treaty (emphasis added). The Four Powers being the USSR, UK, US and France. The Assembly resolutions that bound the Four Powers included UNGA Res 1418(XIV) (1959) (Somalia); UNGA Res 617(VII) (1952) (Eritrea); UNGA Res 515 (VI) (1952) (Libya); UNGA Res 442 (V) (1950) (Somalia); UNGA Res 390 (V) (1950) (Eritrea); UNGA Res 387(V) (1950) (Libya); UNGA Res 289 (IV) (1949). Another potential basis not explored here is based upon the principle of estoppel, in instances where a Member State declares a clear intention to observe an Assembly recommendation: Lassa Oppenheim and Hersch Lauterpacht, *International Law, Vol 1* (Longmans 1948), 139 (referring to League of Nations Assembly resolutions, but the same principle applies); Oscar Schachter, 'Towards a Theory of International Obligation' (1968) 8 Va J Intl L 300; Bleicher (n 23) 457.

[1031] 'Draft articles on Crimes Against Humanity' (n 246), 21.

under the UN Charter.[1032] This view is reflected in a 1957 report of the Secretary-General, noting that a recommendation seeking the implementation of the Charter 'would have behind it the force of the Charter'.[1033] Even so, this does not make the recommendation binding. Nor has a norm-implementing recommendation expressly claimed to be binding.[1034] Rather, the value of a norm-implementing recommendation is its interpretive claim that, within the view of the Assembly at least, a particular Member needs to take the recommendation steps to meet its international obligations.[1035] This in turn provides the foundation for the Assembly to take future measures within its powers or to recommend the Security Council to do so. But it also supports the generalisation of the view within international affairs that the State concerned does not respect its international obligations, as defined and monitored in Assembly recommendations.

5. Conclusion

This Chapter has provided an overview of Assembly recommendations practice in international justice. It has shown that the Assembly has been active in recommending Members to investigate or prosecute crimes, cooperate with UN mechanisms, explain or account for their actions, and to provide reparations to victims. The Assembly has also attempted to influence the Security Council by recommending that it takes action to secure accountability for atrocity crimes, while denouncing their failures to act. However, Assembly practice is by no means consistent, both as to the selection of situations in which recommendations are made and the form in which they are made. Inconsistencies in approaches were also noted whereby a recommendation would not always be followed up in subsequent sessions or where the imperative for accountability would give way to other imperatives. There is also inconsistency in the integration and application of pre-existing legal obligations in recommendations. Despite the Assembly adopting many relevant declarations on the enforcement of international justice (see Chapter 2), these also do not tend to feature at a level of specific application in country situation recommendations. There are likely to be many different reasons for this, not least the preferences of the drafters, but it would certainly support the advancement of international law if the Assembly sought to underpin its recommendations with pre-existing obligations and the norms that it has previously articulated in its declarations.

Nonetheless, it was observed that Assembly recommendations are capable of producing effects that advance international justice. Even if this has not resulted in implementation by the Member States or the Security Council, recommendations have

[1032] See eg UNGA Res 1663 (XVI) (1961), preamble (South Africa); UNGA Res 1662 (XVI) (1961), [2] (South Africa); UNGA Res 1593 (XV) (1961), preamble (South Africa); UNGA Res 1179 (XII) (1957), [2] (South Africa).

[1033] UNSG, 'Question Concerned by the First Emergency Special Session of the General Assembly from 1 to 10 November 1956', Report of the Secretary-General in pursuance of the resolution of the General Assembly of 2 February 1957, (A/Res 461)' (11 February 1957) UN Doc A/3527, [20]. See also White, 'Law of International Organisations' (n 41), 179 (noting that because norm-implementing recommendations 'were clearly based on principles of international law, there was no doubt about their legal effect'); Schachter, 'Quasi-Judicial Role' (n 30), 961.

[1034] See also UNGA 50th plenary meeting (n 744), 17-18 (in addressing the invocation of obligations in recommendations, the US delegate observed: 'We understand that these texts and resolutions adopted in the General Assembly are non-binding documents that do not create rights or obligations under international law').

[1035] This interpretive claim is often expressed in explanations of vote, of which see eg UNGA, 80th plenary meeting (2013) (n 646), 34 ('It is important that a clear message be sent today to demand that the Syrian authorities strictly observe their obligations under international law').

been appreciated as having influence in different ways, including as a means to articulate a common institutional position; in serving a deterrent function where a conflict is ongoing; in burdening a Member State to explain their position and cooperate; and in building an international consensus towards particular enforcement measures being taken. The Assembly's practice also supports the general proposition that recommendations are not binding, despite some of them using mandatory language and drawing upon pre-existing legal obligations. It might be that, over time, a set of recommendations support the development of an obligation, as an 'established practice' under the UN Charter. There might be support for movement in this direction particularly in relation to cooperation with UN commissions of inquiry; many Assembly cooperation recommendations increasingly use mandatory language ('demand' or 'request'), although this language is not so clearly anchored in a belief (at least insofar as the explanations of vote reveal) that there is a legal obligation to cooperate, as yet. While not binding, the application of legal norms in recommendations serves to exert greater pressure on Member States to comply, having behind them 'the force' of international obligations.

Despite the orthodox view being that Assembly recommendations are non-binding, it was also shown that they do entail some minimum requirement on Member States. Rooted in the UN Charter good faith principle, Member States are still required to give due consideration to a recommendation and to consult with the Assembly on the attainment of its object and purpose. While these are quite minimal legal requirements, they do provide the Assembly with a measure of supervision over the implementation of their recommendations by Member States. In this regard, some Assembly practice evaluated in this Chapter corresponds with the proposition that a Member State's persistent disregard of recommendations supports the conclusion that this Member has acted in bad faith or inconsistently with the UN Charter. Although this practice is quite limited, linking a failure to comply with a recommendation with a violation of the UN Charter can serve not only to impose reputational costs on deviant Member States, but it might also provide the foundation for the Assembly to take future action. This might come in various forms, from a strengthening of language in future recommendations to the consideration of creative solutions to exert greater pressure on Member States to comply. Two possible solutions of this nature, the creation of subsidiary investigatory machinery and the authorisation of sanctions, are considered in the Chapters that follow.

CHAPTER 6: GENERAL ASSEMBLY EMPOWERMENT OF INQUIRIES AND COURTS

1. Introduction

Whereas previous Chapters considered the effects that arise from Assembly resolutions (be they quasi-legislative, quasi-judicial, or recommendatory) the following Chapter considers the potential for the Assembly to empower or establish investigations, or courts, to secure accountability for atrocity crimes. This Chapter in turn builds upon two recurring themes in this dissertation so far. The first is that the Assembly, in order to play a meaningful role in international justice, needs reliable and independent information in which to draw from when considering action in a situation; the ability of the Assembly to establish commission of inquiries, vested with the power to investigate alleged violations of international law, is therefore potentially important. The second is the need to consider creative solutions in the event that either the Security Council or the relevant Member State fail to take the Assembly's desired action. These solutions include going further than the 'traditional' form of inquiry to one vested with quasi-prosecutorial powers, in preparing case files against individual suspects so as to support international or national prosecutions. The potential, as a means to overcome obstructions in the Security Council, for the Assembly to make greater use of its power to seek an advisory opinion from the ICJ has also been recognised as a possibility by some scholars. The Assembly might seek an advisory opinion, in this regard, as a way to bring judicial scrutiny to an issue or situation that was previously lacking due to permanent member deadlock. A more radical suggestion is for the Assembly to establish, as a subsidiary organ, an *ad hoc* criminal tribunal with the power to render coercive decisions against individual suspects.

The purpose of this Chapter will be to consider the legal foundations for the Assembly to invoke these creative solutions as a means to advance international justice. It starts with analysis of the Assembly's established practice in creating commission of inquiry. Although there is ample established practice to support their lawful creation, it is also useful to provide a justification for them within the text of the UN Charter. This is particularly so in light of the Assembly's creation in 2016 of the IIIM-Syria, a model of investigation (quasi-prosecutorial) that encountered strong resistance from some Member States, including Russia. From there, the Chapter then considers the extent to which the Assembly is able to engage the ICJ in advancing international justice in the exercise of its advisory opinion jurisdiction. Drawing from examples, it considers how broad the Assembly's power is to frame questions for the ICJ's consideration, opening up the potential for more ICJ engagement in international justice, upon the Assembly's initiation. Finally, the Chapter then considers what only remains theoretical at this stage; the Assembly's creation of an *ad hoc* tribunal analogous to one established by the Security Council.[1036] Yet, an *ad hoc* tribunal created by the Assembly, to be able to act

[1036] There are other contributions of the Assembly to the functioning of courts not explored in detail here, including their role in funding and appointing key personnel. See eg UNGA Res 73/279 (2018) (subvention grant to the ECCC approved by the Assembly); UNGA Res 58/284 (2004) (subvention grant to the SCSL approved by the Assembly). The Assembly is also able to approve funds to support investigation and prosecutions at the ICC following a referral by the Security Council, see Jennifer Trahan, 'The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices'(2013) 24 Crim LF 417, 450-54.

coercively, would have to be founded on a different legal basis than one under Chapter VII.

2. Commissions of Inquiry

The Assembly has established commissions of inquiry for the purpose of determining the existence of violations of international law, to promote or monitor the implementation of such obligations (including to deter future violations), and to ensure that members are 'in possession of the fullest and best available information regarding [a] situation'.[1037] On other occasions, the Assembly has not directly created mechanisms but rather requested or entrusted responsibility in other UN organs (such as Special Rapporteurs or preexisting inquiries) to monitor compliance and implementation of a Member State's international obligations.[1038] The Assembly has 'requested' the Secretary General to initiate and coordinate country-specific investigations into the occurrence of international crimes, as well as to make necessary resources available to do so.[1039] With the exception of the IIIM-Syria (considered below), individual accountability for the perpetrators is rarely established as a goal of such commissions, them being more broadly concerned with identifying violations of international human rights law or international criminal law/international humanitarian law.[1040]

2.1 Legal Foundation of Assembly-established Commissions of Inquiry

The Assembly has an established practice in creating commissions of inquiry, in response to the situations in Greece, Congo, South Vietnam, the Occupied Palestinian Territories, Hungary, South Africa, Mozambique, Cambodia, Afghanistan and Syria.[1041] The weight of this practice alone would suffice to establish a legal power for the Assembly to create inquiries as subsidiary organs.[1042] Practice aside, the basis for the Assembly to establish commissions of inquiry is also supported by the purposes and powers of the Assembly, even if only the Security Council is referenced with having a fact-finding role in the UN Charter.[1043] As the Fact Finding Declaration makes clear, the Assembly regards itself as able to undertake fact-finding so as to exercise its responsibilities in the maintenance of peace and security.[1044] A key function of

[1037] UNGA Res 50/90 (1995), Preamble (Kosovo); UNGA Res 1132 (XI) (1957), preamble (Hungary).
[1038] See eg UNGA Res 49/207 (1994), [6] (Afghanistan); UNGA Res 42/56 (1987), [6] (South Africa); UNGA Res 1627 (XVI) (1961), [2] (Burundi); UNGA Res 38/101 (1983), [14] (El Salvador).
[1039] UNGA Res 72/190 (2017), [1] (Ukraine); UNGA Res 72/252 (2017) (death of death of Dag Hammarskjöld), [1]; UNGA Res 58/247 (2003), [7] (Myanmar); UNGA Res 50/193 (1995), [25] (former Yugoslavia); UNGA Res 49/204 (1994), [7] (former Yugoslavia); UNGA Res 49/196 (1994), [31] (former Yugoslavia); UNGA Res 33/172 (1978) (Cyprus); UNGA Res 1004 (ES-II) (1956), [1] (Hungary).
[1040] Théo Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16 JCSL 105, 114.
[1041] UNGA Res 109 (II) (1947) (Greece); UNGA Res 1132 (XI) (1957), [1] (UN representative for Hungary); UNGA, 1239th plenary meeting (n 978), 18 (South Vietnam); UNGA Res 2443 (XXIII) (1968) (Palestine); UNGA Res 3114 (XXVIII) (1973) (Mozambique); UNGA Res 71/248 (2016) (Syria); UNGA Res 52/135 (1998) (Cambodia); UNGA Res 54/185 (1999) (Afghanistan); UNGA Res 1601 (XV) (1961) (Congo).
[1042] On the concept of established practice, see Chapter 3.
[1043] See UN Charter, art 34.
[1044] UNGA Res 46/59 (1991), annex, [10].

commissions of inquiry is fact finding, which includes to take statements from complainants and witnesses, to inspect and search relevant documents and to have access to relevant sources.[1045] In this regard, the creation of such entities arises as necessarily incidental to the deliberative functions of the Assembly, under Article 10 of the UN Charter, to 'discuss' and 'make recommendations' in relation to 'any questions or matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter'. Article 10 should be read with Article 22, which empowers the Assembly 'to establish such subsidiary organs as it deems necessary for the performance of its functions'. It therefore stands to reason that the creation of commissions of inquiry arises impliedly in the exercise of Article 10 powers, in ensuring that the Assembly's recommendations are expertly informed by independent fact-finding.

A different form of commission of inquiry was established by the Assembly in 2016, in response to the failure of the Security Council to refer the situation in Syria to the ICC Prosecutor.[1046] Rather than being focused generally on collecting evidence of human rights investigations (as with a typical commission of inquiry), the IIIM-Syria was mandated to collect and analyse evidence to identify specific perpetrators to facilitate criminal prosecutions be it in a national, regional or international tribunal.[1047] This quasi-prosecutorial model was later used by the UNHRC in establishing an analogous mechanism to investigate atrocity crimes in Myanmar.[1048] Although still ultimately reliant on others to take the necessary action to secure the prosecution of the identified suspects, the Assembly's creation of the IIIM-Syria was considered to be a particularly valuable first step towards such action being taken. As Liechtenstein noted in support of the resolution, the intention of the IIIM-Syria was 'designed to facilitate and expedite criminal proceedings once there is a court or tribunal able and willing' to fairly try the suspects.[1049]

Although widely supported by Member States, a minority of Members took issue with the Assembly assuming a 'quasi-prosecutorial' function. Russia argued that the Assembly cannot establish an organ that had more power than itself.[1050] The Russians complained in particular that analysing evidence and preparing files, according to a criminal standard of proof, were 'prosecutorial' functions in nature and thus not amongst the functions of the Assembly.[1051] It would also operate without the consent of Syria and thus was inconsistent with the principle of sovereign equality.[1052] On this basis, Russia argued that 'the General Assembly acted *ultra vires* - going beyond its powers as specified' in the UN Charter.[1053] The establishment of the IIIM-

[1045] Dapo Akande and Hannah Tonkin, 'International Commissions of Inquiry: A New Form of Adjudication?' (*EJIL:Talk!*, 6 April 2012) <https://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/>.
[1046] UNGA 66th plenary meeting (n 642), 19 (Lichtenstein). For background, see Whiting (n 4).
[1047] UNSG, 'Report of the Secretary General on the Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (19 January 2017) UN Doc A/71/755, [30]–[31]
[1048] UNHRC Res 39/2 (2018), [22].
[1049] UNGA, 66th plenary meeting (n 642), 19 (Lichtenstein).
[1050] UNSG, *'Note verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary General'* (14 February 2017) UN Doc A/71/793, 1.
[1051] ibid 2. See also UNGA, Seventy-fourth session, 52nd plenary meeting (19 December 2019) UN Doc A/74/PV.52 (2019), 45-46 (Russia).
[1052] UNGA 66th plenary meeting (n 642), 33 (Russia).
[1053] ibid 1.

Syria, according to Syria, 'undermines' its 'legal jurisdiction and procedures'.[1054] Similarly, Myanmar raised similar objections to the UNHRC's creation of an analogous mechanism which it regarded to set a 'grave negative precedent' in the UN system that involves political organs as quasi-prosecutors.[1055]

However, these arguments conflate two different matters. Merely because the IIIM-Syria applies criminal law standards of proof to its fact-finding and identifies individual perpetrators does not mean that it is directly prosecuting those suspects.[1056] The IIIM-Syria is not engaged in a 'determination of any criminal charge', even if it is taking the preparatory steps to do so.[1057] Its function, rather, as with regular commissions of inquiry, is still ultimately to support the Assembly's discursive powers under the UN Charter (Articles 10-14) and inform the content of its recommendations. The argument that this mechanism undermines Syria's jurisdiction also fails: it has no 'coercive' power, in the sense of asserting criminal jurisdiction, over individuals in and of itself. The function of the IIIM-Syria is to assist, through the preparation of case files, other parties in exercising their existing jurisdiction.[1058] This distinction between preparation and coercion in the delimitation of institutional powers was also recognised in the subsequent commission of inquiry report for Myanmar, where a role for the Assembly is envisaged in facilitating the preparation of individual case files for trial which the Security Council could use to underpin Chapter VII action.[1059] Nor does the mechanism purport to reduce or interfere in Syrian jurisdiction; Syria rather is still able to exercise their existing jurisdiction to punish the international crimes under investigation by the IIIM-Syria.[1060]

Aside from the above argument based upon the text of the Charter, it is also apparent that the powers underpinning the IIIM-Syria have received the general acceptance of the membership, as a form of established practice.[1061] The resolution that underpinned the IIIM-Syria (Resolution 71/248 (2016)) was supported by 105 Member States, with 15 voting against, 52 abstentions and 21 not voting. It cannot be said that Resolution 71/248 *in itself* received the 'general acceptance' of the membership to constitute a subsequent agreement on the power of the Assembly to establish a quasi-prosecutorial body. However, Resolution 71/248 was anchored in established practice which had in previous instances commanded general acceptance. The purpose of IIIM-Syria is to facilitate cooperation and information exchange on prosecutions for international crimes, a feature that the Assembly has promoted on a consistent basis since 1946 with the general acceptance of the membership.[1062] Further, this is not the

[1054] ibid 21-22 (Syria).
[1055] UNGA 52nd plenary meeting (n 1051), 32 (Myanmar). As to the Myanmar mechanisms, see UNHRC Res 39/2 (2018) [22] (welcomed in UNGA Res 73/264 (2018), preamble). There are also the criticisms that naming suspects in commission reports taints them with a stigma of criminal guilt, without the benefit of a fair hearing: Michael Nessbit, 'Re-Purposing UN Commissions of Inquiry' (2017) 13 JILIR 83, 106.
[1056] Whiting (n 4), 234.
[1057] ICCPR art 14. That said, the 'Impunity Principles' (yet to be adopted by the Assembly) recognise that suspects implicated in a report should be afforded the opportunity to make a statement): UNCHR, 'Updated Set of principles' (n 1), principle 9.
[1058] UNSG Syria Report (n 1047), [30]-[31].
[1059] UNHRC, 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar' (17 September 2018) UN Doc A/HRC/39/CRP.2, 426.
[1060] Wenaweser and Cockayne (n 64), 214.
[1061] As to established practice, see Chapter 3.
[1062] UNGA Res 3(I) (1946) (without a vote); UNGA Res 3074 (XXVIII) (1973) (94 voted in favour, zero against, 29 abstentions and 12 not voting). See also van Schaack, 'The General Assembly and Accountability' (n 64).

first time that the Assembly has sought to identify individual perpetrators and augment investigations by prosecutorial authorities through the preparation of case files: the Assembly also called for such action in relation to those most responsible for the practice of apartheid in South Africa, with the purpose of transmitting this information to Member States for their prosecutorial action, as well as to the public.[1063] It has also assisted, with general acceptance of the membership, national prosecutions generally with respect to human trafficking and specifically in the situations of Cambodia and Guatemala, albeit with the consent and involvement of the Member States concerned.[1064]

2.2 Duty to Cooperate with Assembly-established Commissions of Inquiry

The development of the function of commission of inquiries to encompass quasi-prosecutorial elements also raises the issue as to the extent to which the Assembly is able to confer upon their subsidiary organs more muscular powers in the future. One potential line of future development, in this regard, might be the fashioning of a duty to cooperate with commissions of inquiry. Cooperation will often be the single most important part in ensuring that the mandate of a commission of inquiry is fulfilled.[1065] A failure of cooperation poses a major constraint on the workings of an inquiry, in that the quality and reliability of inquiry reports will often turn upon the extent to which the territorial State provides access to the inquiry.[1066] Even if an inquiry can conduct interviews with witnesses remotely or outside of the territory concerned, the lack of the cooperation of persons implicated can affect the extent to which exculpatory evidence, on the one hand, and proof of criminal intention, on the other, is acquired.[1067] The drawing of conclusions based upon an incomplete evidentiary record can also compromise the independence of an inquiry in the eyes of some international publics, who perceive the inquiry to have crossed the line into advocacy over fair adjudication.[1068] At the very least, it opens up inquiries to the criticism that their conclusions do not reflect the realities on the ground.[1069]

[1063] UNGA Res 41/103 (1986), [6], [7] (128 voted in favour, 1 against, and 27 abstentions).
[1064] UNGA Res 57/228 B (2003) (Cambodia) (without a vote); UNGA Res 63/19 (2008) (Guatemala) (without a vote); UNGA Res 64/293 (2010), [4] (human trafficking) (without a vote). On Guatemala, see also: Hudson and Taylor, (n 64), 74; Brittany Benowitz, 'Why Support for UN-backed Anti-Corruption Commission in Guatemala is Vital to US Interests' (*Just Security,* 24 September 2018) < https://www.justsecurity.org/60835/support-u-n-backed-anti-corruption-commission-guatemala-vital-u-s-interests>.
[1065] See eg UNHRC, 'Eritrea Report' (n 301), [1523] (the lack of access is a 'great concern' and impediment to an effective inquiry). Non-cooperation is a longstanding problem, see Frances Trix, 'Peace-mongering in 1913: the Carnegie commission of inquiry and its report on the Balkan wars' (2014) 5(2) First World War Studies 147, 151-152.
[1066] UNHRC, 'Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory' (18 March 2019) UN Doc A/HRC/40/CRP.2, [30]-[31]; UNGA, 'Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (28 February 2018) UN Doc A/72/764, [1] ('If relevant information holders choose not to cooperate with the Mechanism, that might affect its ability to collect evidence and develop case files about associated crimes'); UNGA, Second emergency special session, 571st plenary meeting (9 November 1956) UN Doc A/PV.571, [150] (Ceylon).
[1067] See eg Syria Report (n 1066), [15]; Gaza Report (n 976), [137]-[145], [1179]; DPRK Report (n 70) [21], [62], [932], [1086]; UNHRC, 'Eritrea Report' (n 301) [13]-[16];
[1068] ibid.
[1069] ibid.

What can the Assembly do to make cooperation with commission of inquiries mandatory? It has already been shown in Chapter 5 that Assembly practice does not yet support such a legal duty, even if there is evidence of a strengthening of language ('demand' or 'request') in recommendations to cooperate. 'Established practice' in the interpretation of the UN Charter is therefore lacking. Nonetheless, arguments have been made that the text of the UN Charter imposes a duty of cooperation. In particular, Blaine Sloan argued the Assembly's creation of a subsidiary organ is a form of 'action' under Article 2(5) of the UN Charter, to which Member States pledged to give 'every assistance'.[1070] This view is supported by observations from the High-level Panel on UN Peace Operations, which noted in its final report an expectation that Member States give 'every assistance' under Article 2(5) to inquiries established by the Secretary-General; this proposition could also reasonably extend to inquiries established by the Assembly.[1071] However, this was an isolated remark; reports of other inquiries have not reinforced this interpretation of Article 2(5). To the contrary, they have tended to operate on the premise that cooperation is voluntary. Lack of institutional practice aside, the *travaux* provides scant guidance on the meaning of Article 2(5) and the mainstream view remains that Member States are only obliged to give 'every assistance' where the Security Council takes 'action'.[1072] The ICJ view, at least as represented in *Certain Expenses*, is that the Assembly's creation of subsidiary organs in the realm of international peace and security constitutes a form of 'action' that 'depends on the consent of the State or States concerned'.[1073] The ICJ's emphasis on Assembly action being derived from Member State consent would seem to preclude the triggering of a cooperation duty in Article 2(5), this being the antithesis of consent.

This all supports the view that, as matters stand, there is insufficient support for a duty to give 'every assistance' to an Assembly-established commission of inquiry. However, this does not preclude a movement in this direction in the future. It has already been argued that Assembly resolutions are capable of constituting a 'subsequent agreement' or 'established practice', the UN Charter being a living instrument that evolves through the general agreement of Member States. The Assembly could solemnly declare a broader reading of Article 2(5), for example, in relation to the need for Member States to cooperate with its commission of inquiries. This might seem to

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[1070] Sloan, 'Changing World*'* (n 54*)*, 23.

[1071] UNGA, 'Comprehensive Review of the Whole Question of Peacekeeping Operations in all their Aspects' (21 August 2000) UN Doc A/55/305-S/2000/809, [32]. See also the observations of the US delegate on the application of Article 2(5) following the Assembly's termination of the South Africa mandate over South West Africa: 'International Organizations – Legal Effect of Acts' (1975) Digest of US Practice Intl Law 4, 89.

[1072] The *travaux* only references two unsuccessful amendment proposals, both concerned with the implications of this duty to lend every assistance to UN military campaigns on the neutrality of States UNCIO VI, 312, Doc 423, I/1/20 and UNCIO VI, 722, Doc 739, I/1/19(a); UNCIO VI, 722, Doc 739, I/1/19(a). For the mainstream interpretation of Article 2(5), see: Leland Goodrich and Edvard Hambro, *The Charter of the United Nations* (World Peace Foundation 1949), 174-175; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004), 376; Helmut Philipp Aust, 'Ch.I Purposes and Principles, Article 2 (5)' in Simma (vol I) (n 8), 238. Indeed, the Assembly has also equated a Member States' failure to observe a Security Council resolution as amounting to a violation of Article 2(5), further suggesting that the duty in this provision corresponding to binding decisions of the Security Council: UNGA Res 31/154 B (1976), preamble, [1].

[1073] *Certain Expenses* (n 108), 165 (emphasis added). The issue turned on whether the creation of the UNEF (a peacekeeping force), created by the Secretary General pursuant to authority granted by the Assembly, constituted a valid 'expenditure' under the UN Charter. One of the issues, therefore, was whether the GA could take 'action' to establish a peacekeeping force that could be deployed to maintain peace and security in different States. See also reference to Article 2(5) in *Reparation* (Advisory Opinion) (n 479), 178.

challenge the consent principle that underpins Assembly 'action' as outlined in *Certain Expenses*, although consent has also been a fluid concept since the ICJ issued its advisory opinion in 1962. Around this time, even the creation of commissions of inquiry against the consent of the Member State concerned was contentious, bound more generally to debate over the scope of Article 2(7) (see Chapter 4). By contrast, there is now no serious disputing the power of the Assembly to create commissions of inquiry without the support of the Member State concerned. Over time, it might be that the final frontier is that the UN membership come to regard cooperation as mandatory. However, as already acknowledged, Assembly practice, despite a strengthening of language exerting pressure on Member States to so cooperate in particular situations, has yet to reach the point of evincing an established practice in the interpretation of Article 2(5) or other provision under the UN Charter (see Chapter 5).

On a final point, while there might not exist a duty to cooperate with Assembly-established commission of inquiries as a matter of Article 2(5) and Charter law, this also does not prevent a multilateral duty of this kind developing in treaty regimes external to the UN. An emerging norm of this type might be seen within the ICCPR, as seen in General Comment No 36, adopted in September 2019. There the Human Rights Committee observed that 'States should support and cooperate in good faith with international mechanisms of investigation and prosecutions addressing possible violations of article 6.'[1074] Article 6 of the ICCPR enshrines the right to life, which includes a positive obligation to investigate possible violations of this right which, according to the Human Rights Committee here, might extend to cooperation with international mechanisms. Although 'international mechanisms' is quite general, Assembly-established commissions of inquiry are engaged in investigations; future inquiries could align their mandate so that it covers alleged violations of Article 6 so as to engage directly with the ICCPR. Indeed, many inquiry reports have applied standards under the ICCPR.[1075] Although General Comments are not strictly speaking legally binding they are highly persuasive.[1076] A significant majority of the Assembly could also endorse General Comment No 36, thereby evincing a subsequent agreement by the parties in the interpretation of the ICCPR, as it has done with human rights treaties previously.[1077] General Comment No 36 therefore offers useful support for the future development of a duty to cooperate with Assembly-establish commissions of inquiry, at least where the right to life is engaged under the ICCPR.

2.3 Context of Establishing Commissions of Inquiry

While the Assembly is able to establish commissions of inquiry, and to vest them with quasi-prosecutorial powers, it is important to also acknowledge the context which might steer the Assembly towards (or away from) exercising these powers. In particular, the UNHRC has assumed the dominant role in establishing commissions of inquiry in the UN system since 2005.[1078] This might lead to a general perception that

[1074] UNHRC, 'General Comment No 36' (3 September 2019) CCPR/C/GC/36, [28].
[1075] See, for example, the extensive application of the ICCPR in DPRK Report (n 70).
[1076] Eckart Klein and David Kretzmer, 'The UN Human Rights Committee: The General Comments - The Evolution of an Autonomous Monitoring Instrument' (2015) 58 German YB Intl L 189.
[1077] See Chapter 3.
[1078] See eg UNHRC Res 34/22 (2017) (Myanmar); UNHRC Res 31/20 (2016) (South Sudan); UNHRC Res 22/13 (2013) (DPRK); UNHRC Res 19/17 (2012) (Palestine); UNHRC Res S/17-1 (2011) (Syria); UNHRC Res 16/25 (2011) (Côte d'Ivoire); UNHRC Res S/15-1 (2011) (Libya); UNHRC Res S/2-1 (2006) (Lebanon); Shiri Krebs, 'The Legalization of Truth in International Fact-Finding' (2017) 18

the UNHRC, rather than the Assembly, is better placed to establish commissions of inquiry in the future. Still, the creation of IIIM-Syria in 2016 shows the continued relevance of the Assembly in establishing commissions of inquiry. The Assembly and UNHRC are both concerned with promoting human rights; their functions overlap and they often reinforce each other's work.[1079] In this regard, it is possible that the Assembly establishes an inquiry where the UNHRC does not do so, and vice versa.[1080] It is also possible that both organs establish inquiries overlapping on the same situation, as has been the case with Syria.[1081] Nonetheless, it might be considered that the creation of an inquiry in the Assembly signals an institutional escalation of a human rights situation from one reflecting the particular concerns of a specialist organ (the UNHRC) to the membership as a whole (the Assembly).[1082] Hints of this rationale can be seen in the explanation of vote of Liechtenstein on the IIIM-Syria, noting there to be 'clear need for more ownership' by the Assembly given that accountability in Syria has been 'consistently neglected' in the UN system.[1083] The Assembly's creation of a commission of inquiry can in turn bring a situation to the mainstream of the UN atrocity crimes response agenda.[1084]

Furthermore, whether the Assembly establishes commissions of inquiry will also turn upon general perceptions as to the aptitude of these mechanisms to achieve the objectives of the membership in relation to a situation.[1085] Are commissions of inquiry effective? The answer to this question will ultimately depend upon how effectiveness is measured. One indicium is the number of prosecutions following the release of an inquiry report; there is some evidence of modest success on this measure, be it in the context of national investigations or at the early phases of investigations at the ICC.[1086] However, this conclusion also needs to be balanced against the many instances where the Member State willfully ignored the inquiry reports and sought to actively discredit it.[1087] Wider effects of inquiry reports noted have included the value of introducing and keeping a situation on the Assembly's agenda;[1088] in strengthening the text of a country-specific resolution over time to include explicit recognition of violations of international law;[1089] in deterring ongoing and future violations of

Chicago J Intl L 83; Federica D'Alessandra, 'The Accountability Turn in Third Wave Human Rights Fact-Finding' (2017) 33 Utrecht J Intl and Eur L 59.

[1079] See the interactions in seeking accountability in the Rohingya situation, recounted in detail in: Ramsden, 'Accountability for Crimes Against the Rohingya' (n 704).

[1080] As to the interactions between the Assembly and UNHRC on atrocity situations, see: Ramsden and Hamilton (n 4).

[1081] UNGA 66th plenary meeting (n 642), 19 (Lichtenstein) (noting the role of the IIIM-Syria in filling gaps in evidence collection and analysis of prior inquiries).

[1082] On differences between the Assembly and UNHRC, see further Chapter 1.

[1083] UNGA 66th plenary meeting (n 642), 19 (Lichtenstein).

[1084] See further Ramsden, 'Accountability for Crimes Against the Rohingya' (n 704).

[1085] See further Carsten Stahn and Dov Jacobs, 'Human Rights Fact-Finding and International Criminal Proceedings: Towards a Polycentric Model of Interaction' in Philip Alston and Sarah Knuckey (eds) *The Transformation of Human Rights Fact-Finding* (OUP 2016).

[1086] Albeit in the context of HRC COI reports: Luis Moreno-Ocampo, 'The International Criminal Court in Motion' in Carsten Stahn and Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009), 15.

[1087] For recent analysis, see Michael Becker and Sarah Nouwen, 'International Commissions of Inquiry: What Difference Do They Make? Taking an Empirical Approach' (2019) 30(3) EJIL 819; Hala Khoury-Bisharat, 'The Unintended Consequences of the Goldstone Commission of Inquiry on Human Rights Organizations in Israel' (2019) 30(3) EJIL 877.

[1088] UNGA, 92nd plenary meeting (n 644), 9-10 (Ukraine) (speaking in the context of UNSG reports).

[1089] See Chapter 4; Ramsden and Hamilton (n 4) 898.

international law;[1090] in crystallising a stable institutional position within the UN towards a situation and showing that the international community remains engaged (even if certain organs, such as the Security Council, are deadlocked);[1091] in legitimating, and crystallising within a coherent narrative, facts and moral judgments previously made by the Assembly in quasi-judicial resolutions;[1092] in building confidence and defusing an ongoing dispute or situation;[1093] and in placing an onus on the Member State under scrutiny to justify its conduct in front of the Assembly and other UN bodies.[1094] There is, in short, good reasons for the Assembly to consider using the inquiry instrument as a means to advance accountability for an atrocity crimes situation.

3. Triggering the ICJ's Advisory Jurisdiction

Under Article 96 of the UN Charter, the Assembly (and the Security Council) may request the ICJ to furnish an advisory opinion on any 'legal question'. Recognising their role as a participant in the 'activities of the Organisation', the ICJ has observed that a request 'in principle, should not be refused' and only where there are 'compelling reasons'.[1095] One such reason could be that the matter is a bilateral dispute to which one or more of the parties have withheld their consent to judicial proceedings.[1096] Yet, even where a question is bound to a bilateral dispute or the construction of a discrete multilateral treaty regime, the ICJ has accepted requests on these subject matter because of the Assembly's 'longstanding interest', 'permanent interest' or 'concern' for these issues in the discharge of their functions.[1097] However, the ICJ will not delve into the motives of the request; the Assembly has 'the right to decide for itself on the usefulness of an opinion in the light of its own needs'.[1098] That a situation was politically charged, with the Assembly's requesting resolution attracting considerable dissent as with the *Wall* request, has also not precluded the ICJ from issuing an opinion.[1099] The ICJ has also accepted requests that involve questions of a qualitatively different character, including the relatively abstract (is the use of nuclear weapons unlawful?) to ones tied to the responsibility of States for international wrongful acts (as with the 'legal consequences' for Israel's construction of a wall in the Occupied Palestinian

[1090] UNGA 66th plenary meeting (n 642), 20 (Liechtenstein).
[1091] Eliav Lieblich, 'At Least Something: The UN Special Committee on the Problem of Hungary, 1957-1958' (2019) 30(3) EJIL 843, 851.
[1092] UNGA, Eleventh session, 634th plenary meeting (9 January 1957) UN Doc A/PV.634, [12] (Australia).
[1093] UNGA Res 46/59 (1991), annex, [5].
[1094] Other effects within international politics have been noted in Lieblich (n 1091).
[1095] *Wall* (Advisory Opinion) (n 108), 156; *Nuclear Weapons* (Advisory Opinion) (n 232), 234-35; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 65, 71; *Certain Expenses* (n 108), 155; *Kosovo* (Advisory Opinion) (n 446), 415-16.
[1096] As to others, see Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (CUP 1986), 565; Dapo Akande, 'The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice' (1998) 9 EJIL 437.
[1097] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) ICJ Rep 2019 95, 117; *Reservations* (Advisory Opinion) (n 113), 20 (Genocide Convention of 'permanent interest' to the Assembly); *Wall* (Advisory Opinion) (n 108), 158-159 (construction of wall of 'particularly acute concern' to the Assembly in the context of international peace and security); *Nuclear Weapons* (Advisory Opinion) (n 232), 233 (Assembly 'has a long-standing interest in nuclear disarmament').
[1098] *Nuclear Weapons* (Advisory Opinion) (n 232), 236. See also *Western Sahara (Advisory Opinion)* (n 466), 37; *Kosovo* (Advisory Opinion) (n 446), 417; *Wall* (Advisory Opinion) (n 108), 160–61.
[1099] See UNGA Res ES-10/14 (2003) (90 votes in favour, 8 against, 74 abstentions).

Territories).[1100] What is of general importance is that the request is a legal question (irrespective of the political connotations or context) to which there is 'sufficient information and evidence' for the Court to ground its opinion.[1101] Given the high threshold ('compelling reasons') and the absence of other self-limiting principles on judicial advisory discretion (such as a 'margin of appreciation' doctrine), it is unsurprising that the ICJ has never refused to accept a request on questions that fall within its jurisdiction.[1102] Furthermore, the ICJ has also not considered the answering of a request by the Assembly to be inhibited by the matter also being on the agenda of the Security Council.[1103] In the final analysis, whether an advisory opinion is sought on a situation will turn upon any political constraints that exist within the Assembly rather than grounded in any judicial policy that precludes the ICJ from accepting requests.

The ICJ's general receptiveness towards entertaining advisory opinions in turn justifies greater reflection on the potential for the Assembly to make use of the Court to advance accountability for atrocity crimes. This is especially so given that the ICJ has become more experienced in dealing with atrocity crime questions, despite drawing some criticism for its light handling of relevant legal concepts in past advisory opinions.[1104] As already noted, past advisory opinions show that the ICJ has been prepared to deal with abstract questions of law, institutional divisions of responsibilities and also the legality of particular state conduct. It follows that an advisory opinion might be used for a wide variety of purposes in international justice, as some jurists have noted. Jennifer Trahan argued that the Assembly can lawfully seek an advisory opinion on the legality of the exercise of the veto in the Security Council in the face of ongoing atrocity crimes.[1105] Judge Schwebel noted a role for the Assembly in supporting the ICC's functions by serving as a 'channel' to request advisory opinions from the ICJ on aspects of the ICC Statute concerned with general international law.[1106] This issue has come to the fore recently with the ongoing debate over the scope of Head of State immunities, with the AU resolving to obtain the support of the Assembly to request an advisory opinion.[1107] Speaking generally, absent 'compelling reasons', it

[1100] The broad parameters of the ICJ's advisory jurisdiction was outlined from the outset, in that it may give an opinion 'on any legal question, abstract or otherwise': *Conditions of Admission of a State to Membership in the United Nations (Art. 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 57, 61.
[1101] *Chagos* (Advisory Opinion) (n 1097), 115; *Wall* (Advisory Opinion) (n 108), 162.
[1102] It refused to do so for jurisdictional reasons in *Nuclear Weapons in Armed Conflict* (Advisory Opinion) (n 479), 84. Concerns about ensnarling the ICJ in contentious political disputes, or in using the Court as an extension of a campaign to exert pressure on a State, have also not carried much traction, although are often raised by opponents to the advisory opinion: UNGA 83rd meeting (n 747), 10 (UK); UNGA, Tenth Emergency Special Session, 27th meeting (20 July 2004) UN Doc A/ES-10/PV.27, 4 (US); UNGA, Tenth Emergency Special Session, 23rd meeting (8 December 2003) UN Doc A/ES-10/PV.23, 10 (Israel), 18 (Uganda); UNGA Fourty-ninth session, 90th plenary meeting (15 December 1994) UN Doc A/49/PV.90, 25 (France), 26 (Hungary); *Wall* (Advisory Opinion) (n 108) (Separate op Judge Kooijmans), 226; *Namibia* (Advisory Opinion) (n 108), 127. See also criticisms in Pomerance (n 65).
[1103] *Wall* (Advisory Opinion) (n 108), 148-152; *Kosovo* (Advisory Opinion) (n 446), 420-423.
[1104] *Wall* (Advisory Opinion) (n 108) (Sep op Judge Higgins), 213.
[1105] Trahan, 'Existing Legal Limits' (n 66), 254-255.
[1106] UNGA, Fifty-forth session, 39th meeting (26 October 1999) UN Doc A/54/PV.39, 4. See also *Prosecutor v Al Bashir* (Article 87(7) Decision) (Minority op Judge de Brichambaut (n 154), [98] ('Some issues mentioned in the debate might have warranted a request for an advisory opinion by the ICJ, but the [ICC] does not have the possibility to request such advice') On the Assembly-ICC relationship, see further Ramsden and Hamilton (n 4). The Assembly is able to authorise 'other' UN organs and 'specialized agencies' to make a request, which has also been broadly interpreted to include non-UN agencies: UNGA Res 1146 (XII) (1957) (International Atomic Energy Agency).
[1107] Dapo Akande, 'An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue' (*EJIL:Talk!*, 31 March 2016) <https://www.ejiltalk.org/an-international-court-of-

seems highly probable that the ICJ would entertain all of these questions if a request was made.[1108]

The more salient question is whether the Assembly is willing to use their power under Article 96 to advance the field of accountability for atrocity crimes. The Assembly has requested 27 advisory opinions in the past 75 years, the vast majority of which have been concerned with either issues of UN institutional law or the process of decolonisation.[1109] Three in particular are more directly relevant to the field of accountability for atrocity crimes, both in contributing to the definition and development of relevant international law and in scrutinising State conduct in accordance with these norms: *Reservations*;[1110] *Nuclear Weapons*;[1111] and *Wall*.[1112] However, this is not to say that the atrocity crime accountability imperative was the primary motive of the Assembly for all of these requests. The *Reservations* request appeared to be borne out a 'practical urgency' to provide guidance to the Secretary General, as treaty depositary, on the procedure to follow regarding reservations to multilateral treaties; the Genocide Convention just so happened to be the multilateral treaty that was about to come into force and which would therefore provide a focal point for the request.[1113] By contrast, one of the priorities of the Assembly in obtaining the *Wall* opinion was to address the implications for international human rights law and international humanitarian law of Israel's conduct, alongside other imperatives pertaining to regional peace and security.[1114] Multiple motives therefore often permeate requests for advisory opinions.

A further point of distinction is that, unlike the *Reservations* request, those in *Wall* and *Nuclear Weapons* were more evidently part of a plenary campaign to exert pressure on Member States to conform with prior Assembly resolutions on the same subject matter as these requests. Although the Assembly had already formed a view both on the legality of the Israeli wall and the use of nuclear weapons, raising to some delegates problems of redundancy in the requests,[1115] supporting delegates believed that an independent and impartial pronouncement on these issues would augment future responses by the Assembly.[1116] Other anticipated effects also were that the opinion, if in accordance with prior resolutions, would serve to send a 'powerful message' to the deviant state.[1117] The Assembly has, accordingly, liberally referenced advisory

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justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/>; AU, 'Decision on the International Criminal Court' (28-29 January 2018) EX.CL/1068(XXXII), [5].

[1108] These proposals also reflect a broader aspiration for the ICJ to sit at the apex of international tribunals, so as to obviate fragmentation arising from their differing interpretations of international law: David Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law' (2005) 99(1) AJIL 88.

[1109] See the full list: The full list can be found here: ICJ, 'Advisory Proceedings' <https://www.icj-cij.org/en/advisory-proceedings>.

[1110] *Reservations* (Advisory Opinion) (n 113).

[1111] *Nuclear Weapons* (Advisory Opinion) (n 232).

[1112] *Wall* (Advisory Opinion) (n 108).

[1113] UNGA Sixth Committee, 'Reservations to Multilateral Conventions' (10 November 1950) UN Doc A/1494, [3], [8]-[9]; UNGA, Fifth Session, 305th plenary meeting (16 November 1950) UN Doc A/PV.305, 384-385.

[1114] UNGA Res ES-10/14, preamble; UNGA 23rd meeting (2003) (n 1102), 10 (Malaysia).

[1115] UNGA 23rd meeting (2003) (n 1102), 21 (UK) ('This is not a case in which the General Assembly genuinely needs legal advice in order to carry out its functions. It has already declared the wall to be illegal.'), 22-23 (Singapore) ('[P]osing the question might create the impression that the General Assembly is not very sure about the correctness of its early determination on the legality of its Israel's actions').

[1116] ibid, 12 (Malaysia).

[1117] ibid.

opinions in the framing of recommendations to Members.[1118] Furthermore, to some Member States, it was morally essential that the Assembly make the request, so that the plenary was seen to be doing all that it could within its powers to align itself with the victims of internationally wrongful acts. The request in *Wall* thus demonstrated in 'a tangible way' the Assembly's 'continued concern and sympathy' for the 'dire plight of the Palestinian people'.[1119] Requesting an advisory opinion was thus considered a means of 'implementing' prior Assembly resolutions, by bringing to bear upon a deviant Member State some measure of international judicial supervision over its actions, combined with much greater texture on the legal obligations incumbent upon them to meet.[1120] While Members on the receiving end of an advisory opinion might attack the credibility of the Assembly in requesting it, they seldom criticise the reasoning of the ICJ.[1121] For example, after *Wall*, Israel, while challenging the propriety of the Assembly in making the request, respected the advisory opinion and explained what measures it was taking to observe it.[1122] Even if the advisory opinions did not produce direct effects in securing the alignment of States with their international obligations (the *Nuclear Weapons* advisory opinion, after all, continues to be referenced in resolutions to this day),[1123] then they at least contributed towards the development of the Assembly's response in these broader ways.

It can therefore be said that an advisory opinion is able to support the functions of the Assembly in the field of international justice in various ways.[1124] In addition to those already noted above, a request might further the Assembly's objective of codifying international law, with the advisory opinion planting 'legal seeds' and also potentially buttressing the legal interpretations in quasi-legislative resolutions.[1125] ICJ advisory opinions are also capable of progressively defining the Assembly's role in the interpretation of the UN Charter, as the Court's observations on the impact of Assembly practice on Article 12 make clear.[1126] Where a country situation has been lacking in

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[1118] See eg UNGA Res ES-10/15 (2004), [2] (following *Wall* (Advisory Opinion) (n 108)); UNGA Res 51/45 M (1996), [1]-[3] (following ICJ, *Nuclear Weapons* (Advisory Opinion) (n 232), 226 (reiterated every session since, including most recently: UNGA Res 47/59 (2019); UNGA Res 1854 (XVII) (1962) (following *Certain Expenses* (n 108)); UNGA Res 598 (VI) (1952) (following *Reservations* (Advisory Opinion) (n 113).

[1119] UNGA 23rd meeting (2003) (n 1102), 12 (Malaysia).

[1120] ibid 16 (South Africa) ('All too often the General Assembly has been criticized for passing resolutions that are never implemented. Today we have an opportunity to act.'); UNGA 27th meeting (n 1102), 5 (Mexico) (*Wall* (Advisory Opinion) (n 108) has 'contributed significantly to clarifying the scope of applicable norms of international law').

[1121] That does not mean that various aspects of ICJ opinions have been free from controversy: *Wall* (Advisory Opinion) (Sep op Judge Buergenthal), 219.

[1122] UNGA 27th meeting (n 1102), 7 (Israel). See also, following *Reservations* (Advisory Opinion) (n 113): UNGA, Sixth session, 360th plenary meeting (12 January 1952) UN Doc A/PV.360 (shows general respect for the ICJ).

[1123] See recently UNGA Res 47/59 (2019).

[1124] An advisory opinion might also be used by other UN organs or international institutions as a basis for action, such as international financial institutions denying aid to a State. See further Lee Deppermann, 'Increasing the ICJ's Influence as a Court of Human Rights: The Muslim Rohingya as a Case Study' (2013) 14 Chicago J Intl L 291, 314.

[1125] A role envisaged early on by the Assembly: UNGA Res 171 (III) (1947) (on the value of using the ICJ to review 'difficult and important points of law'). As to effectiveness of these 'legal seeds', Andrea Bianchi, 'Dismantling the Wall: The ICJ's Advisory Opinion and its Likely Impact on International Law' (2004) 47 GYIL 343; Karin Oellers-Frahm, 'Ch.XIV The International Court of Justice, Article 96' in Simma (vol II) (n 72), 1990; Oellers-Frahm (n 65) 1033–56.

[1126] *Wall* (Advisory Opinion) (n 108), 149. As Bianchi notes the ICJ has broached issues which may have a remarkable impact on the interinstitutional equilibrium among the main organs of the United Nations': ibid 363.

judicial scrutiny and where gaps in accountability processes exist, an advisory opinion can provide some measure of judicial supervision.[1127] Yet, even where the Assembly has previously formed a view on an issue (i.e. the Israeli Wall is unlawful), or initiated fact-finding processes, the requesting of an advisory opinion would not be redundant. It is able to add texture to future Assembly debates and resolutions on the situation and provide a means for closer supervision of State conduct in accordance with the standards expressed in the opinion.[1128] It is able to contribute towards the establishment of a historical narrative on a situation and shape wider public attitudes.[1129] It might then influence the bargaining position of States in diplomatic negotiations.[1130] That said, while it is possible for the Assembly to use the advisory mechanism, it is no easy feat to persuade enough States to do so. Aside from the Israel situation, the Assembly is more receptive to making requests in the colonial or institutional powers context , as noted above. However, there is no reason why, in time, as an appreciation of the Assembly's function in atrocity crimes accountability increases, and provided that sufficient evidence exists, that the advisory mechanism is seen as a possible means to also scrutinise the legality of conduct in a Member State, especially where other international judicial mechanisms are lacking.

4. Assembly Power to Establish an *Ad Hoc* Tribunal

A theoretical enquiry is whether the Assembly could establish an *ad hoc* criminal tribunal as a subsidiary organ. The Assembly has played an active role previously in supporting the work of criminal tribunals. It substantially assisted in the creation of the ECCC by establishing a Group of Experts to consider options for accountability and

[1127] A draft resolution intended to condemn the construction of the wall was vetoed by a permanent member of the Security Council: UNSC, 'Draft Resolution' (14 October 2003) UN Doc S/2003/980, [1] ('Decides that the construction by Israel, the occupying Power, of a wall in the Occupied Territories departing from the armistice line of 1949 is illegal under relevant provisions of international law and must be ceased and reversed'); UNSC, Fifty-eighth session, 4842nd meeting (14 October 2003) UN Doc S/PV.4842.

[1128] As to these complementary function, see eg Wall (Advisory Opinion) (n 108) (Sep op Judge Koroma), 206 ('It is now up to the General Assembly in discharging its responsibilities under the Charter to treat this Advisory Opinion with the respect and seriousness it deserves, not with a view to making recriminations but to utilizing these findings in such a way as to bring about a just and peaceful solution'); *WHO and Egypt Agreement* (Advisory Opinion) (n 1027), 87 ('[I]n situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate…').

[1129] Sandrine De Herdt, 'A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic' (*EJIL:Talk!*, 20 May 2020) <https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic/>.

[1130] UNGA, Fifty-first session, 79th plenary meeting (10 December 1996) UN Doc A/51/PV.79, 3 (Gabon) (on the anticipated influence of *Nuclear Weapons* (Advisory Opinion) (n 232) on nuclear disarmament negotiations). However, see also scholarship which strikes a less optimistic tone on the impact of advisory opinions on diplomatic negotiations: Andrew Coleman, 'War Crimes and the ICJ's Advisory Jurisdiction' (2001) 26(1) Alternative LJ 32 ('[i]n the six opinions of the ICJ, where individual nation States requested and indeed were expected to follow the decision and take the appropriate action, none, with the exception of those involved in the *Reparations case*, have done so'); Richard Falk, 'The Kosovo Advisory Opinion: Conflict Resolution and Precedent' (2011) 105 AJIL 50 ('it is almost assured that advisory opinions on controversial issues will almost never be respected by governments whose national policies collide with the legally determined outcomes reached by the ICJ.')

thereafter adopting a framework for an UN-Cambodia hybrid tribunal.[1131] But the ECCC, established as a Cambodian court receiving international assistance, did not possess the legal characteristics of those tribunals established by the Security Council, at least insofar as it was vested with coercive powers flowing from the UN Charter.[1132] In this regard, *ad hoc* tribunals established by the Security Council had three legal characteristics relevant to the analysis here, in that they were able to (i) assert criminal jurisdiction (if necessary) against the will of the territorial States concerned; (ii) compel State cooperation and compliance; and (iii) detain and punish perpetrators, all under a UN mandate.

The suggestion that the Assembly could (or should) establish a subsidiary criminal tribunal with these three characteristics has arisen in different contexts. During the drafting of the ILC Articles on State Responsibility for Internationally Wrongful Acts, it was proposed that the Assembly could establish an independent commission of jurists to determine responsibility for international crimes, a proposal that met its demise given that it was attached to the broader (unsuccessful) proposal to recognise State responsibility for international crimes.[1133] Similarly, when reviewing legal options for the creation of the ICTY, the UN Secretary-General noted that the Assembly's 'authority and prestige' would justify it establishing this *ad hoc* tribunal.[1134] Various (unsuccessful) challenges by defence counsel to the jurisdiction of the ICTY and ICTR have also been brought on the basis that these tribunals were not established by a 'consensual act of nations' (as the Assembly would provide), or that the Security Council's decisions deprived the UN membership (via the Assembly) of the opportunity to consider the desirability of creating this *ad hoc* tribunal.[1135] The DPRK inquiry report also noted the possibility that the Assembly could establish an *ad hoc* tribunal on this situation, particularly where the Security Council has failed to do so, using the Uniting for Peace mechanism, or the 'combined sovereign powers' of Members States to assert universal jurisdiction (these legal bases are returned to below).[1136] Most recently, the Myanmar commission of inquiry report similarly recommended that, in the event of Security Council failure, the Assembly 'should consider using its powers within the scope of the Charter … to advance such a tribunal.'[1137]

Whilst the UN membership has considered the option of an Assembly-created tribunal for the former Yugoslavia, the Security Council was ultimately preferred for numerous reasons. The first stems from the legal premise that only the Security Council has the capacity to exercise compulsory legal authority over individuals and States, a necessary prerequisite in establishing a criminal tribunal with jurisdiction over

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[1131] See UNGA Res 57/228 B (2003). See also UNGA Res 52/135 (1997); UNGA Res 55/95 (2000); 'Report of the Group of Experts' (n 297). The Assembly also appointed judges, a role that has been scrutinised: *Prosecutor v Karadzic* (Disqualification Decision) ICTY-95-5/18-T (31 July 2014), [12].

[1132] See generally Steven Roper and Lilian Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (Ashgate 2006).

[1133] See eg ILC, 'Summary record of 2539th meeting' (2 June 1998) UN Doc A/CN.4/SR.2539, 147; Ottavio Quirico, *International 'Criminal' Responsibility: Antinomies* (Routledge 2019), 237.

[1134] UNSC, 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704, [21]. See also the unsuccessful attempt to have the UNGA establish an *ad hoc* tribunal for the 2003 Iraq intervention, as referenced in: *Kuala Lumpur War Crimes Commission v George W Bush* (Notes of Proceedings), Case No. 1 - CP – 2011 (19 November 2011) (Kuala Lumpur War Crimes Tribunal), 41.

[1135] See defence argument's recounted in *Tadić* (Jurisdiction) (n 125), [15].

[1136] DPRK Report (n 70) [1201]-[1202].

[1137] UNHRC, 'Report of the Independent International Fact-Finding Mission on Myanmar' (8 August 2019) UN Doc A/HRC/42/50, 17.

activities occurring within a State.[1138] It was also considered that the involvement of the Assembly in the creation of an *ad hoc* tribunal would not be as expeditious as one taken by the Security Council, due to its smaller membership and 'executive' character.[1139] Indeed, when the Assembly did support the creation of a criminal tribunal, the ECCC, it was criticised as coming too late.[1140] However, recent failures of the Security Council to address the Syria crisis, despite strong Assembly support for a referral to the ICC, as well as Russia's veto of a proposal to establish an *ad hoc* tribunal for the MH17 airline disaster, bring into renewed focus the possibility for the Assembly to establish such tribunals.[1141] The notion that the Assembly could not act quickly enough could also be addressed through the delegation of authority to a subsidiary organ; one proposal by the Cambodian Group of Experts in this respect was a Assembly established subsidiary organ comprising a small number of Member States that could prepare the constituent instruments of the proposed tribunal expeditiously.[1142]

The more fundamental issue is whether the Assembly has the legal authority to establish an *ad hoc* tribunal. In principle, the creation of an *ad hoc* tribunal falls within the broad purposes of the UN Charter, particularly where such tribunal contributes to the restoration and maintenance of peace.[1143] Furthermore, the Security Council is not the only competent organ to act so as to maintain peace; as the ICJ in *Certain Expenses* noted, the Assembly is also concerned with advancing this purpose.[1144] The issue is not whether a tribunal fulfils a permissible purpose in the UN Charter (it does), but rather whether the Assembly has the power to advance UN purposes by establishing a subsidiary judicial organ. In the interpretation of institutional powers, the ICJ has consistently recognised the broad discretion of the principal organs in defining their own functions, there being a presumed validity to their acts, especially given the absence of judicial review (as conventionally understood) within the UN system.[1145] This point is supported by the implied powers doctrine in recognising a broad discretion for principal organs: ICJ jurisprudence indicates that where action is essential for a permissible UN purpose (here, most obviously, the maintenance of international peace and security), then the presumption is that such power is *intra vires*.[1146] Furthermore, the ICJ also noted in *Application for Review* that the powers of the Assembly should not be interpreted restrictively: accordingly, 'to place a restrictive interpretation on the power of the General Assembly to establish subsidiary organs would run contrary to the clear intention of the Charter'.[1147]

While this dictum would have traction within the ICJ, it would need to be placed on firmer ground in the context of criminal proceedings, particularly given that the subsidiary judicial organ would be able to review the legality of its own creation, as the

[1138] UNSC ICTY Report (n 1134), [21]-[23]; UN, *Yearbook of the United Nations* (1947-1948), 598 (Polish representative noting that a tribunal under the auspices of the Genocide Convention could only be established by the Security Council given the need for enforcement action).
[1139] UNSC ICTY Report (n 1134), [21]-[22].
[1140] Hamilton and Ramsden (n 709), 117.
[1141] Barber, 'Accountability' (n 4); Ramsden, 'Uniting for MH17' (n 4); Lemnitzer (n 103). It has also been raised as a possible solution in the Syria situation, see Beth Van Schaack, *Imagining Justice for Syria* (OUP 2020).
[1142] See 'Report of the Group of Experts' (n 297), [148].
[1143] *Tadić* (Jurisdiction) (n 125), [27].
[1144] *Certain Expenses* (n 108), 151, 163.
[1145] *Certain Expenses* (n 108), 168; *Effect of Awards* (Advisory Opinion) (n 652), 58.
[1146] ibid. See also White, 'Relationship' (n 8) 295-6.
[1147] *Application for Review* (Advisory Opinion) (n 63), 172.

ICTY and ICTR did previously.[1148] The methodology applied by the ICTY in *Tadić* was decidedly more stringent than the implied powers doctrine espoused by the ICJ. There it was acknowledged that UN organs do not have unbounded discretion but were (largely) constrained by text; 'the language of the UN Charter speaks of *specific powers*, not absolute fiat'.[1149] Moreover, it is noteworthy that the ICTY Appeals Chamber, in supporting the power of the Security Council to establish the tribunal, contrasted this with the limited power of the Assembly, which was unable to do so given the 'internal division of power' within the UN.[1150] Some Member States have also contended that the Security Council is the only competent organ able to create subsidiary prosecutorial bodies for the same reasons.[1151]

The legality of a subsidiary judicial organ established by the Assembly is therefore a complex issue, although not unprecedented. In 1949 the Assembly established the United Nations Administrative Tribunal (UNAT).[1152] The UNAT was established to address staff grievances against the UN and was empowered to render final and binding awards of compensation. Whether such awards were binding on the Assembly, thereby placing fetters on its budgetary powers, was a contentious issue: some Members argued that the plenary was unable to bind itself. The ICJ was accordingly requested to advise on the circumstances in which, if any, the Assembly could refuse to give effect to an award of the UNAT. [1153] In turn, the answering of this question required the ICJ to consider the powers of the Assembly and its relationship with the UNAT as a subsidiary judicial organ. The ICJ expressly confirmed that the Assembly in creating the tribunal had not established 'an advisory organ or a mere subordinate committee' but rather had created 'an independent and *truly judicial body* pronouncing final judgements without appeal within the limited field of its functions.'[1154] It started by affirming that the UNAT was validly created: although lacking an express textual basis, the power to establish the UNAT arose impliedly from Article 101 of the UN Charter as a 'necessary intendment' to secure the objectives of administrative justice and efficiency.[1155] The ICJ in a later Advisory Opinion would note the broad nature of this power, the 'sole restriction' under the UN Charter being that the subsidiary organ was 'necessary for the performance of its functions'.[1156]

As to the Assembly's competence to establish this organ, the ICJ deduced this from the power of the plenary under Article 101 to regulate staff relations, as well as Article 7(2) which enabled the creation of '[s]uch subsidiary organs as may be found necessary'.[1157] What is noteworthy from *Effect of Awards* is the rejection of the argument that the Assembly only possessed the competence to establish subsidiary organs that assisted in the performance of its specific functions (i.e. under Articles 10 and 11 to discuss any matters within the scope of the UN Charter and to make recommendations to Member States or to the Security Council). It is readily apparent

[1148] *Tadić* (Jurisdiction) (n 125); cf *Prosecutor v Ayyash* (Jurisdiction) STL-11-01/PT/TC (27 July 2012), [55] (question was non-justiciable).
[1149] *Tadić* (Jurisdiction) (n 125), [28] (emphasis added). Arguably, the Appeals Chamber's view is inconsistent with that of the ICJ, who previously held that the Security Council possesses 'general powers': *Namibia* (Advisory Opinion) (n 108), 112.
[1150] ibid.
[1151] UNGA 66th plenary meeting (n 642), 24 (Bolivia).
[1152] UNGA Res 351 A(IV) (1949).
[1153] *Effect of Awards* (Advisory Opinion) (n 652).
[1154] ibid 57 (emphasis added).
[1155] ibid 57.
[1156] *Application for Review* (Advisory Opinion) (n 63), 172.
[1157] *Effect of Awards* (Advisory Opinion) (n 652), 58.

that a judicial power does not impliedly arise from Article 10 as plainly to engage in 'discussion' and 'recommendation' does not reasonably extend to the rendering of a binding judicial determination. Therefore, while the Assembly's creation of commissions of inquiry is on firm ground as arising as an incident to the performance of its Charter functions (see above), more work needs to be done to support the plenary creation of an *ad hoc* criminal tribunal. In this regard, another significant conclusion in *Effect of Awards* was the acknowledgment that the Assembly did not have to delegate its powers in order to validly create a subsidiary organ. By establishing the UNAT, the Assembly was not purporting to 'delegate' its judicial functions but rather was exercising a power it had under Article 101 to regulate staff relations. On this basis, the ICJ regarded the Assembly to be doing nothing different than a national legislature, which may create by statute judicial organs that are capable of binding the legislature.[1158] In short, the principles outlined in *Effect of Awards* would therefore support the Assembly in establishing an *ad hoc* tribunal where this is linked to a textually defined function in the UN Charter.[1159]

One possible textual basis derives from Articles 55 and 56 of the of the Charter. Article 55 notes that 'with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations', the UN shall promote, amongst other functions, the 'universal respect for, and observance of, human rights'.[1160] Article 56 provides that '[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'. Given that international criminal law is a means to enforce human rights obligations, an *ad hoc* tribunal with jurisdiction over situations in relevant Member States could be construed as a means to 'promote' observance of human rights under Article 55. This basis would not, however, be free from controversy; some writers consider Articles 55 and 56 to be essentially programmatic in character and therefore not a source of obligation.[1161] In the final analysis, which view is correct – obligation or aspiration – will ultimately be a matter for the Member States to interpret if they were to consider creating an *ad hoc* tribunal. The Assembly would have ample authority to support the view that Articles 55-56 are legal in nature, including a series of its own resolutions as well as pronouncements of the ICJ.[1162] Although the use of Articles 55-56 to create a subsidiary *ad hoc* tribunal is unprecedented, it is theoretically conceivable that an Assembly resolution interprets these provisions in such a permissible manner, with this interpretation, if commanding 'general acceptance', constituting a 'subsequent agreement' of the membership in the interpretation of the UN Charter (see further Chapter 3). This provides one possible basis in which an interpretive claim could be advanced for the creation of an *ad hoc* tribunal, but there are others.

In particular, other writers see merit in inferring the source of a power to establish an *ad hoc* tribunal in Assembly practice, as Rebecca Barber argues.[1163] There

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[1158] ibid 61. Similarly, the Appeals Chamber in *Tadić* did not regard the Security Council to be delegating any judicial functions; rather it was acting pursuant to specific provisions of the UN Charter (art 41) in restoring and maintaining international peace and security: *Tadić* (Jurisdiction) (n 125), [29].

[1159] For further analysis on *Effect of Awards* (Advisory Opinion) (n 652), see: Joanna Gomula, 'The International Court of Justice and Administrative Tribunals of International Organisations' (1991) 13 Mich J Intl L83, 93-94.

[1160] UN Charter, art 55.

[1161] See discussion in Rüdiger Wolfrum, Eibe H. Riedel, 'Ch.IX International Economic and Social Co-operation, Article 55 (c)' in Simma (vol II) (n 72), 1573.

[1162] See Chapter 2, n 414.

[1163] Barber, 'Accountability' (n 4).

is, in this respect, a body of practice, as with creating a peacekeeping force in the Middle East;[1164] requesting the Secretary-General to dispatch a special assistance mission to Afghanistan;[1165] facilitating and approving the establishment of the ECCC;[1166] and creating various commission of inquiry.[1167] Plainly, the Assembly has gone beyond its recommendatory functions in the UN Charter to establish or support the establishment of bodies with a judicial or quasi-judicial character, including those more generally concerned with enforcement of the UN Charter. On this basis, Barber argued that there is no reason why the Assembly could not go one step further to establish an *ad hoc* tribunal.[1168] While an argument from Assembly practice might support the creation of a tribunal it would not be clothed with coercive powers given that none of these subsidiary organs had such powers; it would have to be established with consent of the relevant Member State concerned. There is also an issue whether a subsidiary organ founded with different powers (i.e. peacekeeping) can be used as precedent for the creation of one with judicial powers. The closest would be to reason by analogy to the UNAT, established by the Assembly to resolve employment related disputes within the UN system (as considered above). However, the UNAT was founded on the basis of a textual power in the UN Charter, as the ICJ reasoned.[1169]

An alternative basis is to establish the tribunal (but without coercive powers) with the consent of the Member State in whose territory the organ will operate. The ICJ in *Certain Expenses* has acknowledged that the Assembly is competent to take 'action' to maintain international peace and security, provided that this is achieved with the consent of the relevant States affected by such action (i.e. the placement of a Assembly-established peacekeeping force in a State). The ICJ inferred this from Article 14 of the UN Charter, which permits the Assembly to 'recommend measures for the peaceful adjustment of any situation'.[1170] On this basis, one such measure could be to establish a criminal tribunal with the consent of the State in which the crimes occurred and on terms that would secure their compliance. In effect, this is the model adopted in Cambodia, the Assembly playing a leading role and providing authority for the UN to enter into an agreement with the Cambodia government for a joint, hybrid, tribunal.[1171] Conversely, this avenue would obviously be of no avail where the territorial State resists its creation. It would also not by itself impose a legal duty on third States to cooperate and comply with decisions of the tribunal (or subsequent resolutions of the Assembly made in relation to the tribunal), this having to be found on a different legal basis to the *Certain Expenses* principle.

Another basis in which to underpin the powers of a Assembly-established tribunal would be via the doctrine of universal jurisdiction, which allows criminal jurisdiction to be exercised irrespective of the place in which the crimes occurred or the nationality of the offender.[1172] While there remains some uncertainty as to the scope of this doctrine, 'universal jurisdiction [is] nowadays acknowledged in respect of international crimes', as the Appeals Chamber in *Tadić* observed.[1173] The value of using universal jurisdiction is that it avoids the territorial State consent issue – such

[1164] UNGA Res 998 (ES-I) (1956).
[1165] UNGA Res 48/202 (1993).
[1166] UNGA Res 57/228 B (2003).
[1167] See n 1072.
[1168] Barber, 'Accountability' (n 4), 580.
[1169] *Effect of Awards* (Advisory Opinion) (n 652), 57
[1170] *Certain Expenses* (n 108), 163.
[1171] The history of its creation is recounted in Hamilton and Ramsden (n 709).
[1172] *Milutinović* (Jurisdiction) (Separate op Judge Robinson) (n 343), [3].
[1173] *Tadić* (Jurisdiction) (n 125), [62]; *Pinochet (No 3)* (n 127), 275 (Lord Millett).

jurisdiction is exercisable even if the State in which the crimes occurred does object.[1174] However, the more complicated question is whether a body such as the Assembly (via a subsidiary organ) is able to exercise universal jurisdiction; ultimately it is a power that belongs to States rather than an international organ. Indeed, in the context of the creation of the Security Council's *ad hoc* tribunals, it was Chapter VII that was said to underpin the tribunal rather than universal jurisdiction, despite judicial debate on this issue.[1175] But given that the Assembly does not have Chapter VII powers as such, this might in turn support the use of universal jurisdiction as the juridical basis for its *ad hoc* tribunal.

The route here would be via a theory of delegation - that States can do collectively what they can do individually, and in turn can clothe an international institution with the competence to act on their collective behalf. It was a creative proposal of Judge Kirby in the event that the Security Council failed to act in securing accountability for crimes against humanity committed in the DPRK.[1176] It was also the juridical basis offered for the Nuremberg trials, in that 'they have done together what any one of them might have done singly'; accordingly, the trials derived their jurisdiction 'from such a combination of national jurisdictions of the States parties' to the London Charter.[1177] Although a point of distinction is that the source of authority is a Assembly resolution instead of a treaty, its plausible to argue that the same delegation principle is applicable in both cases provided that the plenary resolution is articulated in unambiguous terms to encapsulate universal jurisdiction. Moreover, the rationale for universal jurisdiction is to ensure redress for conduct detrimental to all States, with any State exercising jurisdiction doing so on behalf of all others; the doctrine is therefore well suited to application in the Assembly as the most representative UN organ in manifesting the collective will for prosecutorial action in a particular situation. The limitation of using a theory of universal jurisdiction is that, while it would allow for the exercise of coercive legal authority over a suspect, the doctrine itself is not clearly articulated as of yet to include a duty on third states to cooperate with the forum State or the body conducting the trial. Accordingly, while universal jurisdiction would supply criminal jurisdiction, it does not resolve the question about imposing legal duties on States to comply, be it the territorial State in which the crimes occurred, or third States.

Finally, the Assembly might also invoke the Uniting for Peace mechanism to establish an *ad hoc* tribunal, although there remains some doubts as to what legal effect this mechanism has over and above the plenary's existing powers under the UN Charter.[1178] Uniting for Peace can be invoked where the Security Council has 'failed' to exercise its primary responsibility due to a lack of unanimity of its permanent members.[1179] This failure might be seen, for instance, when Russia vetoed the creation of an *ad hoc* tribunal for the MH17 airline disaster under Chapter VII authority.[1180] On this basis, the Assembly is able to bypass Security Council deadlock and take measures to maintain international peace and security. In support of this proposition, the text of

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[1174] Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1(3) JICJ 618, 626.
[1175] *Milutinović* (Jurisdiction) (Separate op Judge Robinson) (n 343), [5]-[49].
[1176] DPRK Report (n 70), **[1201]**.
[1177] IMT, 'Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg', 14 November 1945–1 October 1946 (1947), 218; UNSC, 'Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)' (10 February 1993) UN Doc S/25274, [72]-[73].
[1178] See Larry Johnson, 'Uniting for Peace' (n 78).
[1179] UNGA Res 377 (V) A (1950), [1].
[1180] Ramsden, 'Uniting for MH17' (n 4), 344-345.

the Uniting for Peace resolution establishes that the Assembly has a broad spectrum of powers at its disposal where the Security Council fails to act: the discharge of the Assembly's responsibilities 'calls for possibilities of observation which would ascertain the facts and expose aggressors', which could arguably include the creation of a criminal tribunal.[1181] Some argue that the Assembly is unable to exercise 'coercive' powers analogous to those in Chapter VII, and that Uniting for Peace is merely declaratory of the Assembly's discursive powers in the text of the UN Charter.[1182] An *ad hoc* tribunal established under Uniting for Peace would therefore, on this understanding, be lacking in coercive powers. However, it also seems clear from earlier practice (i.e. the Assembly-mandated military action in the Korean peninsula) and debates surrounding the passage of the Uniting for Peace resolution that the Assembly's limited assumption of coercive powers was contemplated as a form of action that might be taken under this mechanism.[1183] This argument is developed further in Chapter 7.

As already noted, while the various theories would support the creation of an *ad hoc* tribunal with jurisdiction, they would not necessarily support the imposition of cooperation duties on Member States. Establishing the *ad hoc* tribunal under Article 55-56 might well support a cooperation duty as an incidence of the obligation to respect human rights, although that reading of these provisions would need to command general acceptance in the Assembly. Still, the absence of a clear legal basis in the UN Charter in which to found a cooperation duty is not necessarily fatal. As Barber argued, a good argument can be made that, as a matter of customary international law, States are under a duty to cooperate in the prosecution of international crimes, which arguably would include to extradite, prosecute or surrender a suspect to an international tribunal.[1184] In turn, an obligation to prosecute or extradite can be derived from numerous relevant international treaties, including the Geneva Conventions,[1185] Convention against Torture,[1186] and the Genocide Convention.[1187] The Assembly has similarly recognised that a refusal to cooperate is inconsistent with 'generally recognised' international law.[1188] If the Assembly established an *ad hoc* tribunal and, with the support of a large number of Member States, affirmed a cooperation duty as deriving from any one or a combination of the above sources then this would also resolve any doubts as to the validity and scope of this norm. Finally, it might also be the case that an Assembly created *ad hoc* tribunal might come to be endorsed by the Security Council, and with it,

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[1181] UNGA Res 377 (V) A (1950), preamble.
[1182] Reicher (n 78) 48; see also Kenny (n 3) 25; Krasno and Das (n 78).
[1183] White, 'Relationship' (n 8), 308–11.
[1184] Barber, 'Accountability' (n 4), 581-583. See also ILC, 'Third Report on Crimes against Humanity' (23 January 2017) UN Doc A/CN.4/704, 9-10; Raphael van Steenberghe, 'The Obligation to Extradite or Prosecute: Clarifying its Nature' (2011) 9 JICJ 1089, 1115. See also M Cherif Bassiouni and Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers 1995); Christopher Soler, *The Global Prosecution of Core Crimes under International Law* (TMC Asser Press 2019), 324; Eveylon Mack, 'Does Customary International Law Obgate States to Extradite or Prosecute Individuals Accused of Committing Crimes Against Humanity' (2015) 24 Minnesota J Intl L 73, 74.
[1185] *Prosecutor v Tihomir Bkaskic* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) ICTY-95-14-AR (29 October 1997), [29]; Sonja Boelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?' (2000) 5 JCSL 63, 63; Jean-Marie Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7 JICJ 683.
[1186] Torture Convention (n 170), art 7.
[1187] Lee Steven, 'Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligation' (1999) 39 Virginia J Intl L 425, 461.
[1188] See Chapter 2 and UNGA Res 2840 (XXVI) (1971), [4]; UNGA Res 2712 (XXV) (1970), [2].

a requirement to cooperate under Chapter VII. This is a possibility where, as Beth Van Shaack argued, the 'geopolitical winds shift course' leading the Security Council to favour international justice in a situation that they might have been previously resistant.[1189] Yet, even without Security Council support, there are good legal arguments for the proposition that the Assembly, provided that significant political will exists, is able to establish an *ad hoc* tribunal that is vested with legal authority to assert jurisdiction over a situation and to compel the cooperation of the membership.

5. Conclusion

This Chapter considered three avenues in which the Assembly is able to empower investigations or courts to address impunity for atrocity crimes. First, in relation to the creation of commissions of inquiry these are now an established feature of Assembly practice, also underpinned by its discursive powers in the UN Charter. These investigations now extend to the preparation of individual case files to support prosecutions of those suspects in the future, a recent innovation taken in both the Syria and Myanmar situations (albeit the latter established in the UNHRC). Second, there is also some practice in which the Assembly has requested advisory opinions that address components of international justice. In this regard, there is a clear textual power for the Assembly to request an advisory opinion which the ICJ will accept absent 'compelling reasons'. The real limits on this power do not derive from any judicial principle of restraint but rather from the Assembly's own conceptions as to the limits of this power, embracing considerations of both political and judicial propriety in making a request. Third, although contentious and unprecedented, the Assembly could establish an *ad hoc* tribunal without the consent of the territorial State concerned. Being underpinned by a combination of different sources of international law (Articles 55-56 of the UN Charter, Uniting for Peace, universal jurisdiction, and the customary international law duty to cooperate with prosecutions), the Assembly could create a tribunal analogous to one established under Chapter VII.

These three avenues provide some basis for the Assembly to promote accountability for serious violations of international law. The empowerment of investigations and requesting advisory opinions fit within the classic functions of the Assembly as a discursive body in using the findings of such mechanisms to inform its future discussions and resolutions. As noted in Chapter 4, such fact-finding is an essential component of quasi-judicial resolutions. Yet, in relation to commissions of inquiry and advisory opinions, even if they do assist the Assembly's monitoring of a situation, they might influence the direction of international affairs on a situation in their own right. For example, the use of the advisory mechanism to address State responsibility for atrocity crimes serves the function of obtaining an international judicial finding (albeit non-binding) on the steps that a State needs to take to bring itself back into compliance with international law. Furthermore, not only will the IIIM-Syria augment the Assembly's function, but also serve the purpose of assisting international and domestic prosecutorial authorities. The Assembly's efforts at building the capacity of international justice institutions might, at some point, prompt closer reflection on the possibility that the Assembly could play a more direct role in the enforcement of international justice, particularly in creating an *ad hoc* tribunal to prosecute suspects, where other efforts at securing prosecutions have failed. There is a legal basis for the Assembly to do so; the question as ever is whether political will exists to move these

[1189] Van Schaack, 'Imagining Justice' (n 1141), 174.

suggested creative solutions into action. The IIIM-Syria has made a start in this direction.

CHAPTER 7: THE POTENTIAL ROLE OF THE GENERAL ASSEMBLY IN COORDINATING SANCTIONS

1. Introduction

There have been numerous instances in which the Assembly has threatened consequences in the event that a Member State fails to observe a resolution or international obligation. It warned South Africa of 'grave consequences' if it was to execute 'freedom fighters' and issued a 'solemn warning' to Israel to 'cease its threats of aggression'.[1190] Often times, these warnings have come to be seen as empty threats. On other occasions, the Assembly has recommended Member States to sanction the recalcitrant State. Such recommendations have been made with a view to ensuring that the recalcitrant State adjusts 'its conduct to its obligations under the Charter of the United Nations' and to 'give effect to resolutions adopted by the General Assembly', or similar formulations with the express aim of compliance with such resolution.[1191] The Assembly has, at various points, recommended that Member States impose sanctions against Congo, Israel, South Africa, Southern Rhodesia, China (and North Korea), Guatemala, and Portugal.[1192] These recommended sanctions have included the breaking of diplomatic relations (such as by recalling ambassadors from a country); closing sea and air ports to their vessels and aircrafts; boycotting all trade; terminating any credits; suspending technological assistance; severing cultural relations; and imposing an arms embargo.[1193] Some of these resolutions have included a combination of these measures; in the case of Israel and South Africa, the aim was the 'total isolation' of the recalcitrant regime in 'all fields'.[1194] Most of these recommendations have arisen in the context where the Security Council has not imposed mandatory sanctions, the Assembly instead recommending Member States to act autonomously in imposing sanctions against deviant subjects.[1195]

The Assembly's recommendation of sanctions in these instances raises the inevitable question as to whether they are an effective tool within the field of international justice.[1196] One of the earliest Assembly sanctions recommendations, that

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[1190] UNGA Res 33/183 F (1979), [3] (South Africa).

[1191] UNGA Res 1742 (XVI) (1962), [7] (*'requests'* Members to use their influence 'to secure the compliance of Portugal with the present resolution'); UNGA Res 1593 (XV) (1961), preamble (South Africa).

[1192] UNGA Res 37/184 (1982), [5] (Guatemala); UNGA Res 1807 (XVII) (1962), [6]-[7] (Portugal); UNGA Res 1761(XVII) (1962), [8] (South Africa); UNGA Res 1474 (ES-IV) (1960) (Congo); UNGA Res 500 (V) (1951), [1] (Korea).

[1193] UNGA Res 37/69 F (1982), [2] (Israel/South Africa); UNGA Res 37/184 (1982), [5] (Guatemala); UNGA Res 34/93 A (1979), [12] (South Africa); UNGA Res 2107 (XX) (1965), [7] (Portugal); UNGA Res 1474 (ES-IV) (1960) (Congo); UNGA Res 500(V) (1951) (PRC); UNGA Res 39(1) (1946) (Spain).

[1194] See eg UNGA Res 41/35 B (1986), [7] (South Africa); UNGA Res 40/168 (1985), [13]-[14] (Israel).

[1195] The power of the Assembly to advise its membership to impose sanctions on the basis of each Member State's own legal authority is accepted in the scholarly literature, see: Higgins, 'Oppenheim's International Law' (n 414), 972, 977; White, 'Relationship' (n 8), 309.

[1196] This is also tied to the more general debate over the effectiveness of sanctions as a tool in promoting compliance with international norms. For a range of scholarly opinion, see Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007), 262; Nigel White, 'Collective Sanctions: An Alternative to Military Coercion?' (1994) 12(3) Intl Relations 75, 91; Arturo Carrillo and Annalise Nelson, 'Comparative Study and Analysis of National Legislation Relating to Crimes Against Humanity

called for an embargo on China and North Korea, was complied with by 'some forty-five countries'.[1197] Indeed, Member States collectively have, at various points, appreciated the value of sanctions in addressing serious violations of international law. For example, when defining the importance of sanctions to eradicate apartheid, the Assembly noted that 'universally applied economic sanctions are the only means of achieving a peaceful solution'.[1198] The Assembly has also identified the utility of sanctions in supporting ICC action, recommending the Security Council to authorize 'effective targeted sanctions' against perpetrators of international crimes.[1199] To be sure, the inevitable criticism about the Assembly's foray into recommending sanctions was that such measures did not always lead to overwhelming compliance.[1200] Western powers continued to trade with South Africa and arms continued to be supplied to Portugal, amongst obvious examples. But these are perhaps criticisms of prior sanctions strategies employed by the Assembly and the balance of Cold War politics at the time, rather than on the effectiveness of future sanctions (including 'smart' sanctions) that could be used in the realm of international justice.[1201]

Although the sanctions instrument has become a common tool used in response to serious violations of international law, questions over their legality remain, particularly where they are taken unilaterally.[1202] Examples of sanctions in the atrocity crimes context include the adoption of US legislation prohibiting the exports of goods and technology to, and all imports from, Uganda, given that its government 'committed genocide against Ugandans;'[1203] the imposition of a trade embargo by the European

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and Extraterritorial Jurisdiction Special Report' (2014) 46 Geo Wash Intl LR 481; Margo Kaplan, 'Using Collective Interests to Ensure Human Rights: An Analysis of the Articles on State Responsibility' (2014) 79(5) NYU L Rev 1902; Sarah H Cleveland, 'Norm Internalization and U.S. Economic Sanctions' (2001) 26 Yale J Intl L 1.

[1197] Francis Wilcox, 'How the United Nations Charter Has Developed' (1954) 296 Annals American Acad Pol & Social Science 1, 8.

[1198] UNGA Res 2054 (XX) A (1965), [6]. Similarly, the Assembly has noted the importance of 'mandatory sanctions' under Chapter VII as the 'most appropriate and effective means by which the international community can assist the legitimate struggle of the oppressed people of South Africa': UNGA Res 37/69 C (1982), preamble.

[1199] UNGA Res 69/188 (2014), [8].

[1200] Indeed, the Assembly has often recommended the Security Council to impose sanctions under Chapter VII alongside its own sanctions recommendations: UNGA Res 41/35 H (1986), [6]; UNGA Res 37/68 (1982), [9]; UNGA Res 31/6 D (1976), [1]; UNGA Res 1761 (XVII) (1962), [8].

[1201] 'Smart' sanctions differ from conventional sanctions in aiming to target the culpable political elites while cushioning vulnerable groups by exempting specified commodities such as food and medical supplies from embargoes. There is a voluminous literature on smart sanctions and their effectiveness, see eg Arne Tostensen and Beate Bull, 'Are Smart Sanctions Feasible?' (2002) 54(3) World Politics 373; Dursun Peksen, 'When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness Literature' (2019) 30(6) Defence and Peace Economics 635.

[1202] Which might violate the principle of non-intervention, concerning those 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely': *Nicaragua (Merits)* (n 273), 108; Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 Chinese JIL 175, 181; Maziar Jamnejad and Michael Wood, 'The Principle of Non-intervention' (2009) 22 LJIL 345, 347; Daniel Joyner, 'International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions' in Ali Morossi and Marisa Bassett (eds), *Economic Sanctions under International Law* (TMC Asser Press 2015) 89; Richard Porotsky, 'Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo against Cuba' (1995) 28(4) Vand J Transnatl L 901, 920; Curtis Henderson, 'Legality of Economic Sanctions Under International Law: The Case of Nicaragua' (1986) 43 Wash Lee LR 167, 181.

[1203] Uganda Embargo Act, Public Law 95-435 (10 October 1978); United States Statutes at Large 1978 92(1) (US Government Printing Office, 1980), 1051– 1053.

Community and the US against Iraq following its act of aggression against Kuwait;[1204] and the freezing of Yugoslav funds and an immediate flight ban by many European States in response to President Milosevic's 'worsening record on human rights'.[1205] While not all measures that a State might take against another would entail responsibility (some measures being 'retorsions'), increasingly such matters are governed by treaties, such as bilateral or multilateral air services agreements, trade agreements, development aid treaties, or human rights treaties.[1206] The Security Council's authorisation of sanctions under Chapter VII would, by virtue of Article 103 of the UN Charter, release States from any conflicting obligations of this nature as it implements sanctions against the deviant State.[1207] For its part, the Assembly has repeatedly condemned 'unilateral coercive measures', aimed at subordinating a State's sovereign rights, as being 'contrary to international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States.'[1208] In turn, the legality of unilateral sanctions taken without authorisation by the Security Council continues to attract scholarly reflection.[1209] The extent to which the Assembly is able to legally authorise sanctions, as a way to redress the failure of the Security Council to do so in the face of atrocity crimes, therefore commands attention.[1210]

Whether an Assembly 'voluntary sanctions' resolution can act as a legal authorisation, and not merely an advisory recommendation for Member States to act based upon their own authority, will depend upon an analysis of a number of legal regimes.[1211] As a preliminary matter, the extent to which the Assembly is looked upon

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[1204] See eg President Bush's Executive Orders of 2 August 1990, reproduced in (1990) 84(4) AJIL 903.
[1205] Reproduced in (1998) 69 BYBIL 581; (1999) 70 BYBIL 555.
[1206] See further Cleveland (n 1196); Devika Hovell, 'Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions' (2019) 113 AJIL Unbound 140, 145; Mohamed Helal, 'On Coercion in International Law' (2019) 52 NYU JIntl L & Pol 1; Antonios Tzanakopoulos, 'State Responsibility for "Targeted Sanctions"' (2019) 113 AJIL Unbound 135; Cedric Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (2008) 7 Chinese JIL 625; *Nicaragua (Merits)* (n 273), 138 (a '[S]tate is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation'); ILC, ARSIWA (n 861), 128.
[1207] Other scholars have argued that trade agreements allow for the possibilities of sanctions impliedly as a national security interest: Helal (n 1206), 104. For a contrary argument see Carlos Vázquez, 'Trade Sanctions and Human Rights - Past, Present, and Future' (2003) 6 J Intl Econ L 797.
[1208] See eg UNGA Res 74/154 (2019), preamble; UNGA Res 51/103 (1996) UNGA Res 46/210 (1991) and subsequent annual resolutions with the same title; UNGA Res 3281 (XXIX) (1974); UNGA Res 26/25 (1970); UNGA Res 2131 (XX) (1965). See also UNHRC, 'Thematic study of the Office of the United Nations High Commissioner for Human Rights on the impact of unilateral coercive measures on the enjoyment of human rights' (11 January 2012) UN Doc A/HRC/19/33; UNHRC, 'Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights' (30 August 2018) UN Doc A/HRC/39/54.
[1209] Hovell (n 1206); Mergen Doraev, 'The Memory Effect of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again' (2015) 37 U Pa J Intl L 355; Hofer (n 1202).
[1210] Other legal considerations when considering the permissibility of sanctions, which are not considered here, include the need to respect the human rights of the sanctioned, as well as 'secondary sanctions': Tzanakopoulos, 'State Responsibility' (n 1206).
[1211] Judge Lauterpacht once opined that Assembly recommendations may 'on proper occasions' provide a 'legal authorisation' for Member States to act, although did not expand on this observation *South West Africa* (Advisory Opinion) (Separate op Judge Lauterpacht) (n 999), 115. However, given that the case concerned the non-binding effect of Assembly resolutions, rather than their authorising effect, the facts did not provide the occasion for Judge Lauterpacht to expand upon this passage. See also the arguments for resolutions as authorisations in other contexts, including humanitarian intervention and humanitarian assistance: Rebecca Barber, 'A Survey of the General Assembly's Competence in Matters of International Peace and Security: in Law and Practice' (2020 forthcoming) J Use of Force in Intl L.

for guidance as to the validity of conduct will also tie more generally to perceptions as to its quasi-judicial function in international relations; the practice in Chapter 4 is therefore relevant background to the potential for the Assembly's authorising role under the laws of State responsibility. In this respect, the starting point is the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[1212] The ILC did not include the adoption of an Assembly resolution as a possible circumstance precluding wrongfulness in the ARSIWA amongst the justifiable circumstances.[1213] Still, there are arguments that Assembly resolutions help to certify that a context exists that contribute towards the exclusion of State responsibility. Given that this involves an assessment of how Assembly resolutions affect the functioning of treaties, the VCLT must also be considered, particularly its provisions for bringing a treaty to an end, or otherwise suspending it.[1214] Finally, it will be argued that, in relation to the UN Charter, acting upon an Assembly recommendation can, in limited circumstances, constitute 'action' within the framework of the international organisation, thereby having an authorising quality. Attention here is placed on the Uniting for Peace mechanism, as a device in which the Assembly is able to authorise Member States to take action, potentially including enforcement action analogous to that under Chapter VII of the UN Charter.[1215] Therefore, four possible relevant legal avenues will be explored here, drawing upon the circumstances that preclude wrongful acts under the ARSIWA, provisions under the VCLT and UN Charter, and Uniting for Peace.

2. Resolutions as constituting a 'fundamental change of circumstances'

The first relevant doctrine here is *rebus sic stantibus*, which provides a basis for 'termination or withdrawal' from a treaty, or suspension of its effects, where there is a 'fundamental change in circumstances'.[1216] The *rebus sic stantibus* doctrine remains controversial, particularly given the concern that it undermines the stability of international agreements, but this is not the place for a detailed exposition of its rationale or history.[1217] The doctrine is evidently part of customary international law and was codified in Article 62 of the VCLT. According to this doctrine, it is necessary to establish that the existence of those circumstances constituted an 'essential basis' of the consent of the parties to be bound by the treaty, the effect of the change being to 'radically transform' the extent of obligations still to be performed under the treaty.[1218] Meeting these limiting conditions is ultimately a question to be determined according to the particularities of each treaty: it is conceivable that the violation of human rights, and commission of international crimes by State agents specifically, could constitute a 'fundamental change of circumstances'. The doctrine was invoked, for example, by the

[1212] See ARSIWA (n 861).
[1213] ibid, arts 20-25 (consent, self-defense, countermeasures, force majeure, distress, and necessity).
[1214] VCLT (n 108).
[1215] COIs often refer to the Assembly taking action under *Uniting for Peace*, eg Gaza Report (n 976), [1971].
[1216] VCLT (n 108), art 62.
[1217] See further Hersch Lauterpacht, *Function of Law in the International Community* (OUP 1933), 271-285 (the doctrine is a general principle of law and also an 'expression of the view that the rule *pacta sunt servanda* does not apply to States with the same cogency as it applies to individuals, for the simple reason that they are States, and that their interests cannot be subjected to an obligation existing independent of their own will.'). See also Oliver Lissitzyn, 'Treaties and Changed Circumstances (Rebus Sic Stantibus)' (1997) 61 AJIL 895.
[1218] VCLT (n 108), art 62.

Netherlands to suspend the operation of its long-term development aid treaty with Suriname when it came to light that the latter's agents assassinated fifteen political opponents.[1219]

It is thus instructive to consider here what role the Assembly is able to perform in application of *rebus sic stantibus*. Interestingly, the Assembly's predecessor, the Assembly of the League of Nations, could 'advise the reconsideration by Members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world'.[1220] This does not textually go so far as to 'release' a State from its treaty obligations, but its significance lies rather in the recognition that the League Assembly was competent to determine the conditions whether indeed, in its view, a treaty had become 'inapplicable'.[1221] By contrast, the UN Charter did not include a like provision, although Article 14 is broad enough to include recommendations pertaining to treaty revision where these obstruct peace and security ('recommend measures for the peaceful adjustment of any situation'). Indeed, writing in 1948, Blaine Sloan argued that an Assembly recommendation based on the doctrine of *rebus sic stantibus*, in the absence of judicial settlement, would have 'sufficient force effectively to release a State from obligations incurred under a treaty'.[1222] However, given the strict conditions to invoke a fundamental change of circumstances in Article 62 of the VCLT, it seems more difficult to argue that an Assembly resolution would legally 'release' a State from a treaty in the formal sense.[1223] Article 62 of the VCLT notes that a 'fundamental change of circumstances', which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, 'may be invoked' as a ground for terminating or withdrawing from the treaty, or otherwise suspending its operation. It is apparent that a party to the treaty can only 'invoke' the doctrine; the function of the Assembly, therefore, would be in recommending that the Member States concerned proceeds to invoke *rebus sic stantibus*. Furthermore, even if the State heeds the Assembly recommendation and invokes the doctrine, this act does not then 'release' the invoking State from the treaty. Pursuant to Article 65 of the VCLT, it is necessary for the invoking state to notify the other State; if the latter objects, then the parties have to follow a special conciliation procedure set out in Article 33 of the UN Charter.

While an Assembly recommendation is unable to legally effectuate *rebus sic stantibus*, it might support a State's claim that it is released from the treaty obligations. The argument here is that the Assembly recommendation serves a quasi-judicial purpose (covered in Chapter 4), with the resolution offering evidence that the conditions for such a release have been met. The Assembly 'advantage' is that it comprises a near universal membership of States and thus, in this context, is capable of having a powerful legitimating influence for breaches of treaties.[1224] This will be the case whether the parties to the treaty have the matter resolved by a tribunal or otherwise. An adjudicator is unlikely to ignore an Assembly resolution calling for the invocation of *rebus sic*

[1219] See further Robert Munnelly, 'Rebus Redux: The Potential Utility of Fundamental Change of Circumstances Doctrine to Enforce Human Rights Norms' (1989) 22(1) Cornell Intl LJ 147, 148-149.
[1220] Covenant of the League of Nations (entered into force 20 January 1920), art 19.
[1221] John Williams, 'The Permanence of Treaties: The Doctrine of Rebus Sic Stantibus, and Article 19 of the Covenant of the League' (1928) 22 AJIL 89.
[1222] Sloan, 'Binding Force' (n 31), 29.
[1223] Talmon, 'Legalizing' (n 75).
[1224] Schermers and Blokker (n 434), 779; Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Questions of Jurisdiction, Competence and Procedure' (1958) 34 BYBIL 1, 5; Schachter, '*International Law'* (n 557), 85.

stantibus, especially so where the change in 'circumstance' relates to questions within the Assembly's broad mandates in promoting human rights and maintaining international peace and security.[1225] Where a judicial mechanism is lacking to adjudicate on the validity of a *rebus sic stantibus* claim, a quasi-judicial determination of the Assembly is likely to be especially authoritative on the propriety of the State in invoking this doctrine. Finally, given that abuse is a particular concern with any unilateral invocation of *rebus sic stantibus*, there is an advantage in having a multilateral body find that the underlying circumstances of a treaty have now changed to the point that avoidance of the obligations is justified. Action consequent upon an Assembly resolution is, in this regard, preferable to unilateral action.

3. Assembly Resolutions as Supporting Countermeasures

Countermeasures may preclude wrongfulness 'in the relations between an injured State and the State which has committed the internationally wrongful act'.[1226] In this regard, an Assembly resolution might in turn provide a certification that a context exists (i.e. that a State is 'injured' or a norm violated) that in turn justifies countermeasures by injured States. Under the ARSIWA, the doctrine serves to justify action by States that would otherwise constitute an internationally wrongful act, subject to meeting a number of requirements.[1227] In particular, the action taken must be proportionate, aimed at inducing compliance, temporally limited to the period of the breach, and not operate in a way to compromise peremptory norms, international human rights law and obligations of a humanitarian character.[1228] Several Assembly 'voluntary sanctions' recommendations embrace aspects of this definition, as covered above, particularly in expressing the purpose of the sanctions to bring the recalcitrant or offending state back into compliance with its international obligations. This is apparent, for example, in the Assembly recommendation that called upon States to refrain from providing arms to Guatemala 'as long as serious human rights violations' continue to be reported.[1229] There is potential, in this vein, for Assembly voluntary sanctions recommendations to be relied upon by States in support of countermeasures. Such resolution would not be, as with *rebus sic stantibus,* dispositive of the issue but would offer a presumption in favour of the conditions for countermeasures being met (in particular, that the State to which the countermeasures are directed has violated international law and that the measures recommended are proportionate to the breach).

There is also potential for the Assembly to coordinate 'collective' countermeasures to uphold obligations *erga omnes* (obligations owed by States to all other States).[1230] Under the ARSIWA only the 'injured State' may ordinarily take countermeasures against a State which is responsible for an internationally wrongful act; but it is also defined to include breaches of legal obligation that are owed to a group

[1225] Sloan, 'Changing World' (n 54), 101. Quite what qualifies an Assembly recommendation as 'legitimate' is a difficult question, although the extent of Member State support for a resolution will be an important indicator.
[1226] ARSIWA (n 861), 75.
[1227] ibid, art 52.
[1228] ibid.
[1229] UNGA Res 37/184 (1982), [5] (Guatemala).
[1230] *Barcelona Traction, Light and Power Company Limited* (Belgium v Spain) (Merits) [1970] ICJ Rep 3, 32. See also See Antonios Tzanakopoulos, 'Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility' in Ali Marossi and Marisa Bassett (eds), *Economic Sanctions under International Law* (TMC Asser Press 2015), 156; Kaplan (n 1196).

of States, or the international community as a whole.[1231] The invocation of collective countermeasures would thus apply to *erga omnes* obligations. According to this doctrine, all States (and not just the one that is the direct victim) are entitled to take countermeasures in relation to violations of obligations owed to all States. Such obligations, as the ICJ in *Barcelona Traction* noted, include obligations not to engage in acts of aggression or genocide in addition to 'the basic rights of the human person' including protection from slavery and racial discrimination.[1232] This dictum would seem to reasonably include all other serious violations of international criminal law, international humanitarian law and international human rights law. This is confirmed by earlier drafts of the ARSIWA which indicated that the commission of 'international crimes' would constitute a breach of *erga omnes* obligations.[1233] The Assembly is particularly well placed to coordinate countermeasures against States who violate obligations *erga omnes*, given its 'advantage' of comprising an almost entire membership of States, all of whom have a legal interest in the upholding of such obligations.[1234] The perceived risks of abuse attendant with unilateral assessments of *erga omnes* breaches adds weight behind the Assembly performing such a coordinating function given its plenary status.

4. Non-Recognition of Peremptory Norm Violations

Given the focus of this study on atrocity crimes accountability, it is also instructive to consider the potential applicability of the collective non-recognition 'sanction' in international law, as a means to counteract the effects of the legal violation.[1235] Under Article 41(2) of the ARSIWA, States are said to be under a legal obligation not to recognise, as lawful, a situation created by a serious breach of a peremptory norm of international law, nor render aid or assistance in maintaining that situation.[1236] There is inevitable uncertainty as to what norms are peremptory, although the ICJ has provided useful guidance, referring, by way of example, to the prohibitions on aggression,

[1231] ARSIWA (n 861), arts 42 and 48. See also Nigel White, 'Sanctions and Restrictive Measures in International Law' (2018) 27(1) Italian Ybk Intl L 1; Linos-Alexandre Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 1137, 1146-47

[1232] *Belgium v Spain* (Merits) (n 1230), 32.

[1233] Martin Dawidowicz, 'Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council' (2007) 77(1) BYBIL 333, 347 (and citations there).

[1234] ibid, 345 (and citations there).

[1235] On non-recognition as a form of sanction aimed at isolating the deviant State, see Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2005) 99, 125 (the obligation 'may prove a powerful sanction by the international community against the responsible State'); Enrico Milano, 'The non-recognition of Russia's annexation of Crimea: three different legal approaches and one unanswered question' (2014) Quest Intl L 35, 49; Christian Tomuschat, 'International crimes by States: an endangered species?' in Eric Suy and Karel Wellens (ed) *International Law: Theory and Practice - Essays in Honour of Eric Suy*, (Martinus Nijhoff 1998) 253, 259 (nonrecognition as 'an essential legal weapon in the fight against grave breaches of the basic rules of international law').

[1236] Earlier drafts encapsulated this doctrine in the context of international crimes. See Eric Wyler, 'From "State Crimes" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law' (2002) 13(5) EJIL 1147.

genocide, slavery and racial discrimination.[1237] The non-recognition duty is also limited to the 'situations created' by the serious violation of international law, such as attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples.[1238] To the extent of addressing a peremptory breach, therefore, a State is obliged to sanction a violating State through non-recognition; the opposite of this would be to assist that State with, for example, trade or provision of economic assistance in relation to that particular situation. Of the numerous judicial applications of this principle, the ICJ in *Wall*, having noted the construction of the wall to have violated certain peremptory norms, advised that States are 'under an obligation not to render aid or assistance in maintaining the situation created by such construction'.[1239] The general existence of the non-recognition duty seems clear but how precisely might the Assembly support its application and what relevance does it have in the field of atrocity crimes accountability?

Absent a judicial mechanism to determine both a violation of peremptory norms and to apply the non-recognition duty in a specific scenario, the commentary to ARISWA indicates rather opaquely that '[c]ollective non-recognition would seem to be a prerequisite for any concerted community response against such breaches'.[1240] There is some limited practice of the Assembly doing so, particularly in the colonial-human rights context or where a State has unlawfully acquired territory.[1241] Following the Rhodesian white minority government's unilateral declaration of independence from the UK, the Assembly condemned 'activities of those foreign financial and other interests which, by supporting and assisting the illegal racist minority regime in Southern Rhodesia, are preventing the African people of Zimbabwe from attaining freedom and independence.'[1242] It has also recognised Israeli and South African occupations as invalid and called upon States not to recognise them.[1243] In relation to Russia's annexation of Crimea, the Assembly further underscored that the referendum purporting to alter the status of Crimea had 'no validity' and called upon States 'to refrain from any action or dealing that might be interpreted as recognizing any such

[1237] *Belgium v Spain* (Merits) (n 1230), 32. See also *East Timor (Portugal v Australia)* (Merits) [1995] ICJ Rep 90, 102 (right of peoples to self-determination).
[1238] ARSIWA (n 861), 114-115.
[1239] *Wall* (Advisory Opinion), n 108, 196. See also *Nicaragua (Merits)* (n 273), 100; *Namibia* (Advisory Opinion) (n 108), 56 (noting there to be an obligation 'to recognize the illegality and invalidity of South Africa's continued presence in Namibia' and 'to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia').
[1240] ARSIWA (n 861), 114. For a general overview, see: Talmon, 'Duty not to Recognize' (n 1235), 121 ('In practice, it is most likely that this collective response will be co-ordinated through the competent organs of the United Nations'). See also individual judicial opinion on the extent to which a non-recognition determination is necessary by either of the principal political organs: *Portugal v. Australia* (Merits) (n 1237) (Separate op Judge Skubiszewski) 224, 264 (non-recognition as 'self-executing'); *Wall* (Advisory Opinion) (n 108) (Sep op Judge Higgins), 216 (Judge Higgins) (non-recognition as premised upon a binding decision of the Security Council). As to Security Council practice, see eg UNSC 569 (1985) (South Africa); UNSC Res 218 (1965) (Portugal).
[1241] See also Assembly declarations on the non-recognition doctrine: UNGA Res 2625 (XXV) (1970), annex, first principle ('No territorial acquisition faulting from the threat or use of force shall be recognized am legal').
[1242] UNGA Res 2022 (XX) (1966), [9]; UNGA Res 2151 (XXI) (1966), [5] (Southern Rhodesia).
[1243] UNGA Res 37/123 A (1982), [5] (Israel); UNGA Res 37/39 (1982), [4]; UNGA Res 34/93 G (1979), [5]-[6] (South Africa); UNGA Res 3151 (XXVIII) G (1973), [7] (South Africa); UNGA Res 2254 (ES-V) (1967), [2] (Israel); UNGA Res 39/15 (1984), preamble (South Africa); UNGA Res 32/105 N (1977), [5]-[6] (South Africa); UNGA Res 31/6 A (1976), [3] (South Africa); UNGA Res 2054 (XX) A (1965), [7] (South Africa); UNGA Res 1761 (XVII) (1962), preamble (South Africa).

altered status'.[1244] It can be seen that Assembly practice in this area serves a quasi-judicial function in identifying serious violations of international law which then clarifies the duty of non-recognition in specific instances. Yet, it might be said that the Security Council is a better candidate to demand non-recognition, as it is able to bind the membership.[1245] However, the Security Council has not always acted and nor have the Assembly regarded this to be an exclusive role of the Council (as the above practice shows). Although a Security Council decision could underpin a call for collective non-recognition with the force of the UN Charter, an Assembly resolution can also offer strong evidence as to the existence of a peremptory breach and the requirement for non-recognition as a matter of customary international law.[1246]

There is also the question whether the non-recognition doctrine is structurally amenable to application to the effects created by atrocity crimes; recall that Article 41 ARISWA purports to apply to all violations of peremptory norms.[1247] The doctrine is ultimately premised upon denying the existence of rights or claims that flow from an illegal act, with such acts of non-recognition including the withdrawal of consular representation or diplomatic missions, denial of the legal validity of public officials or acts of the regime, and to refuse any claim to membership of an international organisation.[1248] Non-recognition has operated, in practice, in cases of a factual situation that also takes the form of a claim arising from the illegality, be that to Statehood, territorial sovereignty, or governmental capacity.[1249] Even where the racist policies of the Rhodesian and South African colonial authorities were condemned by the Assembly, the call for non-recognition was ultimately tied to the claim over the continued legality of governance by these authorities over peoples with a right to self-determination.[1250] In relation to non-recognition and the perpetration of the core international crimes, the duty would be most obviously applicable where the crime of aggression has occurred, as this conduct might lead to unlawful territorial acquisition that justifies denial by States.[1251] By contrast, the perpetration of genocide, crimes

[1244] UNGA Res 68/262 (2014), [6]. See also UNGA Res 541 (1983), [15] (non-recognition of Turkish Cyprus); Thomas Grant, 'East Timor, the UN System and Enforcing Non-Recognition in International Law' (2000) 33(2) Vand J Transnatl L 273, 277 (and citations there on the Assembly's response in rejecting Indonesia's claim to title over East Timor).

[1245] The ICJ has also emphasised Security Council binding resolutions on non-recognition: *Namibia* (Advisory Opinion) (n 108), 53 ('A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence.'); *Portugal v. Australia* (n 1237), 105.

[1246] See also Talmon, 'Duty not to Recognize' (n 1235), 121-122 ('Many, if not most, of the calls for non-recognition have been made in non-binding resolutions of the General Assembly and in statements of the President of the Security Council, which could neither authoritatively determine the existence of a serious breach nor create an obligation not to recognise a situation as lawful. The title of Art. 41 speaks of "particular consequences of a serious breach", not of the particular consequences of a UN resolution.')

[1247] Dawidowicz (n 1233), 677.

[1248] ibid 683 (and citations there).

[1249] See generally Talmon, 'Duty not to Recognize' (n 1235).

[1250] See n 1273-1274; Dawidowicz (n 1233), 678 (noting that the relevant 'ILC Commentary refer almost exclusively to unlawful situations resulting from territorial acquisitions brought about or maintained by the threat or use of force').

[1251] It has also been suggested that non-recognition extends to a government that comes to power due to a genocidal campaign, although Assembly practice of this nature is non-existent: Talmon, 'Duty not to Recognize' (n 1235). See also UNCHR, 'Summary Record of the 3rd meeting' (4 December 1992) UN Doc E/CN.4/1992/S-2/SR.3, 16 (Malaysia) ('It was imperative that the international community should firmly uphold the principle of nonrecognition of territories acquired through Serbian aggression, ethnic cleansing and other illegal acts.') Furthermore, as some writers have noted, the obligation of non-recognition has traditionally been intimately linked to forcible territorial acquisition: Dawidowicz (n 1233), 685.

against humanity, war crimes, and large scale human rights abuse, do not so apparently result in unlawful situations and claims which are capable of being denied by States.[1252] The non-recognition duty here would most likely arise and be breached if a third-party State were minded to expressly support such atrocities or provide aid or assistance (such as financing or arms supply) in maintaining the situation.[1253] Writers have also noted the theoretical possibility of organised responses to certain scenarios arising from atrocity crimes. These include the non-recognition of a government that came to power on the back of a genocidal campaign; in this regard, it seems logical to extend non-recognition of governance over illegal territorial acquisition also to situations where their governmental authority substantially arose from a breach of peremptory and *erga omnes* norms.[1254] Another possibility is that the Assembly apply the doctrine to potentially call for the non-recognition of an asserted State immunity where officials had violated peremptory norms.[1255]

However, the ultimate problem is that the non-recognition doctrine remains generally underutilised by the Assembly (and the other political organ, the Security Council, for that matter) despite the ILC's broad articulation of the rule applying to breaches of peremptory norms generally and not merely those narrow areas in which there is discernible practice.[1256] Nonetheless, there is room for the Assembly, as the primary forum in which collective solidarity can be harnessed, to develop this doctrine in a manner that addresses, to a greater extent, the consequence of atrocity crimes in the future and not just the narrower scenarios of territorial acquisition or colonial occupation.

5. Sanctions Authorised within the Framework of the UN Charter

The above analysis covers the influence that Assembly resolutions are capable of having outside of the UN Charter. Another possible argument is that Assembly resolutions provide authority for a group of Member States to take action within the framework of the UN Charter that in turn releases them from any conflicting obligations under other treaties. An 'authorisation', in this sense, is premised upon an entrustment of UN functions in willing Member States; an authorisation, for example, is a common device used to effectuate UN military action due to the absence of a standing army. It is apparent that the effect of an authorisation, as Article 59 of the ARSIWA indicates, is that those Articles 'are without prejudice to the Charter of the United Nations'.[1257] The ARSIWA also do not 'cover the case where action is taken by an international organization, even though the Member States may direct or control its conduct'.[1258] The concept that a resolution amounts to an authorisation for Member States to take action on behalf of the UN finds no direct textual support in the UN Charter. However, that has not prevented the Security Council from adopting resolutions that authorised

[1252] Dawidowicz (n 1233), 685; Talmon, 'Duty not to Recognize' (n 1235), 107.
[1253] Alison Pert, 'The "Duty" of Non recognition in Contemporary International Law: Issues and Uncertainties' (2012) 30 Chinese (Taiwan) Ybk Intl L Aff 48.
[1254] Talmon, 'Duty not to Recognize' (n 1235), 125.
[1255] Patricia Moser, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision on the Ferrini Case' (2012) 4 Goettingen J Intl L 809.
[1256] Some writers regard the scope of the nonrecognition doctrine to be narrow given this lack of practice, see generally Pert (n 1253).
[1257] See further ARSIWA (n 861), 32.
[1258] ibid, 137.

willing Member States to use force; this is now established practice.[1259] As, too, is the understanding that Council authorisations fall within the ambit of Article 103 so as to release contributing Member States from any relevant conflicting obligations outside of the UN Charter.[1260] Could Assembly resolutions also provide authority to Member States to take action against a recalcitrant State that in turn occurs within the framework of the UN Charter?

One way in which to conceive of UN action is that which triggers the applicability of Article 103 of the UN Charter. This provides that in '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. The effect of Article 103 is now settled: it serves to operate as a circumstance precluding the wrongfulness of any act taken to implement the UN obligation.[1261] Rather ambiguously, the ILC Commentary to Article 59 of the ARSIWA noted that 'competent *organs* of the United Nations have often *recommended or required* that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases'.[1262] Although envisaging competent 'organs' taking action, the ILC did not specifically reference the possibility that the Assembly could take action that triggers the applicability of Article 103. To do so would encounter the problem that Assembly 'recommendations' are not binding in the sense that they entail, intrinsically, an obligation 'under the present Charter'.[1263] Strictly speaking, Security Council resolutions that 'authorise' action are also not obligations despite being generally accepted as falling within Article 103.[1264] However, this is based upon an established practice grounded in the necessity to ensure the 'flexibility' and operability of Chapter VII powers, both pertaining to military force and economic sanctions.[1265] The point here is that the Security Council's enforcement powers under Chapter VII justify this reading of Article 103; by comparison, the Assembly is lacking in analogous enforcement powers so as to more readily justify a reading that its recommendations for Member States to take action trigger the applicability of Article 103.

While this is generally the case, there is an argument that the Assembly is able to authorise what would otherwise be unlawful through the invocation of the Uniting for Peace mechanism. This mechanism is triggered in circumstances where, due to lack of unanimity of the permanent members, the Security Council 'fails to exercise its primary responsibility for the maintenance of international peace and security'.[1266] In such scenario, the Assembly is able to 'consider the matter immediately with a view to

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[1259] Niels Blokker, 'Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by "coalitions of the able and willing"' (2000) 11(3) EJIL 541, 568.
[1260] ibid.
[1261] Indeed, art 59 notes that it is without prejudice to the UN Charter. See further Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20(1) Duke J Intl & Comp L 77.
[1262] ARSIWA (n 861), 143 (emphasis added).
[1263] *Corfu Channel* (UK v Albania) (Merits) [1947] ICJ Rep 4, 31-33. On art 103 as having a narrow scope to only include decisions: *Namibia* (Advisory Opinion) (n 108) (Separate op Vice-President Ammoun), 99.
[1264] Art 25 stipulates that Member States 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. Art 94 provides that Member States undertake 'to comply with the decision of the International Court of Justice in any case to which it is a party'.
[1265] *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [33] (Lord Bingham). See *Libya v UK* (Provisional Measures) (n 613), 15. Indeed, on occasion, the Security Council has expressly invoked art 103 calling upon Members to implement sanctions irrespective of any conflicting obligations: UNSC Res 670 (1990).
[1266] UNGA Res 377 (V) A (1950), [1].

making appropriate recommendations to Member States for collective measures, *including* in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.'[1267] Such 'collective measures' recommended by the Assembly might include those types described in Article 41 of the UN Charter, which provides a non-exhaustive list of measures that the Security Council is able to take, falling short of the use of armed force, including the 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'[1268] Before delving into the scope of the Uniting for Peace mechanism, and whether it endows upon the Assembly powers that go beyond recommendatory, it is necessary to address two possible objections to the use of this mechanism as a contemporary solution to Security Council deadlock in atrocity situations.

First, Uniting for Peace, a product of early Cold War exigencies was first invoked in response to inter-State uses of force with the overarching imperative of maintaining 'international peace and security'.[1269] However, as has been noted, securing accountability for serious violations of international law (including international criminal law and international human rights law) has been recognised by the Assembly and other UN organs as falling within the ambit of 'security' maintenance under the UN Charter.[1270] This not only reflects a contemporary imperative of the Assembly but also resonates to a limited extent in the text of the Uniting for Peace resolution. A key purpose of the mechanism was also to 'expose aggressors', a violation of international law that the Assembly recognised even before Uniting for Peace as giving rise to individual criminal responsibility.[1271] Furthermore, although one aspect of Uniting for Peace was to recognise the power of the Assembly to recommend the use of force, as the language in the resolution above indicates ('including') it was envisaged that the Assembly could take 'collective action' that fell short of using force.

Second, it might be questioned whether Uniting for Peace still serves any useful purpose, at least as a viable diplomatic tool: some might say that the conditions in international relations have changed such that Member States are reluctant to invoke the doctrine because it is a 'double-edged' sword; it was soon used against its protagonists.[1272] However, this overstates the position. Many of the salient features of Uniting for Peace have been successfully absorbed into Assembly practice, particularly in being able to act on a matter when the Security Council is 'exercising' its functions, which is, strictly speaking, textually prohibited under Article 12(1) of the UN Charter.[1273] Uniting for Peace has therefore inspired a realignment of powers under the UN Charter that continue to this day. Even without expressly invoking Uniting for Peace, there are many examples of the Assembly proposing action that originated as failed draft resolutions in the Security Council, as with the situations in Syria, Jerusalem and Ukraine.[1274] Furthermore, it is clear, as from the emergency session held in June

[1267] ibid.
[1268] Kelsen, 'Acheson Plan' (n 77) 520.
[1269] Ramsden, 'Authorising Function' (n 79) (and citations there).
[1270] See in particular Chapters 3 and 4; Ramsden, 'Age of International Justice' (n 44).
[1271] UNGA Res 377 (V) A (1950), preamble; UNGA Res 95 (I) (1946) (affirming the Charter and judgment of the Nuremberg tribunal, including the 'crime against peace').
[1272] Carswell (n 76), 456. See also Michael Reisman, 'The Constitutional Crisis in the United Nations' (1993) 87 AJIL 83, 84, fn2.
[1273] See further discussion in Chapter 1.
[1274] See eg UNGA Res ES-10/19 (2017) (Jerusalem); UNGA Res 68/262 (2014) (Ukraine); UNGA Res 66/253 B (2012) (Syria).

2018, pertaining to the protection of the Palestinian civilian population, that the Assembly has invoked Uniting for Peace in contemporary times, albeit on an extraordinary basis.[1275]

The more fundamental question concerns the legal effects of using the Uniting for Peace mechanism. Specifically, is use of the mechanism capable of enhancing the Assembly's powers in the management of international peace and security, such that the plenary is able to assume powers normally reserved to the Security Council (i.e. in being able to authorise Member States to take Chapter VII-analogous coercive action)? There are two possible interpretations of practice and powers under the Uniting for Peace mechanism.[1276] A narrow approach is that Assembly recommendations are not capable of modifying legal relations outside of the UN; if a Member State chooses to act on the recommendation under Uniting for Peace then they cannot rely on it as a basis to defeat legal obligations that conflict with the recommendation.[1277] A State would therefore have to find another ground to justify what might otherwise be an internationally wrongful act in implementing, as per the discussion here, a voluntary sanctions regime against a recalcitrant State (such as the doctrine of countermeasures, discussed above). A broader approach to powers under Uniting for Peace, on the other hand, treats this mechanism as arising out of an institutional necessity which therefore entails the Assembly assuming powers ordinarily the reserve of the Security Council.[1278] This would include being able to authorise the collective use of force against a State, or to impose a sanctions regime that defeats any such conflicting obligations owed by States to the sanctioned State.

The argument that Uniting for Peace merely reflects the narrow approach above rests upon the limited or uncertain practice of the Assembly in authorising enforcement action, as well as a textual interpretation of the resolution itself. This approach isolates the clause 'breach of the peace or act of aggression' as the basis in which the Assembly is able to recommend armed force; where the Assembly, for instance, recommends military action it is merely exhorting Member States to exercise their rights under international law to act in individual or collective self-defence.[1279] A recommendation by the Assembly to use force is thus simply declaratory of the pre-existing right to self-defence.[1280] Indeed, the deployment of various peacekeeping missions established under Assembly resolutions were predicated on host State consent.[1281] This interpretation is also consistent with the observations by the ICJ in *Certain Expenses*, where a distinction was drawn between an Assembly mandated peacekeeping operation (premised on consent of the host State) and 'enforcement action' under Chapter VII, the latter being the Security Council's exclusive preserve.[1282] The focus on the use of force here goes to illustrate the more general proposition that the Assembly cannot authorise enforcement action of any form, including those coercive measures falling

[1275] UNGA Res ES-10/20 (2018).
[1276] Ramsden, 'Authorising Function' (n 79), 279-285.
[1277] See eg Talmon, 'Legalizing' (n 75); Zaum (n 79); International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001).
[1278] Andrassy (n 77), 563; Reicher (n 78),17-18; Ramsden, 'Authorising Function' (n 79), 304.
[1279] Yoram Dinstein, *War, Aggression and Self-Defence* (CUP 2011), [906]
[1280] Josef Kunz, 'Sanctions in International Law' (1960) 54(2) AJIL 324, 336-337; Christian Tomuschat, 'Uniting for Peace' (2008) UN Audiovisual Lib Intl L 3 <http://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf>.
[1281] UNGA, 'Summary Study of the Experience Derived from the Establishment and Operation of the Force' (9 October 1958) UN Doc A/3943, [10]; UNGA Res 1474 (ES-IV), [2] (1960) (recommending Members to 'assist' the Congo in upholding 'law and order').
[1282] *Certain Expenses* (n 108), 165.

short of the use of force. On this weaker account, the major purpose of Uniting for Peace was to recognise the possibility for the Assembly to adopt recommendations on a situation even where the Security Council was 'exercising its functions'. Uniting for Peace thus supported a slight institutional realignment, departing from Article 12(1) of the UN Charter, that would allow the Assembly to act in 'parallel' with the Security Council on a situation.[1283]

The broader reading of Assembly powers under Uniting for Peace, on the other hand, treats this resolution as a 'constitutional moment' which supported the conditional realignment of security powers within the UN where the Security Council has 'failed'.[1284] Such moment arose given the urgent need to act following the USSR's veto of continued enforcement action in Korea in 1950. Uniting for Peace, on this broader reading, was intended to allow the plenary to make recommendations to Member States that would amount to authorisations to act under the authority of the UN Charter. Indeed, it is apparent from the Korea intervention that the Assembly *did* go beyond merely recommending States to act in pursuit of their right of collective self-defence; Resolution 376 (V) (1950) sought to achieve 'a unified, independent and democratic government of Korea', objectives that manifestly went beyond the stricter confines of self-defence principles.[1285] Major powers at the time also recognised this to be a UN operation underpinned by coercive powers.[1286] Therefore, there is some practice to support a broader reading of the Uniting for Peace mechanism. But what about the Assembly's authorising effects on measures that fall short of the use of force, particularly in authorising sanctions?

To be sure, the extent of the Assembly's capacity to 'authorise' sanctions has not been fully tested, as on many occasions the Security Council took parallel action (even if belatedly) to authorise the imposition of sanctions against deviant States.[1287] But the authorisation of 'collective measures', as the text of Uniting for Peace indicates, is not solely limited to 'breaches of the peace or acts of aggression'. As noted, the word 'including' in Resolution 377(V) envisages that 'collective measures' can be taken in instances where a 'threat to the peace' has arisen also, save that such recommended measures have to fall short of armed force.[1288] On this basis, there is room for the Assembly to recommend sanctions as a collective measure as UN action, where it has first determined that a given situation constitutes a threat to peace and security. Still, there is limited practice to support this reading. It is necessary to go back to the Korean resolutions in 1950 to find practice that appeared to authorise sanctions as a form of collective action, and even then it followed the determination that a 'breach of the peace or act of aggression' had occurred. On this basis, the Assembly also recommended the imposition of an arms embargo against China.[1289] But there are more general endorsements of the Assembly's capacity to authorise sanctions. Numerous reports of

[1283] A point recognised in *Wall* (Advisory Opinion) (n 108), 28; UNGA, 66th plenary meeting (n 642), 28-29.
[1284] Carswell (n 76), 456-458.
[1285] UNGA Res 376 (V) (1950); White, 'Relationship' (n 8), 311.
[1286] Nigel White, 'From Korea to Kuwait: The Legal Basis of United Nations' Military Action' (1998) 20 Intl History Rev 597, 614. See also UNGA, 'Report of the Collective Measures Committee' (1951) UN Doc A/1891, 32-33.
[1287] UNSC Res 221 (1966); UNSC Res 181 (1963); UNSC Res 180 (1963).
[1288] UNGA Res 377 (V) A (1950), [1] ('…General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, *including* in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.')
[1289] White, 'Relationship' (n 8) 308-311; UNGA Res 500 (V) (1951).

the Collective Measures Committee, established to implement Uniting for Peace, acknowledged the use of sanctions as collective measures available to the Assembly to recommend. In perhaps the most direct endorsement of the coercive effect of Assembly recommendations under Uniting for Peace, the Collective Measures Committee noted that 'in the event of a decision or recommendation of the United Nations to undertake collective measures . . . States should not be subjected to legal liabilities under treaties or other international agreements as a consequence of carrying out United Nations collective measures.'[1290] Indeed, the Assembly even overwhelmingly affirmed this committee's work on the possibility of either it or the Security Council recommending the 'application of a selective embargo'.[1291] This would tend to support the possibility that an Assembly resolution is able to provide legal cover for Member States to impose sanctions that might conflict with prior international obligations.[1292]

If it is accepted, then, that the Assembly may replace the Security Council to authorise sanctions where the latter is deadlocked, it is still necessary to consider the conditions in which it may do so. This turns upon two predicates in Resolution 377 (V) (1950) a finding of Security Council 'failure' and a determination that a given situation constitutes a 'threat to international peace and security'.[1293] The latter can be addressed briefly because, as the ICJ in *Certain Expenses* observed, the UN Charter makes it 'abundantly clear' that the Assembly shares responsibility for the maintenance of peace and security with the Security Council.[1294] It is also accepted that the characterisation of a 'threat' includes the violation of human rights and the commission of international crimes.[1295] This accords with the Assembly's promotion of human rights in its own right and as an aspect of peace and security, a view reinforced by the ICJ in *Wall*: while the 'Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects'.[1296] In short, the Assembly is able to determine on its own that a situation constitutes a 'threat'.[1297]

Issues also arise in determining what constitutes a Security Council 'failure'. For the Assembly (or indeed the Security Council) to trigger Uniting for Peace, it is necessary for a permanent member to exercise the veto power, which then in turn results in the Security Council 'failing' to exercise its primary responsibility.[1298] There is a debate as to whether the 'pocket' veto also amounts to a 'failure', where a resolution is not voted on due to an inevitability of its not passing, but this point would make little difference in practice: a determined group of Security Council members could push for a vote so as to force a veto.[1299] It is thus apparent that there is room for a finding that the Security Council did not 'fail' despite exercising the veto, this being a legitimate technique within the UN Charter to ensure the selective regulation of international peace and security.[1300] The problem here is that the Assembly has not tended to explain

[1290] UNGA, 'Report of Collective Measures Committee' (n 1286), 32.
[1291] UNGA Res 703(VII) (1953), [1].
[1292] But also see Talmon, 'Legalizing' (n 75), 126; Barber, 'Revisiting the Legal Effect' (n 476).
[1293] UNGA Res 377 (V) A (1951), [1].
[1294] Certain Expenses (n 108), 163.
[1295] See Chapter 4; Ramsden, 'Age of International Justice' (n 44).
[1296] *Wall* (Advisory Opinion) (n 108), [27]-[28]. See also UN Charter arts 1, 13(1), 55, 60.
[1297] But also see Carswell (n 76), 472-473.
[1298] Krasno and Das (n 78) 188-190
[1299] ibid.
[1300] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994), 262; Philippa Webb, 'Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria' (2014) 19(3) *JCSL* 471.

why the Security Council has failed, or indeed even addressed this apparent precondition to the use of Uniting for Peace when convening sessions under this mechanism. Thus, despite there being 10 emergency special sessions arising from permanent member vetoes under the Uniting for Peace mechanism, the Assembly has seldom premised this upon Security Council failure, and even then the language used has not been consistent.[1301] Even so, it is unnecessary to give too much attention to what constitutes a 'failure' under Uniting for Peace as this falls within the discretion of the Assembly to determine.[1302] Indeed, the Assembly's competence to determine Security Council 'failure' was accepted in *Wall*, where the ICJ found that the emergency special session at issue had been 'duly convened' under the Uniting for Peace resolution.[1303] Resolution 377(V) does not prescribe any restrictions on determining 'failure'; the adoption of a quasi-judicial resolution with the requisite two-thirds majority would therefore suffice to establish that the Security Council has 'failed' under Uniting for Peace.[1304]

In any event, there are certain advantages in elucidating on the expectations that Members have with respect to action in the Security Council, in not only building practice on Uniting for Peace, but to exert pressure on the Security Council to act.[1305] An important recent study by Jennifer Trahan has considered instances of resistance to the Security Council veto inside the UN system.[1306] This study is set in the context of recent initiatives by States to encourage the permanent members to voluntarily abstain from using the veto in the face of atrocity crimes.[1307] The proposition that the veto is, as such, constrained by legal standards, including being subordinate to *jus cogens* norms, is more contentious.[1308] It is possible, as Trahan argues, that the Assembly could confirm this understanding, of the Security Council being subjected to legal limits, in a resolution.[1309] Given the focus of the analysis here, on the use of the Assembly to authorise sanctions, rather than legal restrictions on the Security Council power, an analysis on this proposition is beyond the scope of the present work. Nonetheless, as

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[1301] UNGA Res ES-10/19 (2017), preamble ('deep regret'); UNGA Res ES-10/10 (2002), preamble ('yet to take the necessary measures'); UNGA Res ES-10/2 (1997), preamble ('regret' that the SC 'twice failed to adopt a resolution'); UNGA Res ES-7/6 (1982), preamble ('deep regret' that the SC has 'failed to take effective and practical measures in accordance with the Charter of the United Nations to ensure implementation of its resolutions…'); UNGA Res ES-8/2 (1981), preamble ('Noting with regret and concern' that the SC 'failed to exercise its primary responsibility for maintenance of international peace and security'); UNGA Res 498 (V) (1951), preamble; UNGA Res ES-7/2 (1980), preamble ('regret and concern' that the SC 'failed to take a decision').

[1302] Ramsden, 'Authorising Function' (n 79) 302; Reicher (n 78) 15; Kenny (n 79) 26. But also see Carswell (n 76) 472.

[1303] *Wall* (Advisory Opinion) (n 108), 151.

[1304] This is not to deny, however, the benefit of having the Security Council itself certifying that it had failed to exercise its responsibilities previously and to confirm this in a procedural resolution requesting the Assembly to convene an emergency special session: Barber, 'Uniting for Peace not Aggression' (n 76), 107; Ramsden, 'Authorising Function' (n 79) 298; Carswell (n 76) 466; Melling and Dennett (n 79) 302.

[1305] See also Chapter 3 which considers the possible role for the Assembly in harmonising general acceptance of the membership as to the Charter based limitations on the exercise of the veto power in atrocity situations.

[1306] Trahan, 'Existing Legal Limits' (n 66).

[1307] Including a 'code of conduct' that would involve a voluntary suspension of the veto where there is evidence of 'overwhelming human catastrophe' and 'mass atrocity' respectively: UNSC, Sixty-seventh year, 6849th meeting (12 September 2012) UN Doc S/PV6849, 23 (French delegate referred to the 'code of conduct' in a Security Council debate on the ICC).

[1308] Trahan, 'Existing Legal Limits' (n 66), 142-259.

[1309] ibid 259.

noted in this section, Security Council failure and Assembly action are not mutually exclusive; it is patently arguable that an indicator of 'failure' to justify the invocation of Uniting for Peace is the Council's inaction over atrocity crimes. Although outside of the Uniting for Peace context, there are many instances in which the Assembly has confronted veto use in relation to atrocity crimes and serious violations of international law.[1310] Quite prominently, the Assembly 'deplored' the Security Council's failure to agree on measures to ensure compliance of the Syrian authorities with its decisions, regretting also a failure to refer the situation to the ICC.[1311] Another indicator of 'failure' might derive from Article 24(2) of the UN Charter, which provides that the Security Council 'shall act in accordance with the Purposes and Principles of the United Nations'. The Assembly has, as Chapters 3 and 4 explored, often articulated what these 'Purposes and Principles' entail and might do so more concretely in evaluating compatibility of Security Council conduct with them.[1312] As initiatives develop to challenge the veto, the use of the 'failure' standard in the Uniting for Peace mechanisms offers a potential avenue into which such norms can find concrete expression.

6. Conclusion

This Chapter has explored broadly possible bases for the Assembly to coordinate sanctions against States or perpetrators of atrocities. It noted that the legality of sanctions, particular where taken unilaterally, remain legally contentious. Accordingly, this Chapter has identified various avenues in which the Assembly is able to play a role in supporting the legal application of sanctions in atrocity situations.

The extent of the Assembly's authority in this regard turns upon the interaction between a resolution that reflects general State opinion and various rules of State responsibility. It was noted generally that Assembly resolutions are unable to automatically release a State from any obligations that conflict with the intended imposition of sanctions against an offending State. However, an Assembly resolution, which is widely supported by the membership, offers strong evidence that the conditions excusing breaches of international law have been met, including 'fundamental change of circumstances' and collective countermeasures. In turn, an Assembly resolution that certifies the existence of circumstances that justify the imposition of sanctions against an offending State is likely to cast a very strong presumption of legality upon the actions of the sanctioning States, even if not a formal certification in and of itself. It was also shown that the non-recognition doctrines offer some scope for the Assembly membership to collectively abstain from recognising the asserted claims of an offending States, although this doctrine has limited application in the atrocity crimes accountability context. By contrast, it was argued that the Uniting for Peace resolution is amenable to being refashioned to address Security Council

[1310] UNGA Res 37/233 A (1982), preamble ('grave concern' that the Security Council has been prevented from taking effective action 'in discharge of its responsibilities under Chapter VII of the Charter' on account of permanent member vetoes); UNGA Res 32/105 F (1977), preamble ('expressing serious regret' that three permanent members continued to resist the comprehensive embargo with South Africa); UNGA Res 31/6 D (1976), [10] (called on France, UK and US 'to desist from misusing their veto power…to protect the racist regime of South Africa.').

[1311] UNGA Res 66/253 B (2012), preamble.

[1312] In an earlier innovation, Judge Alvarez spoke of abuse of rights by permanent members: *Competence of the General Assembly* (Advisory Opinion) (n 590). See also Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer 1998); Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill LJ 389, 401; Michael Ramsden, 'Authorising Function' (n 79), 300; Carswell (n 76), 471.

inaction on atrocity crimes, with there being some practice in which the Assembly has purported to authorise States to act within the framework of the UN Charter (and Article 103) in imposing sanctions on an offending State.

However, it also has to be acknowledged that Assembly resolutions that have recommended States to sanction an offending State (or officials within that State) have never clearly indicated that such resolution acts as a legal authorisation for sanctions. The Assembly membership, with the possible exception of the Korean example under the Uniting for Peace mechanism, have never perceived of its role in this way. There are any number of reasons that might explain this, from a lack of political will, to a concern about the aggregation of power to a politically uncertain body, to perhaps a lack of belief that Assembly 'recommendations' can serve an authorising function. This Chapter has shown, properly conceived, that the UN membership, acting collectively through the Assembly, can promote the legality of a sanctions regime, particularly as a means to overcome Security Council inaction in an atrocity situation.

CHAPTER 8: CONCLUSION

This dissertation has evaluated the practice and powers of the Assembly in advancing accountability for atrocity crimes. As a general matter, it was made clear that the Assembly's general impact in the field has exceeded the limited 'recommendatory' function envisaged for it in the text of the UN Charter. Upon a disaggregation of Assembly resolutions according to their quasi-legislative, quasi-judicial and recommendatory character, this dissertation has shown the effects that these various instruments have had in the advancement of international justice. Yet, beyond resolutions it was also noted that the Assembly is able to take tangible action to promote accountability in atrocity situations and has done so through the creation of commissions of inquiry, with the potential for it to take other forms of action. All of this practice justified a number of conclusions as to the response of the Assembly in atrocity situations and its potential to play a more active role in the future.

Firstly, it considered a subset of resolutions that are 'quasi-legislative' in character. The reference to 'quasi-legislative' acknowledges the lack of a formal role for the Assembly in adopting binding rules of international law, but rather appreciates the influential contribution that its resolutions have (or could have) on States or legal regimes in the identification, creation or interpretation of norms. As Chapter 2 established, the Assembly's quasi-legislative resolutions have had an impact on judicial decision-making in the field of international justice. Courts have thus attached weight to Assembly quasi-legislative resolutions, both in the interpretation of treaty norms and the identification of customary international law. Even resolutions that purport to be a mere expression of established international law have served a valuable function in defining, formulating, clarifying, specifying, authenticating and corroborating the rules contained within them. Given the definitional uncertainties that can arise in the construction of customary international law, these resolutions have assisted judges in developing the law. It was also shown that an appreciation of the Assembly's quasi-legislative influence will turn upon an understanding of the sources of international law and the conditions for the identification and creation of such norms. In relation to law under the UN Charter, it was shown that the Assembly, given its composition of all Member States, is able to form a 'subsequent agreement' or 'established practice' in the interpretation of Charter norms. Whether UN norm development arises by way of subsequent agreement or established practice, it is unnecessary for there to be Member State unanimity; 'general agreement' will suffice. There is thus procedural latitude on the part of Member States (via the Assembly) to develop Charter norms to advance international justice. Similarly, the judicial application of customary international law in relation to accountability norms under international criminal law/international humanitarian law/international human rights law has tended to place emphasis on deductive forms of reasoning and an emphasis on documentary sources to establish State acceptance (*opinio juris*). There is potential therefore for the Assembly to contribute towards the normative direction of international justice, at least insofar as international courts are concerned.

Secondly, it was also shown that the Assembly has developed a quasi-judicial function which has extended to addressing atrocity situations. It was noted that this practice has emerged for multiple reasons, be it to justify the adoption of specific recommendations, but also as part of a strategy to 'name and shame' offending States so as to exert pressure on them to conform with their international obligations. But this quasi-judicial practice has also produced other effects, including to contribute towards

the development of international law (as they did in crystallising proscriptions on apartheid and enforced disappearances as a crime against humanity). The legal basis for the Assembly to enquire into the affairs taking place within a Member State is now incontrovertible and is not impeded in any significant way by Article 2(7) of the UN Charter. It was shown that there is an established practice of the Assembly identifying the occurrence of serious violations of international law, be that under international criminal law, international humanitarian law or international human rights law. Still, there are inevitable limitations in the Assembly pronouncing upon the occurrence of violations by, or within, a Member State. The most obvious is informational; the Assembly is reliant upon the findings of others as a basis for their pronouncements in resolutions. Some of the earlier quasi-judicial practice was controversial because it was not based upon the findings of independent fact finders but seemed to be motivated by purposes extraneous to accountability. Nonetheless, more contemporary quasi-judicial resolutions have been grounded in the findings of commissions of inquiry. In this regard, resolutions and inquiry reports can become mutually reinforcing, the conclusions of the experts then obtaining the collective endorsement of the UN membership, thereby strengthening the case for accountability. A primary example of this shown in Chapter 4 is the Myanmar situation, where findings of the commission of inquiry were closely integrated into Assembly resolutions which, together, provided a basis for the ICJ to order provisional measures requiring Myanmar to meet its obligations under the Genocide Convention.

Thirdly, the Assembly has a practice of recommending States and the Security Council to take action to secure accountability for atrocity crimes. Recommendations have thus been made for various types of action to be taken by Member States, including to investigate or prosecute alleged crimes, to cooperate with UN investigations and to respond to allegations. The Assembly has also recommended the Security Council to exercise Chapter VII powers as a means to secure accountability for atrocity crimes. Unlike quasi-legislative and quasi-judicial forms of resolutions, recommendations of this nature have a clear textual basis in the UN Charter (Articles 10-14). More difficult is assessing the impact of recommendations in achieving an accountability outcome. Even if the impact of recommendations on any subsequent response cannot be easily appreciated, recommendations have been perceived by actors as have effects in broader ways, including to crystallise a common institutional position and to pressure a Member State into dialogue. While recommendations are capable of having, in a broad sense, impact, the membership could take specific steps to enhance this instrument. In particular, despite the use of mandatory language in some situations (‘demand’ or ‘request’) there remains a general lack in Assembly practice of any recognition that ‘recommendations’ carry with them legal requirements. While recommendations might not be ‘binding’ as such, it was argued that Member States are still obliged to give regard to them in good faith and to consult with the Assembly on ways to achieve it. Although the Assembly has occasionally noted the persistent disregard of its recommendations to be incompatible with UN membership, there is certainly scope for them to do so more, grounded in the legal principle of good faith. Furthermore, the Assembly could also use its recommendations to articulate and monitor the implementation of international legal obligations as they pertain to accountability for atrocity crimes. This would not only mean that recommendations have behind them the force of pre-existing obligations but would also likely contribute to the development of these obligations as they are articulated and applied by States in Assembly recommendations.

Fourthly, it was also noted that the Assembly has the capacity to empower judicial and quasi-judicial entities to take action. Firmly within Assembly practice has been the creation of commissions of inquiry to investigate allegations of atrocity crimes, these subsidiary organs justified as a means for the Assembly to fulfil its recommendatory functions under the UN Charter. The Assembly's power to request advisory opinions (as it did in three instances relevant to the field of atrocity crimes accountability) is similarly premised upon the empowerment of another body to render an expert legal opinion so as to help the Assembly carry out its functions. The Assembly's creation of IIIM-Syria by contrast represents a broader approach where the express purpose also includes to build capacity for the eventual prosecution of those most responsible for crimes in Syria. It represents, in this way, a creative solution in the absence of a Security Council referral to the ICC Prosecutor that would have enabled an international investigation into conduct of named suspects. The creation of an analogous mechanism for Myanmar indicates a possible future trend in collective membership action to address accountability gaps through the creation in the Assembly of commissions vested with quasi-prosecutorial functions. This also raises the question as to the possibility of the Assembly going a step further, in establishing an *ad hoc* tribunal particularly in situations where there is little prospect of the ICC assuming jurisdiction over a situation, be that because a State is not party to the ICC Statute, or due to the unlikelihood of a Security Council referral. It was argued that there is a legal basis for the Assembly to establish a tribunal that could be legally analogous to one established under Chapter VII of the UN Charter, although this would also rely upon a creative reading of international legal sources to do so. Yet, even if an *ad hoc* tribunal is not established there is potential for the Assembly to make greater use of its power to request advisory opinions from the ICJ, as part of a strategy to obtain a judicial opinion on the legal consequences in a situation that might involve the occurrence of atrocity crimes. Although the ICJ advisory opinion would not be binding as such, it would offer another dimension to Assembly campaigns for accountability in a situation.

Fifthly, there exists legal possibilities for the Assembly to support sanctions against Member States that are allegedly responsible for, in the particular context of international justice, gross and systematic violations of human rights. In terms of institutional sanctions, the Assembly is able to deprive an offending State of some of its rights of UN membership. Article 6 of the UN Charter provides the basis for the Assembly to expel a Member State that has persistently violated the Charter but this power itself depends upon a Security Council recommendation which has not been forthcoming on previous occasions. Nonetheless, it was also shown, in the case of South Africa, that the Assembly has creatively used its credentials-approval power so as to take into account the human rights record of the government purporting to represent the Member State in the Assembly. The potential for the Assembly to support the legality of economic sanctions was also considered on several bases. It was argued that Assembly resolutions are capable of performing a function in coordinating sanctions, signalling that the particular conditions under the laws of 'fundamental change of circumstances' and collective countermeasures have been met. It was also argued that the Uniting for Peace mechanism could be used to support an Assembly function in authorising sanctions, although practice in doing so is rather limited and contentious. The duty not to recognise *jus cogens* violations was noted to be particularly amenable to application by the Assembly, as a forum in which States are able to organise so as to collectively abstain from recognizing the asserted claims of an offending States, including to refrain from entering into economic relations in relation to the illegal situation. In short, there are multiple possibilities for the Assembly, as a multilateral

forum, to support the imposition of economic sanctions that might otherwise be said to conflict with the sanctioning States' international legal obligations. Even if the Assembly has never consciously sought to take up this role there is potential for movement in this direction.

This dissertation has viewed the Assembly's contribution to international justice from an institutional perspective, as a single unitary actor, rather than to examine at any length Member State political interactions within this body. This is not to deny or reduce the relevance of Member State support or motivations in evaluating the effectiveness of Assembly resolutions. It was thus noted, in the quasi-legislative context, that the prescriptive influence of Assembly resolutions will turn upon the obtaining of a 'large majority' or 'general acceptance' of the norm in question. An Assembly recommendation that seeks to exert pressure on a Member State is likely to be more effective in doing so if it has attracted widespread support. Another aspect of this analysis is the relevance of particular States, or groups of States, and their influence on Assembly action. For example, the campaigning efforts of blocs such as the Non-Aligned Movement in advancing accountability for atrocity crimes is worthy of a study in its own right. As too is the extent to which the effectiveness of Assembly resolutions is way tied to their obtaining the support of the most powerful States. This dissertation has not overly explored these political correlations although some studies have suggested the support of powerful States has had a bearing both on the degree of Assembly activism at any one time and the extent to which a resolution is implemented at an institutional and State level.[1313] That said, this critique should not be overstated; many of the most important resolutions in international justice have in fact enjoyed broad support, from big and small States alike. Furthermore, not all aspects of international justice overtly depend on these power dynamics, particularly when identifying the existence of customary international law. For instance, international criminal tribunals have construed international norms based upon Assembly resolutions that were lacking support of the most powerful States (at least initially), as did the ICTY in using the highly contentious Resolution 37/123 (D) (1982) to support the proposition that genocide can be committed in a limited geographical zone.

In a similar manner, another line of enquiry that has not been considered at great length here is the composition and nature of voting blocs in the Assembly and the relevance of this to the likelihood that a resolution or other action is adopted. The consequence of bloc resistance to international justice has been highlighted in more recent times with the AU's coordination of an ICC withdrawal strategy for its Members.[1314] The possible adverse consequence of plenary activism was evidenced by South Africa's attempt in the ICC-ASP to amend the ICC Statute so as to confer a power to suspend an ICC investigation on the Assembly, using the Uniting for Peace mechanism.[1315] Although unsuccessful, the South African proposal illustrates potential

[1313] See eg Ramsden and Hamilton (n 4), 898 (emergence of an increasingly muscular UNHRC coincided with renewed US engagement with the UN); Falk (n 12), 787 (need for major power support for a resolution to assume normative authority); Axel Dreher and others, 'Does US aid buy UN General Assembly votes? A disaggregated analysis' (2008) 136(1-2) Public Choice 139 (effect of strong Member States on voting patterns); Diana Pane, *Unequal Actors in Equalising Institutions: Negotiations in the United Nations General Assembly* (Palgrave Macmillan 2013).

[1314] See further Kurt Mills and Alan Bloomfield, 'African resistance to the International Criminal Court: Halting the Advance of the Anti-Impunity Norm' (2018) 44(1) Rev Intl Studies 101; Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia' (2018) 29 Crim LF 63.

[1315] ICC, 'Proposed amendment to the Rome Statute of the International Criminal Court, Report of the Working Group on the Review Conference' Appendix VI (November 2009) ICC-ASP/8/20/Annex II.

structural weaknesses in pluralising State involvement in international justice within a plenary body made up of fluid and potentially unsympathetic coalitions. Still, the notion that there is a stable geopolitical bloc of members seeking to frustrate international justice, such as from aggrieved African States, is not borne out in the voting records that have been subject to scholarly analysis (perhaps because the grievance of African States is not with international justice generally but rather more specifically with the way in which the Security Council has exercised its power to refer situations to the ICC). In fact, one study has shown African States to generally support country-specific resolutions on international justice, even where the recommendations pertained to the securing of accountability for atrocities on the African continent, such as in Côte d'Ivoire, Libya and Eritrea.[1316] In the Assembly it is also apparent that resolutions calling for accountability had not led to a unified resistance from African States. For instance, Assembly recommendations that the Security Council refer the situations in Syria and DPRK to the ICC were supported by up to half of all African States voting.[1317] In a similar manner, other regional blocs have also actively supported accountability measures concerning atrocities that have occurred within its region: the establishment of IIIM-Syria was supported by Member States from every UN regional group, which itself followed a call for accountability by the League of Arab States.[1318]

A related point is whether the scope for the Assembly to respond to atrocity crimes is likely to be inhibited by Member States seeking to avoid setting institutional 'precedents' that can be used against them in the future. This might be seen to be particularly acute in relation to more creative uses of Assembly powers, as with the creation of *ad hoc* tribunals or the authorisation of lawful sanctions. In this respect, Member States might treat the Uniting for Peace mechanism as a cautionary tale in vesting too much power in the Assembly; the mechanism, promoted initially by the major western powers to overcome the Russian veto, would soon be used against them (as with the UK and France in relation to the Suez crisis). As Schachter once observed, '[r]arely will responsible national officials lose sight of the possibility that a failure on their part to observe the rules can be used "against" them in the future and thereby weaken the basis for their own reliance on commonly accepted restraints.'[1319] Does the 'double-edged' sword critique inhibit the scope for the Assembly assuming more powers to advance accountability for international justice? This consideration is likely to have some impact on the voting positions of some Member States, particularly those whose human rights records have come under scrutiny in the Assembly. However, as noted in the previous paragraph, this concern is also overstated as Assembly practice has shown a general consensus in the promotion of international norms for the accountability of atrocity crimes, as well as their application in specific situations. The Assembly's most innovative contribution to international justice of the past decade, the creation of the IIIM-Syria, was supported by 105 Member States, which, although far from unanimous (with 15 against and 52 abstaining), shows that even more progressive uses of Assembly powers have enjoyed wide support. Indeed, in the context of the ICC, Stuart Ford noted the cohesiveness in voting patterns in the Assembly of those States

[1316] Eduard Jordaan, 'The African Group on the United Nations Human Rights Council: Shifting Geopolitics and the Liberal International Order' (2016) 115(460) Afr Aff 490 (although this study examined votes in the UNHRC rather than the Assembly).
[1317] UNGA Res 69/189 (2014) (Syria) (127 in favour, 13 against, with 48 abstentions: of those, 27 African States voted yes, 21 abstained, and only one voted against (Zimbabwe); UNGA Res 70/172 (2015) (DPRK) (119 yes, 19 no, 48 abstentions: of those, 22 African States voted yes, 7 no, 21 abstentions).
[1318] UNGA, 66th plenary meeting (n 642), 36 (Saudi Arabia).
[1319] Schachter, 'Quasi-Judicial Role' (n 31), 963.

that are also States Parties to the ICC Statute.[1320] But more generally, it is also likely that the 'international justice consensus' in the Assembly itself contributes towards goals such as deterrence of crimes and punishment of those responsible, although data to establish this effect is often unavailable or fragmentary.

Although there is a range of Assembly practice pertaining to the seeking of accountability for atrocity crimes, which has enjoyed wide support, a recurring criticism has been that this body has acted selectively in calling for accountability. This has arisen at two levels, both in the failure to give the appropriate response to comparable situations and in the inconsistent language used in resolutions in the application of atrocity crime norms. As Chapters 4 makes clear, there is some element of truth in this proposition: during the height of the decolonization movement, it is apparent that the language of international justice was occasionally used as a tool in a campaign to marginalize a colonial regime, rather than with the aim of securing prosecutions for the condemned (alleged) atrocities as such. By contrast, for large periods, the conduct of some States from the 'global south' remained largely unchecked in the Assembly. Indeed, this selectivity was exacerbated by the continued recognition of the credentials of the Pol Pot regime in the Assembly, even though, by that time, it lacked the characteristics of a government given that it was forced into exile. Similarly, it was also noted that the Assembly has not been immune from the criticism of 'victor's justice', in calling for accountability for crimes committed by one side to a conflict, despite the existence of credible allegations that the other party also committed crimes (as with the singling out of pre-Gaddafi forces for prosecution). There is no doubt that addressing these perceptions of selectivity remain an important part of the narrative in justifying Assembly involvement in advancing international justice, both generally and in specific situations. At the same time, while a lack of even-handedness has sometimes left the Assembly open to criticism, this should not be overstated and needs to be put in context.

For a start, some scholars have readily acknowledged that victor's justice, in not only being accurate in describing case selection in many international trials, is an unavoidable feature of international justice.[1321] The question is not whether international justice can be completely separated from politics; rather it is whether the international politics is of a nature and quality to instill confidence in the process of finding perpetrators responsible.[1322] The Assembly's advantage, in this regard, is its near universal membership of States, which has the potential to support a broader reach than mechanisms subject to closer control by powerful States, as with the Security Council and its permanent membership. As Chapter 4 explained, resolutions calling for accountability in the DPRK, Myanmar, Syria and Israel occurred in the Assembly, which would be an impossibility in the Security Council due to shielding of these States by respective permanent members. It is also a mischaracterisation to claim that the Assembly always perpetuates a friend-enemy distinction when it adopts resolutions; in relation to the Gaza conflict, for example, it called for the accountability of perpetrators to both sides of the conflict, based upon the findings of a UNHRC-established commission of inquiry.[1323] As already emphasised, the scope in this regard for Assembly resolutions to be linked to fact-finding mechanisms composed of experienced and independent jurists, such as commissions of inquiry, offers some

[1320] Stuart Ford, 'The ICC and the Security Council: How Much Support Is There for Ending Impunity?' (2016) 26 Ind Intl & Comp L Rev 33, 47.
[1321] Sarah Nouwen and Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 EJIL 941.
[1322] ibid 964.
[1323] See further Yihdego (n 644), 20.

promise in the future for situations to be treated in an even-handed way, or at least will bring into the open more readily any bias in calling for the accountability of only one group of perpetrators in a conflict.

Another part of the broader picture in which to assess Assembly practice in the field of international justice is with regard to the multiple, perhaps sometimes, conflicting imperatives that this body is mandated to promote. In this regard, the Assembly will often be motivated by a broader set of imperatives than that of atrocity crimes accountability in performing its functions of maintaining international peace and security and promoting human rights. Rather than seeking to attribute blame, using precise legal standards, to a particular State or group, resolutions might instead be drafted with strategic ambiguity, in balancing the need to censure such conduct while providing an incentive for those allegedly responsible to comply with the resolution. There are a complex range of factors that might steer the Assembly away from placing an overarching emphasis on the accountability imperative, even in the face of documented atrocity crimes. For example, this might reflect a desire to change focus in a situation to address more urgent exigencies, such as the prevention of crimes during an intensification of hostilities, or to respect the authority of a new Assembly-friendly government that has come to power. On the latter, despite the Assembly calling consistently on South Africa to prosecute apartheid under the Apartheid Convention, this soon changed upon the promulgation of a new national constitution containing amnesty clauses so as to facilitate societal and democratic transition.[1324] The lack of consistency in the Assembly's response to atrocity crimes across situations therefore also has to be evaluated in light of these broader imperatives, situated within the ongoing debate over the appropriate balance to be achieved in a post-conflict situation between accountability and reconciliation.

In analysing the Assembly's practice and powers it is necessary to locate these within the context of the UN system and the role of the Security Council. It was noted at various points of this dissertation that the Assembly, based on the force of the Uniting for Peace resolution and as reflected in established practice, is able to act on a situation in parallel with the Security Council. The effect has been to render Article 12 (which limits the Assembly exercising its functions in relation to a dispute where the Security Council is already exercising its functions) effectively otiose. Still, whether the Assembly is able to assume analogous powers to the Security Council is contentious. As it was in 1950 with the Uniting for Peace resolution, the extent to which the Assembly is used as a creative outlet will be closely tied to the general perceptions as to the legitimacy of the Security Council monopoly on enforcement powers under the UN Charter, specifically here in relation to atrocity crimes. Recent efforts by States have sought to exert pressure on the Security Council to voluntarily abstain from exercising the veto in atrocity situations, with increased scholarly focus on the possible legal constraints on Council members in these situations. One proposal has envisaged a role for the Assembly to certify that a crisis poses an imminent threat of mass atrocity as a basis for the veto to be suspended in that situation.[1325] The extensive quasi-judicial practice covered in Chapter 3 would certainly support the Assembly performing this function. The scope for the Assembly to hold the Security Council to account has also attracted recent proposals, including for Assembly discussion to be triggered in any instance in which the permanent members of the Security Council exercise their veto.[1326] This growing international attention on the limits of the veto power also

[1324] UNGA Res/36/13 (1981); UNGA Res 37/47 (1982); UNGA Res 48/159 (1993).
[1325] See Trahan, 'Existing Legal Limits' (n 66), 133 (and citations there).
[1326] ibid, 126-127 (and citations there).

justifies greater reflection on the possibilities for the Assembly to remedy veto misuse, be that in holding the Security Council to account or in providing an alternative legal channel in which powers entrusted by the UN are to be exercised. As States continue to negotiate the supposed 'new Cold War', there is a legal basis for the Assembly to fill the void created by Security Council deadlock to not only unite for peace but also against impunity.

SUMMARY

The rise of 'international justice', a field broadly concerned with the imperative of securing accountability for atrocity crimes, has led to much reflection on the role of international institutions in addressing impunity gaps. This literature – now considerable - has included not only international criminal tribunals tasked with interpreting and applying the laws of individual criminal responsibility, but also other courts – including the International Court of Justice (ICJ) and regional human rights mechanisms – in adjudicating upon the responsibility of States in atrocity situations. Similarly, there have also been studies on the impact of political institutions in advancing accountability for atrocities, with scholarship on the United Nations (UN) Security Council's contribution being particularly voluminous. By contrast, at least until recently, there has been little attempt to comprehensively identify, classify and evaluate the contribution of the UN General Assembly (Assembly) to the field of international justice.

This dissertation aims to comprehensively examine the foundations and effects of Assembly power as it has developed to address the imperative of accountability for atrocity crimes. Assembly 'power', in this regard, is evaluated according to five functions: (1) 'quasi-legislative'; (2) 'quasi-judicial'; (3) 'empowering'; (4) 'recommendatory'; and (5) 'sanctioning'. In turn, this study poses two major questions. First, what is the scope of the Assembly's legal powers? Second, to what extent has the Assembly's exercise of these functions had an 'effect' in advancing accountability for mass atrocity? In addressing these questions, this study not only intends to identify the extent of the Assembly's legal competence but to also inspire more ambitious thinking regarding the possible role that it might play in responding to atrocity situations through the explication of these five functions.

Having provided an outline of these broader fields of enquiry in Chapter 1, Chapter 2 then considers the nature and effect of Assembly resolutions that are 'quasi-legislative' in character, meaning that they purport to define and identify norms of international law. Far from the misconception that Assembly resolutions are merely non-binding and at best only exhortations of legal opinion, it is shown here that resolutions of a quasi-legislative character have had a pervasive and persuasive impact on the decision-making of many international and domestic courts. It shows more specifically that Assembly quasi-legislative resolutions have normative value in defining, formulating, clarifying, specifying, authenticating and corroborating the rules contained within them.

Having considered Assembly practice in adopting quasi-legislative resolutions that have been used by courts in the field of international justice, Chapter 3 considers more generally the legal effect of such resolutions. Within UN institutional law, it argues that Assembly quasi-legislative resolutions can amount to a 'subsequent agreement' in the interpretation of a provision of the UN Charter, or otherwise can contribute towards an 'established practice' that shows such general interpretive acceptance of the membership. Finally, the influence of Assembly quasi-legislative resolutions on the field, as the previous Chapter considered, is explicable given the prevalence of a judicial approach in favouring deductive forms of reasoning that places emphasis on documentary sources and findings of State acceptance (*opinio juris*) over State practice.

Chapter 4 examines a type of Assembly resolution that can be described as 'quasi-judicial' in monitoring compliance with a set of norms or making evidence-based factual determinations. There are a variety of legal bases to support the Assembly performing a quasi-judicial function, as this Chapter explains. There is also a rich quasi-judicial practice in Assembly resolutions engaging with issues of individual and State responsibility within the laws of International Criminal Law, International Humanitarian Law, International Human Rights Law and the UN Charter. Beyond this, the Assembly has also pronounced on states of affairs in international relations that serve to resolve contested issues of Statehood or territory, which in turn has facilitated accountability responses.

Chapter 5 considers the legal nature of Assembly recommendations and practice in recommending action to advance accountability for atrocities. Having surveyed recommendations practice on international justice, this Chapter identifies four common forms of recommendation: to investigate or prosecute; to cooperate; to explain or account; and to provide victims reparations. The Assembly has also recommended the Security Council to take action to secure accountability in a situation. This Chapter shows that recommendations, although non-binding, are capable of producing effects to advance international justice. Furthermore, despite the orthodox view being that recommendations are non-binding, they impose requirements on Member States, rooted in the good faith principle, thereby offering some measure of supervision on Member State conduct in atrocity situations.

Chapter 6 evaluates the capacity of the Assembly to empower subsidiary or judicial mechanisms to advance international justice. It first analyses the Assembly's established practice in creating commissions of inquiry and explains the legal basis for these mechanisms including the recent innovation of commissions with 'quasi-prosecutorial' elements. From there, the Chapter then considers the extent to which the Assembly is able to engage the ICJ in advancing international justice in the exercise of its advisory opinion jurisdiction. This shows potential for the Assembly to use the ICJ to address atrocity situations that were otherwise lacking in judicial scrutiny. Finally, the Chapter then considers what only remains theoretical at this stage; the Assembly's creation of an *ad hoc* tribunal analogous to one established by the Security Council. It analyses the potential basis within the UN Charter and general international law to clothe such a tribunal with legal competencies to try suspects.

In noting Assembly practice in recommending sanctions, Chapter 7 considers the possibility that such recommendations produce legal effects that support the legal imposition of sanctions against offending Member States. Four potential legal avenues that can be used to instil in Assembly recommendations a legal effect is explored: the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts; the Vienna Convention on the Law of Treaties, the UN Charter, and Assembly practice under its Uniting for Peace resolution.

This dissertation examines the practice and legal foundation of Assembly activity of a quasi-legislative, quasi-judicial, recommendatory, empowering and sanctioning nature in the field of international justice. The Conclusion evaluates the potential for the Assembly to adopt creative solutions to advance accountability crimes in the future, to not only unite for peace but also against impunity, particularly in the face of Security Council deadlock.

SAMENVATTING (SUMMARY IN DUTCH)

DE ROL VAN DE ALGEMENE VERGADERING VAN DE VERENIGDE NATIES BIJ HET BEVORDEREN VAN AANSPRAKELIJKHEID VOOR GRUWELDADEN: WETTELIJKE BEVOEGDHEDEN EN EFFECTEN

De opkomst van *'international justice'* (internationale gerechtigheid), een gebied dat zich over het algemeen bezighoudt met de noodzaak om verantwoording af te leggen voor '*atrocity crimes'* (gruweldaden), heeft geleid tot veel reflectie over de rol van internationale instellingen in het aanpakken van lacunes in de regelgeving rondom straffeloosheid. Deze literatuur – inmiddels van aanzienlijke omvang - omvat niet alleen de internationale staftribunalen belast met het interpreteren en toepassen van de regels omtrent individuele strafrechtelijke aansprakelijkheid, maar ook andere rechtbanken - waaronder het Internationaal Gerechtshof (IGH) en regionale mensenrechtenmechanismen – wanneer zij oordelen over de verantwoordelijkheid van staten in *atrocity* situaties. Daarnaast zijn is er onderzoek gedaan naar de impact van politieke instellingen op het bevorderen van aansprakelijkheid voor *atrocity crimes*, waarin met name het onderzoek naar de bijdrage van de Veiligheidsraad van de Verenigde Naties (VN) een grote rol speelt. Daarentegen zijn er, althans tot voor kort, weinig pogingen gedaan om de bijdrage van de Algemene Vergadering van de VN (de Vergadering) op het gebied van internationale rechtspraak volledig te identificeren, te classificeren en te evalueren.

Dit proefschrift heeft als doel om uitputtend onderzoek te verrichten naar de fundamenten en effecten van de macht van de Vergadering, en hoe deze zich heeft ontwikkeld om de noodzaak van aansprakelijkheid voor *atrocity crimes* te adresseren. De 'macht' van de vergadering wordt in deze context beoordeeld aan de hand van vijf functies: (1) de 'quasi-wetgevende' functie; (2) de 'quasi-gerechtelijke' functie; (3) de 'machtigende' functie; (4) de 'raadgevende' functie; en (5) de 'sanctionerende' functie. Dit onderzoek roept op zijn beurt twee grote vragen op. Ten eerste, wat is de reikwijdte van de juridische bevoegdheid van de Vergadering? Ten tweede, in hoeverre heeft de uitoefening van deze functies door de Vergadering een 'effect' gehad in de zin van het bevorderen van de aansprakelijkheid voor *mass atrocities*? Bij het beantwoorden van deze vragen is dit onderzoek niet alleen bedoeld om de omvang van de bevoegdheden van de Vergadering vast te stellen, maar ook om ambitieuzer te denken over de mogelijke rol die deze zou kunnen spelen bij het reageren op *atrocity* situaties, door de explicatie van deze vijf functies.

Nadat in hoofdstuk 1 een overzicht wordt gegeven van het onderzoeksgebied, gaat hoofdstuk 2 in op de aard en het effect van Resoluties van de Vergadering die 'quasi-wetgevend' van aard zijn, wat inhoudt dat ze de bedoeling hebben om normen van internationaal recht te definiëren en te identificeren. In tegenstelling tot de misvatting dat Resoluties van de Vergadering louter niet-bindend, en in het gunstigste geval slechts aansporingen van juridische adviezen zijn, wordt hier aangetoond dat Resoluties van quasi-wetgevende aard een doordringende en doorslaggevende impact hebben gehad op de besluitvorming van veel internationale en nationale rechtbanken. Het toont, meer specifiek, aan dat quasi-wetgevende Resoluties van de Vergadering een normatieve

waarde hebben bij het definiëren, formuleren, verduidelijken, specificeren, authentiseren en bevestigen van de daarin opgenomen normen.

Na het bespreken van de praktijk van de Vergadering op het gebied van quasi-wetgevende Resoluties die door rechtbanken worden gebruikt op het gebied van *international justice*, gaat hoofdstuk 3 verder in op de rechtsgevolgen van dergelijke Resoluties in het algemeen. Dit hoofdstuk beargumenteert verder dat, binnen het institutionele recht van de VN, quasi-wetgevende Resoluties van de Vergadering kunnen worden beschouwd als een 'vervolgovereenkomst' bij de interpretatie van een bepaling van het VN-Handvest of, als alternatief, kunnen bijdragen aan een 'gevestigde praktijk' die van een algemene erkenning van dergelijke interpretatie door de VN-leden weergeeft. Ten slotte wordt beargumenteerd dat de invloed van quasi-wetgevende Resoluties van de Vergadering, zoals in het vorige hoofdstuk is besproken, verklaarbaar is, gezien de overwegend juridische benadering op dit gebied, waarbij er meer waarde wordt gehecht aan documentaire bronnen en de rechtsovertuiging van staten (*opinio juris*) dan aan statenpraktijk.

Hoofdstuk 4 onderzoekt een specifiek type Resolutie van de Vergadering dat kan worden omschreven als 'quasi-gerechtelijk', in de zin dat deze toezicht houden op de naleving van een reeks normen of op feiten gebaseerde empirische bevindingen uitspreekt. Zoals in dit hoofdstuk wordt uitgelegd, zijn er verschillende rechtsgronden op basis waarvan de Vergadering het vervullen van een quasi-gerechtelijke functie kan baseren. Er is ook een rijke quasi-gerechtelijke praktijk van Resoluties die betrekking hebben op kwesties van individuele- en staatsverantwoordelijkheid binnen het internationaal strafrecht, internationaal humanitair recht, internationale mensenrechten en het VN-Handvest. Daarnaast heeft de Vergadering zich ook uitgesproken over de stand van zaken in internationale betrekkingen met als doel om betwiste kwesties betreffende soevereiniteit of territorium op te lossen, wat op zijn beurt de verantwoordingsprocessen heeft vergemakkelijkt.

Hoofdstuk 5 gaat in op de juridische aard van de aanbevelingen en de praktijk van de Vergadering bij het aanbevelen van maatregelen om de aansprakelijkheid voor *atrocities* te bevorderen. Na onderzoek van de praktijk van aanbevelingen op het gebied van *international justice*, identificeert dit hoofdstuk vier veelvoorkomende vormen van aanbeveling: het onderzoeken of vervolgen; het samenwerken; het uitleggen of verantwoorden; en het aanbieden van herstelbetalingen aan slachtoffers. De Vergadering heeft de Veiligheidsraad ook aanbevolen om actie te ondernemen om de aansprakelijkheid binnen bepaalde situaties vast te stellen. Dit hoofdstuk laat zien dat aanbevelingen, hoewel niet-bindend, effecten ten gevolgen kunnen hebben die *international justice* bevorderen. Bovendien leggen ze, ongeacht de orthodoxe opvatting dat de aanbevelingen niet-bindend zijn, voorwaarden op aan de lidstaten, geworteld in het beginsel van goede trouw, en bieden ze daarmee een zekere mate van toezicht op het gedrag van de lidstaten in *atrocity* situaties.

Hoofdstuk 6 evalueert de bevoegdheid van de Vergadering om subsidiaire of gerechtelijke mechanismen te machtigen om *international justice* te bevorderen. Het analyseert eerst de gevestigde praktijk van de Vergadering wat betreft het instellen van onderzoekscommissies en zet de rechtsgrond voor deze mechanismen uiteen, inclusief de recente innovatie van commissies met 'quasi-vervolgende' elementen. Vanuit dit startpunt beschouwt dit hoofdstuk verder in hoeverre de Vergadering in staat is om het

IGH te betrekken bij het bevorderen van *international justice* in de uitoefening van haar adviserende functie. Dit geeft het potentieel weer van de Vergadering om het IGH te gebruiken om *atrocity* situaties aan te kaarten die anders niet aan juridisch toezicht onderhevig zouden zijn geweest. Ten slotte gaat het hoofdstuk in op wat in dit stadium alleen als theoretisch beschouwd kan worden; de oprichting van een ad-hoc tribunaal door de Vergadering, vergelijkbaar met aan de tribunalen opgericht door de Veiligheidsraad. Het analyseert de mogelijke juridische basis hiervoor binnen het VN-Handvest en algemeen internationaal recht om een dergelijk tribunaal te bekleden met de bevoegdheden om verdachten te berechten.

Hoofdstuk 7 wijst op de praktijk van de Vergadering in het aanbevelen van sancties en beschouwt de mogelijkheid dat dergelijke aanbevelingen rechtsgevolgen hebben die het opleggen van sancties tegen overtredende lidstaten ondersteunen. Er worden vier mogelijke juridische wegen onderzocht die gebruikt zouden kunnen worden om een dergelijk juridisch effect teweeg te brengen: de *Articles on the Responsibility of States for Internationally Wrongful Acts* van de *International Law Commission* (ILC); het Verdrag van Wenen inzake het Verdragenrecht; het VN-Handvest; en de praktijk van de Vergadering in het kader van de *Uniting for Peace* Resolutie.

Dit proefschrift onderzoekt de praktijk en de juridische basis van de handelingen door Vergadering van quasi-wetgevende, quasi-gerechtelijke, machtigende, raadgevende en sanctionerende aard op het gebied van *international justice*. De conclusie evalueert het potentieel dat de Vergadering heeft om creatieve oplossingen aan te nemen die de aansprakelijkheid voor *atrocity crimes* in de toekomst te bevorderen, en om zich niet alleen *voor* vrede te verenigen, maar ook *tegen* straffeloosheid, name in het licht van de impasse binnen de Veiligheidsraad.

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