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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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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.