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

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CHAPTER 3: RELATION OF GENERAL ASSEMBLY RESOLUTIONS TO INTERNATIONAL LAW

1. Introduction

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

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

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

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

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

2. Influence: Exhortatory Resolutions

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

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

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

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

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

3. Influences: Interpretation of Treaties

3.1 Interpretive Resolutions: UN Charter

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

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

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

[402] See discussion in Chapter 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[433] UNCIO XIII 710 (1945).

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

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

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

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

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

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

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

[441] ibid, 30.

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

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

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

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

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

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

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

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

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

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

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

[455] ibid 149

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

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

[458] ibid.

[459] ibid 79-81.

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

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

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

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[461] See n 433 and 434.

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

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

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

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

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

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

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

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

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

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

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

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

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

[478] See further Chapter 3.

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

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

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

[482] ibid.

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

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

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

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

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

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

3.2 Interpretive Resolutions: Other Treaties

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

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

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

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

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

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

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

4. Influences: Identification and Formation of Customary International Law

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

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

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

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

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

4.1 Forms of Contribution to Customary International Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[551] ibid.

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

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

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

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

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

4.3 Customary Method in International Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Conclusion

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

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

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

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

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