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

Ramsden, M.P.

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

1. Introduction

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

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

---

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

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

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

[582] See Chapter 1.

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

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

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

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

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

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

[585] See also the discussion in Chapter 1.

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

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

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

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

2. Legal Foundations for Quasi-Judicial Powers

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

2.3 Compatibility with Standards of Procedural Fairness

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

3. Quasi-Judicial Practice: Criminal Responsibility

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

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

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

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

3.1 Genocide

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

[688] ibid [666].

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

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

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

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

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

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

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

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

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

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

3.2 Crimes Against Humanity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3 War Crimes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

3.4 Aggression

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

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

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

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

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

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

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

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

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

---

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

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

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

4. Quasi-Judicial Practice: State Responsibility

4.1 Gross Human Rights Violations

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

---

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

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

[809] See Wilson (n 802).

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

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

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

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

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

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

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

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

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

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

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

4.2 Violations of the UN Charter

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

[867] Alvarez, 'International Organizations' (n 476), 430-432 (contrasting the success of Assembly quasi-judicial resolutions in relation to the self-determination claims of Palestine and Namibia).

[868] ICC, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine' (Press Release, 16 January 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>.

[869] Fatou Bensouda, 'The International Criminal Court: A New Approach to International Relations' David Rockefeller Lecture Series (21 September 2012) <https://www.cfr.org/event/international-criminal-court-new-approach-international-relations>. See also UN Office of Legal Affairs, 'Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties' (1949) UN Doc ST/LEG/7/Rev.1, [81]-[83].

[870] ICC-OTP, *Situation in Georgia*, 'Request for authorisation of an investigation pursuant to article 15' ICC-01/15 (17 November 2015), [54]; ICC-PTCI, 'Decision on the Prosecutor's request for authorisation of an investigation' ICC-01/15 (27 January 2016).

[871] ICC, 'Ukraine accepts ICC jurisdiction over alleged crimes committed between 21 November 2013 and 22 February 2014' (Press Release, 17 April 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr997&ln=en>.

[872] As also noted in ICC Prosecutor, 'Report on Preliminary Examination Activities 2018' (5 December 2018), [67] <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>. See also reliance on UNGA Res 62/243 (2008) to establish that the population expelled from Azerbaijan had a right to return, thereby supporting the finding of an interference with the right to peaceful enjoyment of possessions: *Chiragov v Armenia* App No 13216/05 (ECtHR, 16 June 2015), [67].

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

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

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

---

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

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

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

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

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

[878] *Milutinović* (n 343), [37].

[879] ibid, [38].

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

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

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

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

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

6. Conclusion

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

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

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

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

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

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

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

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

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