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Counter-Terrorism and Human Rights: The Emergence of a Rule of Customary Int'l Law from U.N. Resolutions

Keywords

Human Rights Law, Terrorism, Sanctions, Torture, Military, War and Peace

**COUNTER-TERRORISM AND HUMAN RIGHTS:
THE EMERGENCE OF A RULE OF CUSTOMARY INT'L LAW
FROM U.N. RESOLUTIONS**

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In response to the global threat of international terrorism and the counter-terrorism efforts by national governments, the United Nations General Assembly (G.A.) and the United Nations Security Council (S.C.) have adopted various resolutions and conventions.¹ The effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism. However, the absence of such agreement to date has, *inter alia*, thwarted efforts aimed at adopting a comprehensive international, legally-binding instrument regarding international terrorism. In spite of its urgency and the critical importance of terrorism to contemporary international relations, international terrorism has proven not easily amenable to satisfactory or exclusive regulation by treaty. Notwithstanding the definitional dilemma, the United Nations' resolutions regarding counter-terrorism have insisted on the necessity to protect human rights in the context of counter-terrorism.²

Although the United Nations currently has no agreed-upon definition of terrorism, this article will argue that it is nonetheless possible to hold States engaged in counter-terrorism efforts liable for violations of international human rights law even when they are not signatories to relevant international treaties. The basis for such an obligation, it will be advocated, derives from various resolutions of the United Nations and decisions of national courts which represent a step toward the codification of a general obligation to protect human rights in the context of counter-terrorism as an emerging rule of customary international law. The substance of such a rule would provide that no State can legally adopt

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1. See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention against the Taking of Hostages, G.A. Res. 146 (XXXVI), U.N. Doc. A/34/46 (Dec. 17, 1979); International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. Doc. A/RES/52/164 (Dec. 15, 1997); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/49, U.N. Doc. A/RES/54/49 (Dec. 9, 1999); International Convention for the Suppression of Acts of Nuclear Terrorism, G.A. Res. 59/290, U.N. Doc. A/RES/59/290 (Apr. 13, 2005).

2. See, e.g., G.A. Res. 146 (XXXVI), *supra* note 1, at Preamble; G.A. Res. 52/164, *supra* note 1, art. 14; G.A. Res. 54/49, *supra* note 1, art. 17; G.A. Res. 59/290, *supra* note 1, art. 12.

strategies aimed at combating international terrorism if those strategies simultaneously derogate from established international human rights norms. The practical utility of this discussion would be to put States on notice that counter-terrorism efforts oblivious of international human rights standards may be in breach of international law, regardless of the non-existence of an international treaty regime regulating State practices in this area. In that regard, States could be legally liable both domestically and internationally.

As will be discussed, a norm of customary international law depends on the existence of State practices and the engagement in those practices with a sense of legal obligation (*opinio juris*).³ This article will propose that the relevant international conventions and U.N. General Assembly and U.N. Security Council paper-trail⁴ regarding protection of human rights while combating international terrorism, as well as on national and international decisions, establishes a sufficient documentary record of State practice. Similarly, the nature and language of those resolutions, as well as the respect that national governments have accorded the decisions of their own national courts in regard to the need to protect human rights

3. See discussion *infra* Section I.

4. See, e.g., G.A. Res. 52/164, *supra* note 1, art. 5 (requiring that each State adopt measures that may be necessary including domestic legislation to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by consideration of a political, philosophical, ideological, racial, ethnic, religious or other nature and are punished by penalties consistent with their grave nature); G.A. Res. 54/49, *supra* note 1, art. 4; Human Rights and Terrorism, G.A. Res. 56/160, ¶ 6, U.N. Doc. A/RES/56/160 (Feb. 13, 2002) (calling upon States to “take all necessary and effective measures, in accordance with relevant provisions of international law, including international human rights standards, to prevent, combat and eliminate terrorism . . . and . . . strengthen, where appropriate, their legislation to combat terrorism”); Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 57/219, ¶ 1, U.N. Doc. A/RES/57/219 (Feb. 27, 2003) (affirming that “States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights”); Protection of Human Rights and Fundamental Freedoms While Encountering Terrorism, G.A. Res. 59/191, U.N. Doc A/RES/59/191 (Mar. 10, 2005); Human Rights and Terrorism, G.A. Res. 59/195, ¶ 3, U.N. Doc. A/RES/59/195 (Mar. 22, 2005) (rejecting the “identification of terrorism with any religion”); Threats to International Peace and Security Caused by Terrorist Acts, S.C. Res. 1373, ¶ 2, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (calling on all States to ensure that “terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts”); S. C. Res. 1535, U.N. Doc S/RES 1535 (Mar. 26, 2004) (stating that States “must ensure that any measures taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law, in particular international human rights”); S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (reiterating much of S.C. Res. 1535); S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005). See also U.N. High Comm’r for Human Rights, *Promotion and Protection of Human Rights: Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 8, E/CN.4/2006/94 (Feb. 16, 2006) (stating that states have the right and duty to protect their citizens against terrorist attacks, but state action must be in conformity with international human rights); U.N. Comm’n on Human Rights, *Civil And Political Rights, Including Religious Intolerance*, ¶ 103, E/CN.4/2003/66 (Jan. 15, 2003) (*submitted by Abdelfattah Amor*) (stating that “non-governmental organizations . . . continue to express grave concern that the ‘total security’ drive being implemented under cover of anti-terrorist laws . . . have a direct and immediate impact on the entire human rights protection system”); Kofi Annan, Sec’y Gen., U.N., Message for Human Rights Day, Torture, Instrument of Terror, Can Never Be Used To Fight Terror (Aug. 12, 2005), available at <http://www.un.org/News/Press/docs/2005/sgsm10257.doc.htm>.

while combating international terrorism, would support the case for the existence of the requisite *opinio juris*.

The argument that will be developed is premised not only on the recent cases of the International Court of Justice (I.C.J.), but also on the more foundational I.C.J. cases establishing the circumstances under which codification of international norms takes place by reference to resolutions of instruments of the United Nations. In particular, the argument is predicated on the *North Sea/Continental Shelf Case*'s⁵ discussion of the codification of customary law from conventional documents, as well as the I.C.J. decisions in the *Case Concerning Military and Par-Military Activities in and Against Nicaragua*,⁶ *Case Concerning Armed Activities on the Territory of Congo (Congo v. Uganda)*,⁷ the *Construction of A Wall Advisory Opinion*,⁸ and the *Threat or Use of Nuclear Weapons Advisory Opinion*⁹ in their treatment of the legal effect of U.N. resolutions. Additionally, the article will examine the decisions of several national courts that have ruled anti-terrorism legislations and practices as being overreaching to the extent these derogated from human rights standards. Specifically, courts in the United Kingdom, the United States, and India exemplify this trend, with some of these tribunals having derived their norms of international law by reference to the resolutions of international organizations.

This article is divided into four sections. Section I will discuss how a rule of customary international law generally develops, including discussions of development from conventional sources and the use of United Nations resolutions for finding a rule of customary international law generally. Section II will expound the treatment of and reliance upon the United Nations resolutions as a source of law by the International Court of Justice, in order to facilitate our discussion of an emerging rule of customary international law from resolutions. Section III will consider the limitations for using resolutions as binding statements of *opinio juris*. Finally, section IV will analyze the resolutions of both the General Assembly and Security Council that are particularly relevant to complying with human rights while combating terrorism and advocate that such resolutions have established the necessary *opinio juris* and, combined with the decisions of the high courts of influential countries which abide by the rule, confirms a rule of customary international law that counter-terrorism measures must conform to human rights.

I. DEVELOPMENT OF A RULE OF CUSTOMARY INTERNATIONAL LAW (C.I.L.)

As this article addresses the emergence of a norm of customary international law from resolutions, a fundamental explanation of the typical development of

5. See *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3 (Feb. 20).

6. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

7. See *Armed Activities on the Territory of the Congo, (Dem. Rep. Congo v. Uganda)*, 2000 I.C.J. 111 (Nov. 7).

8. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136 (July 1).

9. See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226 (July 8).

customary international law is in order. The list of sources of international law under Article 38 of the Statute of the International Court of Justice¹⁰ includes what is labeled as “international custom,” also known as customary international law.¹¹ Customary international law, which has equal authority with conventional laws, such as treaty law,¹² is often relied upon for its important role in providing a rule of law in areas of international law in which no widely applicable conventional rule exists.

A. General Requirements for the Development of a Rule of C.I.L.

Customary international law receives the status of “law” because the I.C.J. considers custom as “evidence of a general practice accepted as law” and thus as “part of the *corpus* of general international law.”¹³ To be accepted as “customary,” the proponent of an emerging norm must show that States adhere to a practice demonstrative of such custom and do so with a sense of legal obligation, known as *opinio juris*.¹⁴ In other words, “[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”¹⁵

The I.C.J. has various approaches to establish the existence of international custom. In many cases, the I.C.J. is willing to assume the existence of an *opinio juris* on the bases of the evidence of a general practice, a consensus in the literature, or the previous determinations of the Court or other international tribunals.¹⁶ However, in some cases the Court calls for more positive evidence of the recognition of the validity of the rules in question in the practice of States.¹⁷ As respected international law scholar, Ian Brownlie, points out, the choice of

10. This article is often given preeminence by international legal scholars as the starting point for sources of international law. See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-5 (6th ed. 2003) (emphasizing that Article 38 of the I.C.J. Statute “is generally regarded as a complete statement of the sources of international law”).

11. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter *I.C.J. Statute*].

12. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. §102 cmt. j (1987) [hereinafter *Restatement (Third) of Foreign Relations*].

13. I.C.J. Statute, *supra* note 11, art. 38(1)(b); North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, at 28 (Feb. 20).

14. *North Sea Continental Shelf*, 1969 I.C.J. at 41-42.

15. *Id.* at 44.

16. BROWNLIE, *supra* note 10, at 8.

17. See, e.g. S.S. “Lotus,” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 23 (Sept. 7) (commenting “[e]ven if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty”).

approach appears to depend upon the nature of the issues – that is, the state of the law may be a primary point of contention – and the discretion of the Court.¹⁸

B. Development of C.I.L. from a “Conventional” Rule

For rules which develop from purely “conventional” statements of law – i.e. those arrived at by convention or agreement, such as treaties or charters – before finding the existence of such rule, the I.C.J. considers: (i) whether the language of the agreement is norm-creating; (ii) the passage of time since the rule was embodied in the agreement; and (iii) the consistency of State practice concerning the rule.¹⁹

As to the first requirement, the I.C.J. has stated that “the provision concerned should, at all events, potentially be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.”²⁰ Thus, in the *North Sea Continental Shelf Case*, the Court found that the provision concerned was not of a “norm-creating character” for several reasons, including that it was not phrased in the convention as a rule but as a default (to be used where parties did not agree to their own method), unresolved controversies about the scope of the provision existed, and the parties were free to accept the convention while making reservations regarding this provision.²¹ In other words, the ability of States to freely derogate from the rule while accepting the remainder of the convention undercut the argument that it had a norm-creating character.²²

On the passage of time element, the Court held that development of a rule of customary international law over a brief period of time from “conventional” statements of law demands a greater showing of the third element, State practice, than is generally required to prove such a rule.²³ As the I.C.J. expounded in the *North Sea Continental Shelf Case*:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a *purely conventional rule*, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a *rule of law or legal obligation* is involved.²⁴

18. BROWNIE, *supra* note 10, at 9-10.

19. *North Sea Continental Shelf*, 1969 I.C.J. at 41-43.

20. *Id.* at 41-42.

21. *Id.*

22. *Id.*

23. *Id.* at 43.

24. *Id.* (emphasis added).

Thus, the brevity of a practice's existence is not a bar to the I.C.J. finding a rule of customary international law, but may be supplemented by greater uniformity in State practice than normally required. Brownlie observes that "[p]rovided the consistency and generality of a practice are proved, no particular duration is required: the passage of time will of course be a part of the evidence of generality and consistency."²⁵

The framework provided in the *North Sea Continental Shelf Case* for the development of a rule of customary international law from conventional sources is of particular relevance to discussing the emergence of such a rule from U.N. resolutions, which arguably serve as conventional sources.²⁶ In the context of the proposed rule, an analysis will demonstrate that the norm-creating character of the resolutions and uniformity of state practice strongly evidence the rule and trump any concerns surrounding the brevity of the rule's existence.

However, because many would debate that General Assembly or non-Chapter VII resolutions have any legal effect, it must first be demonstrated that it is appropriate to use such resolutions as a conventional source of customary international law. The next section will extract principles from the I.C.J.'s jurisprudence on the use of resolutions to strengthen the argument that U.N. resolutions may be considered a "conventional" source to which the *North Sea* framework applies and from which a customary rule of law may be derived.

II. LEGAL EFFECT OF UNITED NATIONS RESOLUTIONS IN THE I.C.J.'S JURISPRUDENCE

Some international legal scholars would dispute labeling U.N. Resolutions as a "conventional" source, since such label places them in the same category as international agreements, and thus imputes legal value to resolutions.²⁷ A number of scholars subscribe to the view that resolutions of the United Nations have little or no legal weight and are highly skeptical of any position that puts emphasis on the legal effect of resolutions.²⁸ As a general observation, this proposition is probably true. Formally, the United Nations Charter regards U.N. General Assembly resolutions as being "recommendations."²⁹ Moreover, the General Assembly is not an official legislature in the ordinary sense that is associated with

25. BROWNLIE, *supra* note 10, at 7.

26. See Gaetano Arangio-Ruiz, *The United Nations Declaration on Friendly Relations the System of the Sources of International Law: With an Appendix on the Concept of International Law and the Theory of International Organisation* 9 (1979).

27. *Id.*

28. For example, Professor David J. Bederman argues that suggestions that "the resolutions of United Nations bodies (particularly the General Assembly, where each nation has a vote) constitute a binding source of international law are extravagant." DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS*, 44 (2d ed., Foundation Press 2006) (2001) [hereinafter *BEDERMAN*].

29. The U.N. Charter employs the language of "recommend" in referring to the powers and functions of the General Assembly. Charter of the United Nations art. 10-11, June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter *U.N. Charter*].

political discourse in particular national settings and the resolutions of the Security Council bind the members only when speaking under enumerated powers.³⁰

Despite such criticism, resolutions of both the United Nations' General Assembly and Security Council are often relied upon as evidence of customary international law both internationally³¹ and domestically.³² The International Law Commission³³ in an early report to the U.N. concluded that customary international law could be derived from the cumulative practice of international organizations, likely having applicability to U.N. Resolutions.³⁴ More recently, several scholars have emphasized the importance of resolutions to the rapid development of a rule of custom, advising that "[m]odern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs."³⁵ This statement resonates with those of U.S. Courts such as in *Siderman de Blake v. Republic of Argentina*,³⁶ where the 9th Circuit confirmed that "a resolution of the General Assembly of the United Nations... is a powerful and authoritative statement of the customary international law."³⁷ The advantages of relying on resolutions as a source of custom, as has

30. See Lara M. Pair, *Judicial Activism in the ICJ Charter Interpretation*, 8 ILSA J. INT'L & COMP. L. 181, 189 (2001).

31. Arbitral Award on the Merits in Dispute Between Texaco Overseas Petroleum Company / California Asiatic Oil Company and the Government of the Libyan Arab Republic, 17 I.L.M. 1, 28 (1978); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (separate opinion of Judge Ago); Legality of the Threat or Use of Nuclear Weapon, Advisory Opinion, 1996 I.C.J. 226 (July 8).

32. *Filartiga v. Pena-Irala*, 630 F.2d 876, 882, 884 (2d Cir. 1980); *Almog et al. v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 279-80 (E.D.N.Y. 2007) (relying upon G.A. Res. 1566 as evidence of a customary international law rule against terrorist acts); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) ("[A] resolution of the General Assembly of the United Nations . . . is a powerful and authoritative statement of the customary international law of human rights"); *Bodner v. Banque-Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *Burger-Fischer v. Degussa*, 65 F. Supp. 2d 248, 255 (D.N.J. 1999).

33. The work of the Commission is a source of law under the I.C.J. Statute. I.C.J. Statute, *supra* note 11, art. 38(1)(d) (stating that "teachings of the most highly qualified publicists" are a subsidiary source of international law).

34. Int'l Law Comm'n, *Report To The General Assembly On Ways And Means For Making The Evidence Of Customary International Law More Readily Available*, A/CN.4/6 (June 1, 1949) (noting that records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations) available at http://untreaty.un.org/ilc/documentation/english/a_cn4_6.pdf.

35. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001), *relying, in part, on* Eduardo Jiménez de Aréchaga, *Remarks*, in CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 48 (Antonio Cassese & Joseph H. H. Weiler eds., 1988) [hereinafter *Roberts*]. See also Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 544 (1993) ("Today, major developments in international law often get their start of substantial support from proposals, reports, resolutions, treaties or protocols debated in such forums . . . Sometimes these efforts result in consensus on solving the problem and express it in normative terms of general application.") (emphasis added) [hereinafter *Charney*].

36. *Siderman de Blake*, 965 F.2d 699.

37. *Id.* at 719.

been observed, is that the method “is potentially more democratic [than looking to other sources] because it involves practically all States.”³⁸

Consistently, the International Court of Justice has affirmed that General Assembly resolutions and non-Chapter-VII resolutions of the United Nations Security Council have legal significance under certain circumstances. For instance, in the *Construction of A Wall Advisory Opinion*,³⁹ the I.C.J. included “relevant resolutions adopted pursuant to the U.N. Charter by the General Assembly and the Security Council” among the “rules and principles of international law” which were useful in assessing the legality of the measures taken by Israel.⁴⁰ In various cases, therefore, the International Court of Justice has employed resolutions of the General Assembly and non-Chapter-VII Security Council resolutions not only as material sources of international law but, more importantly, in providing norms for resolution of international disputes, especially in the context of surveying and establishing the development of a rule of customary international law.

To the extent the I.C.J.’s jurisprudence is relevant to establishing a norm of customary international law from various resolutions of the General Assembly and Security Council, this discussion is narrowly focused on the purposes for which resolutions have been invoked by the Court. The three primary purposes for which resolutions have been used – those that are relevant to our analysis – are: (i) as indicative of a State’s subscription to or pledge to abide by the norm embodied in the relevant resolution; (ii) as evidence of the ongoing practices of States; and (iii) as proof of *opinio juris*. Each of these uses will be discussed in turn.

A. State’s Votes on Resolutions as Subscription to the Embodied Norm

As to the first purpose, the I.C.J. has indicated that States must be careful in voting for resolutions, as such votes evince a pledge to uphold the resolution’s embodied norm and may be legally binding against the States if a later controversy arises.⁴¹ For example, in the *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*,⁴² the Court was called upon to resolve a dispute concerning the delimitation of the boundary between the States and Cameroon’s sovereignty over the Bakassi Peninsula. Resorting to a resolution of the General Assembly, the Court observed that “this frontier line was acknowledged by Nigeria when it voted in favour of General Assembly resolution 1608 (XV).”⁴³ Nigeria’s acknowledgment by voting in favor of the resolution had therefore become binding upon it as a legal recognition of Cameroon title to the disputed territory, and the

38. Roberts, *supra* note 35, at 768.

39. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

40. *Id.* at 171.

41. See, e.g., *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.; Eq. Guinea intervening)*, 2002 I.C.J. 303, 410 (Oct. 10).

42. *Id.*

43. *Id.* at 410.

Court held that “[n]o Nigerian *efectivités* in Bakassi before that time can be said to have legal significance for demonstrating a Nigerian title.”⁴⁴

The Court’s opinion in the *Land and Maritime Boundary Between Cameroon and Nigeria* case indicates that any State which votes in favor of the United Nations resolutions must be aware that its vote indicates both that it agrees with the norm that the Assembly, as a whole, subscribes to in that resolution and also that it cannot be allowed by the Court to repent of its position if a matter is raised against it by another State and that resolution is invoked.⁴⁵ Further, this principle would likely extend not only to resolutions of the General Assembly, but also non-Chapter-VII Security Council resolutions as well for States which hold or have held a position on the Council.

B. Resolutions as Evidence of Ongoing State Practice

The second purpose for which resolutions have been used is as evidence. To successfully demonstrate the existence of a State practice for the purpose of proving a rule of customary law, a court needs evidence, and one way to adduce such evidence may be to rely upon a long string of resolutions on a particular topic.⁴⁶ Not surprisingly, therefore, the I.C.J. has placed considerable reliance on resolutions of the General Assembly for this purpose.

For instance, in the *Case Concerning Armed Activities on the Territory of the Congo*,⁴⁷ the I.C.J. used United Nations resolutions liberally for evidentiary purposes. Both parties presented to the Court various resolutions of the United Nations Security Council.⁴⁸ Many of the resolutions invoked were not promulgated under Chapter-VII of the U.N. Charter and would not be considered legally binding, such as resolution 1234,⁴⁹ which called for an immediate signing of the ceasefire agreement.

In rejecting Uganda’s self-defense excuse for the use of force in the Congo, without discriminating between “Chapter-VII” and “non-Chapter-VII” resolutions,

44. *Id.* at 416.

45. Some commentators would remark that votes in organizations like the U.N. General Assembly are “political” and therefore non-binding in any legal sense. *See, e.g.,* Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT’L L. 566, 589 (1980) (“Formal votes, when taken, are often taken for a political purpose . . . ; they may attempt to set norms for States to follow, but they do not legally bind the organization or its members to carry out specific activities . . . The U.N. General Assembly is the clearest example . . . ”); Damir Arnaut, *When in Rome . . . ? The International Criminal Court and Avenues for U.S. Participation*, 43 VA. J. INT’L L. 525, 581 n.258 (“[T]he history of General Assembly resolutions may be understood to demonstrate that they are often based on purely political considerations . . . ”). Such categorization may be applicable to votes which are simultaneously accompanied by State declarations that such votes are considered political. *See, e.g., infra* note 62. It does not address the circumstance where a simultaneous declaration of that purpose is absent, nor the weight given votes in I.C.J. jurisprudence, to the extent it is critical of General Assembly votes as a whole.

46. *See, e.g.,* *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 1, 128-29 (Dec. 19).

47. *Id.*

48. *Id.* at 15.

49. S.C. Res. 1234, U.N. Doc. S/RES/1234 (Apr. 9, 1999).

the Court referred to what it respectfully recognized as being the “long series” of U.N. Security Council resolutions⁵⁰ which “testif[ied] to the magnitude of the military events and the attendant suffering.”⁵¹ The series cited by the Court was composed not only of resolutions passed both under Chapter-VII and non-Chapter-VII powers of the Council, but in fact consisted of a majority of non-binding, non-Chapter-VII resolutions.⁵² The Court further relied on resolution 1304⁵³ for evidence showing that a “loss of civilian lives... and damage to property inflicted by the forces of Uganda” were present and for the observation that the United Nations Security Council had “identified Uganda and Rwanda as having violated the sovereignty and territorial integrity of the Congo and as being under the obligation to withdraw their forces.”⁵⁴ Indeed, the Court went on to cite even U.N. General Assembly resolutions.⁵⁵ For example, in deciding the issue of whether or not any armed attack took place on Uganda emanating from the Congo, the Court relied on Article 3(6) of General Assembly resolution 3314⁵⁶ for the definition of aggression.⁵⁷

Based upon the Court’s practices, embodied in *Congo*, the Court’s reliance on the United Nations resolutions as evidence of a State practice is a natural extension of the evidentiary function of resolutions. The Court’s employment of non-binding resolutions in an evidentiary context indicates how seriously the Court takes those resolutions as evidence of State action and, it can also be assumed, of State practice.

C. Resolutions as Providing Necessary *Opinio Juris*

Finally and most importantly, the Court has also looked to resolutions to provide a declaratory basis of the *opinio juris* element for a rule of customary international law. Thus, in the case of *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*,⁵⁸ speaking to a circumstance where it had been argued that a rule of customary international law existed, the Court considered whether an *opinio juris* existed as to the binding character of the purported obligation. The Court remarked:

This opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the parties and the attitude of States toward certain General Assembly resolutions.... The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the

50. *Armed Activities on the Territory of the Congo*, 2005 I.C.J. at 54.

51. *Id.* (emphasis added).

52. *See id.* at 54.

53. S.C. Res. 1304, U.N. Doc. S/RES/1304 (June 16, 2000).

54. *Armed Activities on the Territory of the Congo*, 2005 I.C.J. at 67, 43.

55. *See id.* at 15, 53.

56. G.A. Res. 3314 (XXIX), U.N. Doc. A/9619 (Dec. 14, 1974).

57. *Armed Activities on the Territory of the Congo*, 2005 I.C.J. at 53.

58. *Military and Paramilitary Activities (Nicar. V. U.S.)*, 1986 I.C.J. 14 (June 27).

validity of the rule or set of rules declared by the resolution by themselves.⁵⁹

In other words, the I.C.J. could derive the requisite *opinio juris* from a careful analysis of the resolution in order to determine States' attitudes towards the rule embodied.

The Court further found that, with regard to the United States, that the weight of an expression of *opinio juris* could be attached to its support of the resolution of the United Nations on the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the U.N.⁶⁰ According to the I.C.J., the adoption by States of this text afforded an indication of their *opinio juris* as to the customary international law on the question.⁶¹ The Court cautioned that multiplicity of resolutions is not, without more, sufficient to establish a rule of customary international law, as it still depends upon the "exact content of the principle accepted" and whether "[State] practice [is] sufficiently in conformity with it" for a rule of C.I.L. to exist.⁶² The I.C.J. also indicated that if a State expressly mentions, while voting for a particular resolution, that it regards the resolution as being merely a political statement without legal content, then that resolution may not be invoked against it.⁶³ Despite these qualifications, the I.C.J. gave G.A. resolutions a prominent place for their ability to demonstrate *opinio juris*.⁶⁴

Further, in the *Legality of the Threat or Use of Nuclear Weapon Advisory Opinion*, the Court expanded upon its statement in the *Nicaragua Case*, examining General Assembly resolutions to determine whether or not such resolutions provided the necessary *opinio juris* for the Court to find a rule of customary international law.⁶⁵ The issue arose as some States argued that "the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961,⁶⁶ that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons."⁶⁷ According to other States, the resolutions in question had "no binding character on their own account" and were not "declaratory of any customary rule of prohibition

59. *Id.* at 99-100 (emphasis added).

60. *Id.* at 100; see generally G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).

61. *Military and Paramilitary Activities*, 1986 I.C.J. at 101.

62. *Id.* at 107-08.

63. *Id.* at 106-07 (explaining that while the United States voted in favor of General Assembly resolution 2131(XX), it also declared at the time of its adoption that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law." Resolution 2131 (XX) relates to the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty).

64. See BROWNIE, *supra* note 10, at 15.

65. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 254-55 (July 8).

66. See generally G.A. Res. 1653 (XVI), U.N. Doc. A/5100 (Nov. 24, 1961).

67. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 at 254.

of nuclear weapons.”⁶⁸ Additionally, opposing States pointed out that this series of resolutions not only failed to muster the approval of all of the nuclear-weapon States but of many other States as well.⁶⁹ The I.C.J. responded to the issues raised by stating that:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.⁷⁰

The I.C.J. thus rejected the argument of some States that resolutions were legally insignificant because of their non-binding character, giving resolutions the power to establish *opinio juris* depending upon their content and the conditions of their adoption.

The Court went on to find that “[e]xamined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be ‘a direct violation of the Charter of the United Nations’; and in certain formulations that such use ‘should be prohibited.’”⁷¹ However, the Court found that “several of the resolutions under consideration in the present case [had] been adopted with substantial numbers of negative votes and abstentions; and thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.”⁷² Regardless of the outcome, the clear import of the I.C.J.’s opinion in *Legality of the Threat or Use of Nuclear Weapons* was to signal that, depending upon the level of State consensus,⁷³ resolutions of the United Nations Security Council and General Assembly can establish the existence of requisite *opinio juris*.⁷⁴

The Court confirmed this principle in the more recent *Case Concerning the Application on the Convention on the Prevention and Punishment of the Crime Against Genocide*.⁷⁵ Confronting a patently human rights issue, the Court relied on

68. *Id.*

69. *Id.*

70. *Id.* at 254-55.

71. *Id.* at 255.

72. *Id.*

73. See discussion *infra* Section III.

74. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 254-55 (July 8) (stating that the primary basis for the *opinio juris* as an ingredient of international customary law is the *Statute of the International Court of Justice* itself which refers to “a general practice *accepted as law*”) (emphasis added); I.C.J. Statute, *supra* note 11, art. 38(1)(b).

75. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Mont.)*, 46 I.L.M. 188, ¶ 142 (Feb. 26).

several U.N. resolutions in conjunction with the Genocide Convention as a basis for a customary international law rule that genocide is a crime.⁷⁶ The issue in the case concerned whether any legal significance could be attached to the expression “ethnic cleansing” in connection with the crime of genocide.⁷⁷ Within the Genocide Convention, the term “ethnic cleansing” had no legal significance of its own.⁷⁸ However, the parties to the case submitted, among other sources, several resolutions of the United Nations.⁷⁹ The Court resorted to the preamble of General Assembly Resolution 47/121 which refers to ethnic cleansing as a “form of genocide.”⁸⁰ Further, the Court referenced the “contemporaneous Security Council and General Assembly resolutions condemning the killing of civilians in connection with ethnic cleansing.”⁸¹

More importantly, the Court found that the affirmation that genocide was a crime under international law, not only in Article I of the Genocide Convention but also “read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96(I).”⁸² According to the Court, the “affirmation recognize[d] the existing requirements of customary international law....”⁸³ In other words, this declaration, which “purport[ed] to reflect legal principles,” was considered an expression of the necessary *opinio juris* for finding a rule of customary international law.⁸⁴

The proposal of the I.C.J. that resolutions may serve as the instrument for finding customary international law is consistent with other evidence of international opinion concerning the effect of non-binding resolutions in supplying the necessary *opinio juris* for a rule of customary international law. For example, a memorandum of the United Nations’ Office of Legal affairs has stated that:

[I]n view of the greater solemnity and significance of a ‘declaration,’⁸⁵ it may be considered to impart, on behalf of the organ adopting it, a

76. *Id.* at ¶ 161.

77. *Id.* at ¶ 190.

78. *Id.*

79. *Id.* at ¶ 274.

80. *Id.* at ¶ 190 (noting that the Interim Report of the United Nations Commission of Experts had referred to “ethnic cleansing” to mean “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area”).

81. *Id.* at ¶ 274 (noting in particular Security Council Resolution 819 (1993), and General Assembly Resolutions 48/153 (1993) and 49/196 (1994)).

82. *Id.* at ¶ 161.

83. *Id.*

84. *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 12, § 102 note 2, cmt. c (1987) (discussing how General Assembly resolutions have been held to express *opinio juris* for rule of customary international law).

85. “Declarations” are sometimes accorded greater weight than normal resolutions. See Noelle Lenoir, *Universal Declaration on the Human Genome and Human Rights: The First Legal and Ethical Framework at the Global Level*, 30 COLUM. HUM. RTS. L. REV. 537, 551 (1999) (noting “U.N. declarations represent a form of action that is both psychological and political. The principles enshrined in them can add leverage to claims for rights, especially claims emanating from non-governmental organizations.”); See also, Major Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of*

strong expectation that Members of the international community will abide by it. Consequently, insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.⁸⁶

The “strong expectation” such a declaratory resolution can create that “Members of the international community will abide by it,”⁸⁷ supports *opinio juris* by evincing that the State practice in question is not coincidental, but is rather “rendered obligatory by the existence of a rule of law requiring it.”⁸⁸ The Restatement 3rd of Foreign Relations Law of the United States⁸⁹ also accords with this principle, confirming that “[r]esolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight.”⁹⁰

III. CONDITIONS UNDER WHICH RESOLUTIONS SUPPORT *OPINIO JURIS*

Given that the I.C.J. has repeatedly affirmed that non-binding resolutions of the United Nations can in fact support the *opinio juris* element for finding a rule of customary international law, discerning *when* and under what circumstances they will be given that effect are important. The primary issues which arise are how to assess the weight of resolutions and whether doubt should be cast on the legal force of resolutions when States supporting such resolutions commit inconsistent acts. Discussion of these problems will occur in light of both the I.C.J.’s own decisions and other decisions of domestic and international tribunals.

A. *Weighing the Force of Resolutions*

A key issue that naturally arises is what conditions must be present to give a resolution force as *opinio juris*. Such weight for resolutions of the General Assembly varies depending upon the voting conditions surrounding the resolutions.⁹¹ The relevant conditions for analysis include not only the amount of support but also the nature of support – whether the States voting for or against the resolution represent a significant block of States which are much differently situated than those in the opposing block.⁹² For example, in the dispute concerning *Texaco Overseas Petroleum Company and the Government of Libya*, the arbitrator considered it “important to note” that not only a majority of the assembly had

War in Space, 48 A.F. L. REV. 1, 110 n.485 (2000) (“The fact that a General Assembly Resolution assumes for itself the term “Declaration” does highlight the importance of the document.”).

86. Office of International Standards and Legal Affairs, *General Introduction to the Standard-Setting Instruments of UNESCO, Recommendations*, available at http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html#4.

87. *Id.*

88. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

89. Restatement Third of Foreign Relations Law is considered a subsidiary source of international law under the I.C.J. Statute. See I.C.J. Statute, *supra* note 11, art. 38(1)(d)..

90. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 12, §103 cmt. c (1987); see also *id.* at §102 note 2 (discussing how General Assembly resolutions have been held to express *opinio juris* for rule of customary international law).

91. *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. the Government of Libyan Arab Republic*, 17 I.L.M. 1, 28 (1978).

92. *Id.*; see also Charney, *supra* note 35, at 544-45.

voted for the text at hand, but also that the States voting in favor included both “many States of the Third World, [and] also several Western developed countries with market economies....”⁹³ The distinction between third world and developed countries did not serve in itself as a standard of evaluation, but rather was remarkable for its relevance to the particular controversy at hand – an economic dispute crossing the divide of developed and third world economies.

Similarly, the U.S. District Court case of *Nguyen Thang Loi v. Dow Chem. Co.*,⁹⁴ the only domestic case available from the United States which has also engaged in analysis of the legal weight to be given of a General Assembly Resolutions for the purposes of establishing customary law, evaluated not only the voting record but also the position of important players relative to the subject matter of the resolution. Thus, although a particular resolution concerning the military use of herbicides passed 80-3, the Court held that it did not evince consensus on an issue, where two of the three States voting against the resolutions, the United States, Australia, were among the world’s larger military powers, and such “no” votes were accompanied by 36 abstaining.⁹⁵ Additionally, the abstention of one-third of the countries was held to “deprive the resolution of even precatory force” as it was demonstrative of a lack of consensus.⁹⁶

In both of these decisions, the tribunals emphasize the same factors in assessing their legal weight. Namely, they used the voting pattern relative to whether a consensus is obtained (sometimes meaning a substantial majority or near-unanimity⁹⁷ and at other times described as a lack of express objections to the heart of the norm the resolutions contemplate),⁹⁸ the number of abstentions (which in the eyes of some expresses tacit consent),⁹⁹ and the positions of key concerned actors are assessed to determine whether a particular resolution is binding. Although the I.C.J. itself has not directly addressed the topic, the I.C.J.’s refusal to derive *opinion juris* from resolutions in *Nuclear Weapons* because of “substantial numbers of negative votes and abstentions,”¹⁰⁰ indicates that the Court would follow this generally accepted methodology, in determining the weight of reductions as providing *opinio juris*.

93. *Id.*

94. *Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 126-27 (E.D.N.Y. 2005).

95. *Id.* at 126.

96. *Id.*

97. *See, e.g., id.* at 126 (noting “A General Assembly resolution, even though it is not binding, may provide some evidence of customary international law when it is unanimous (or nearly so).”).

98. *See, e.g., Charney, supra* note 35, at 544 (“unanimous support is not required . . . The absence of objections, of course, amounts to tacit consent by participants that do not explicitly support the norm. Even opposition by a small number of participating States may not stop the movement of the proposed rule toward law . . .”).

99. *Id.*

100. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 255 (July 8).

B. Inconsistent Actions by States Supporting a Resolution

Some argue that no *opinio juris* can exist if States vote overwhelmingly in support of particular resolutions but their conduct is inconsistent with their words.¹⁰¹ The example given is that States voted overwhelmingly in the U.N. General Assembly for resolutions condemning State-sponsored torture, yet some of those States continued to engage in torture.¹⁰² Could it, therefore, be said that no customary norm prohibiting States from engaging in torture existed? The fact of the matter is that the law against torture is actually a norm of customary international law.¹⁰³ To ignore the words simply because they are at times not accompanied by action would be to ignore an increasingly important source of norms. A particular country's failure to keep its word does not necessarily mean that it does not understand its verbal commitments to have legal effect.

The dispute is given a more than hypothetical character when put in context of the I.C.J.'s jurisprudence on the issue. As previously stated in the discussion above,¹⁰⁴ in the *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*,¹⁰⁵ a country which votes in favor of a resolution may not altogether disregard what their vote signifies and is, in some ways, bound by their vote. Therefore, scholars who make the argument that the inconsistency of some States defeats the binding nature of a resolution must confront the principle the Court referenced in *Cameroon*.

IV. ANALYSIS OF COUNTERTERRORISM AND HUMAN-RIGHTS-RELATED RESOLUTIONS

The resolutions of the U.N. General Assembly and Security Council concerning fighting terrorism in a manner consistent with human rights support the finding of *opinio juris* based upon both their language and voting patterns. As an analysis of the resolutions reveals, the language is of a strong, norm-creating character. Moreover, voting patterns show consistent support of a majority of States which cuts across both the Western democracies waging the "War on Terror," many of whom have approved of the language in one or more resolution, and the developing countries on the front lines. Additionally, the decisions of the high courts of many States¹⁰⁶ have recognized the non-derogability of human rights in fighting terrorism both apart from and in reference to resolutions of the U.N. in that regard, establishing the requisite State practice and cementing the rule of

101. See BEDERMAN, *supra* note 28, at 45.

102. *Id.*

103. *Filartiga v. Peña-Irala*, 630 F.2d 864, 882-84 (2d. Cir. 1980) (relying partially on General Assembly resolutions to hold that torture violates the "law of nations"); BEDERMAN, *supra* note 28, at 45 (describing General Assembly resolutions as mere evidence of state practice and *opinio juris* and not enough alone to form an international legal obligation).

104. See *supra* Part II.a.

105. *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, 2002 I.C.J. 303, 431 (Oct. 10).

106. I.C.J. Statute, *supra* note 11, art. 38(1)(d) (providing that decisions of national courts are accorded force as subsidiary sources of international law).

customary law which the resolutions embody. Thus, despite the brevity of this rule's existence, first manifesting itself merely six years ago, the uniform consensus on the norm alleviates the need for a "long" practice.

A. General Assembly Resolutions

The General Assembly Resolutions concerning the topic at issue are primarily G.A. Res. 56/160, G.A. Res. 58/187, G.A. Res. 59/191, G.A. Res. 59/195, and G.A. Res. 57/219. The language of these resolutions is consistent with the *North Sea Case* requirement that a provision must be norm-creating.¹⁰⁷ As a very forceful whole, the resolutions emphasize both the non-derogability of human rights and the duty of states to comply. G.A. Res. 56/160 authorizes States to "take all necessary and effective measures, *in accordance with relevant provisions of international law, including international human rights standards*, to prevent, combat and eliminate terrorism... and... strengthen, where appropriate, their legislation to combat terrorism."¹⁰⁸ Consistently, G.A. Res. 57/219 urges that "States *must ensure* that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights."¹⁰⁹ G.A. Res. 58/187 holds that certain human rights are "non-derogable" and "[r]eaffirms that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law."¹¹⁰ The remaining two resolutions, G.A. Res. 59/191¹¹¹ and 59/195¹¹² reaffirm and build off of the principles contained in G.A. Res. 57/219.

Of the five resolutions at issue, two – G.A. Res. 59/191 and G.A. Res. 57/219 – were passed without a vote. Of the remainder, G.A. Res. 56/160, entitled "Human Rights and Terrorism," passed unanimously, 102 votes to none, with sixty-nine abstentions.¹¹³ Those in favor cover many of the nations in what might be deemed the "front lines" on the War on Terror – those States that deal domestically with the suppression of terrorism at its roots – Saudi Arabia, Iran, and Afghanistan among them.¹¹⁴ Those abstaining, or in the words of one scholar, expressing "tacit consent,"¹¹⁵ include many of the Western democracies waging the

107. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 41-42 (Feb. 20).

108. G.A. Res. 56/160, *supra* note 4, ¶ 6 (emphasis added).

109. G.A. Res. 57/219, *supra* note 4, ¶ 1 (emphasis added).

110. United Nations General Assembly Resolution on Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 58/187, Preamble ¶ 1, U.N. Doc. A/RES/58/187 (Mar. 22, 2004).

111. G.A. Res. 59/191, *supra* note 4.

112. G.A. Res. 59/195, *supra* note 4.

113. UNBISNET, United Nations Bibliographic Information System, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=VN27665315312.1231&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VM&term=56%2F160&matchopt=0%7C0&oper=and&aspect=power&index=.VW&term=&matchopt=0%7C0&oper=and&index=.AD&term=&matchopt=0%7C0&oper=and&index=BIB&term=&matchopt=0%7C0&ultype=&uloper=%3D&ullimit=&ultype=&uloper=%3D&ullimit=&sort=&x=0&y=0#focus> (last visited Nov. 25, 2008) [hereinafter *UNBISNET Vote 56/160*].

114. *Id.*

115. Charney, *supra* note 35, at 544.

war, including the United States, the United Kingdom and France.¹¹⁶ Moreover, in the context of this particular resolution, it is inapposite to say that the abstentions “deprive it” of its force, as *Ngyuen Thang Loi* phrased it,¹¹⁷ since the three aforementioned States supported Security Council resolutions with a similar effect (each State having veto powers as permanent members of the Security Council, the resolutions would not have passed but for their votes), and further, the high courts of two of the States have subsequently recognized the need to afford certain human rights to suspected terrorists, as will be discussed below. One can only conclude that the abstentions, rather than a statement of non-support, were for purposes unrelated to the human rights language of the resolution.

Compared to G.A. Res. 56/160, States manifested even greater support for G.A. Res. 58/187, passing the resolution not only unanimously, 181 votes to 0, but with only one country abstaining.¹¹⁸ The resolution is of particular importance not only for affirming that even in the War on Terror, human rights must be upheld, but also for placing such a statement within the context of the principle of non-derogation.¹¹⁹ The effect of the resolution in giving rise to a rule of C.I.L. is particularly forceful, having passed unanimously with only one abstention. Moreover, the one country which abstained, India, voted in favor of both G.A. Res. 56/160 previously and G.A. Res. 59/195 subsequently and recognized in the jurisprudence of its Supreme Court a year later¹²⁰ that human rights deserve protection even during the War on Terror.¹²¹

Finally, G.A. Res. 59/195, creates additional support for arriving at our proposed rule of customary international law. The resolution emphasized similar desires as those stated in 59/191 and 57/219, strongly urging States to combat terrorism “in accordance with relevant provisions of international law, including international human rights standards.”¹²² The General Assembly cast 127 votes in favor and 50 in opposition, with 8 abstentions.¹²³ The resolution, receiving greater

116. UNBISNET Vote 56/160, *supra* note 113.

117. *Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 126 (E.D.N.Y. 2005).

118. UNBISNET, United Nations Bibliographic Information System, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=12276H69D8190.3036&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VM&term=58%2F187&matchopt=0%7C0&oper=and&aspect=power&index=.VW&term=&matchopt=0%7C0&oper=and&index=.AD&term=&matchopt=0%7C0&oper=and&index=BIB&term=&matchopt=0%7C0&uloper=%3D&ullimit=&uloper=%3D&ullimit=&sort=&x=0&y=0#focus> (last visited Nov. 25, 2008).

119. G.A. Res. 58/187, *supra* note 110.

120. *People's Union for Civil Liberties & Anor v. Union of India*, [2004] 1 L.R.I. 1, 17 (India), available at <http://www.lexisnexis.com> [hereinafter *People's Union*].

121. *Id.*

122. GA/RES/59/195, *supra* note 4.

123. UNBISNET, United Nations Bibliographic Information System, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=1A276M8414R23.4618&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VM&term=59%2F195&matchopt=0%7C0&oper=and&aspect=power&index=.VW&term=&matchopt=0%7C0&oper=and&index=.AD&term=&matchopt=0%7C0&oper=and&index=BIB&term=&matchopt=0%7C0&uloper=%3D&ullimit=&uloper=%3D&ullimit=&sort=&x=0&y=0#focus> (last visited Nov. 25, 2008).

opposition than previous resolutions nevertheless received greater support than 56/160 as well, evincing a growing change in attitude of even those who originally remained neutral.

B. United Nations Security Council Resolutions

In addition to the resolutions of the General Assembly that are addressed above, many resolutions of the U.N Security Council touch on human rights while combating terrorism. Those which directly embody the norm that the War on Terror must comport with human rights standards, including resolutions 1456, 1535, and 1624, are non-Chapter VII resolutions, meaning they are not immediately binding upon U.N. Member States.¹²⁴ However, resolutions 1373 and 1566, both binding Chapter VII resolutions, are also of relevance to this discussion for indirectly indicating the same norm – 1373 by requiring States to conform to human rights while implementing security measures for their borders and 1566 by broadly “reminding” States of their obligation to respect human rights.

The first counter-terrorism resolution to include the human rights language was Security Council Resolution 1456 in January 2003.¹²⁵ The importance of resolution 1456 was twofold: it both stressed the general obligation of nations to combat terrorism “in accordance with international law, in particular international human rights, refugee, and humanitarian law”¹²⁶ and also emphasized the more specific obligation to accord terrorists due process rights, stating that States had an obligation under the “principle to extradite or prosecute.”¹²⁷

Additionally, Security Council resolution 1535 reiterated the State’s obligation to comply with human rights in combating terrorism.¹²⁸ In language reminiscent of resolution 1456, the Council stated that “States... must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”¹²⁹

Shortly after the passage of 1535, the Security Council again addressed the issue in Security Council resolution 1566,¹³⁰ a binding Chapter-VII resolution.¹³¹ Interestingly, resolution 1566 pairs the obligation of States to combat terrorism in accordance with human rights with the concept that “acts of terrorism seriously impair the enjoyment of human rights.”¹³² As will be discussed, this implication

124. See James A. R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 428 [hereinafter *Nafziger & Wise*]; see also Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 NW. J. INT’L HUM. RTS. 24, 102 [hereinafter *Schott*].

125. S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003).

126. *Id.* at ¶ 6.

127. *Id.* at ¶ 3.

128. S.C. Res. 1535, *supra* note 4; see also S.C. Res. 1624, *supra* note 4.

129. *Id.* at Preamble.

130. S.C. Res. 1566, *supra* note 4.

131. See Nafziger & Wise, *supra* note 124, at 428; see also Schott, *supra* note 124, at 102.

132. S.C. Res. 1566, *supra* note 4, at Preamble.

formed the basis of decisions of at least two national courts in defending human rights in the context of the War on Terror.¹³³

Lastly, Security Council resolution 1373,¹³⁴ also a binding Chapter-VII resolution, passed shortly after the September 11th attacks, is relevant to this discussion for having affirmed the principle of acting in accordance with human rights in the specific instance of dealing with refugees. Among a list of a number of actions which the Council called upon the States to implement, the Council called for States to “take appropriate measures in conformity with... international standards of human rights...” to scrutinize refugees seeking asylum, ensuring terrorists did not cross borders unsuspected.¹³⁵ The language of 1373 is particularly important as it bound the States to implement counter-terrorism measures, yet simultaneously required that human rights would receive priority in considering what measures were “appropriate.”¹³⁶

Each of the foregoing Security Resolutions were adopted by a unanimous council that permanently includes the United States, the United Kingdom, and France – three of the Western States most involved in the War on Terror.¹³⁷ A commonality exists in each of these resolutions of the Security Council: the non-derogability of human rights in fighting terrorism. Moreover, these resolutions and resolution 1566 in particular, give context to this rule that States respect human rights in the War on Terror, explicating that terror itself is a violation of human rights and, as such, counter-terrorism must not fall victim to the very failings of terrorism. Taken as a unit and in combination with the long string of General Assembly resolutions to the same effect, these Security Council resolutions embody a forceful statement of the nations, evincing an *opinio juris* for the proposed rule.

C. National Decisions Affirming Human Rights in Countering Terrorism

A uniform sense of legal obligation to protect human rights while countering international terrorism is manifested in the decisions of the high courts of several major world powers, including India, the United Kingdom, Australia, and the United States.¹³⁸ Moreover, the practice of these particular States is of particular importance to an emerging rule of customary international as these States are among those at the forefront of the global War on Terror and two of these States hold permanent positions on the U.N. Security Council.¹³⁹ From these Court

133. See, e.g., People's Union, *supra* note 120; R (on the application of Al-Jedda) v. Sec'y of State for Defence, [2007] UKHL 58 (U.K.); see, also, discussion *supra* subsection IV(C).

134. S.C. Res. 1373, *supra* note 4.

135. *Id.* at ¶ 3(f).

136. *Id.*

137. S.C. Res. 1373, *supra* note 4; S.C. Res. 1456, *supra* note 125; S.C. Res. 1535, *supra* note 4; S.C. Res. 1624, *supra* note 4; S.C. Res. 1566, *supra* note 4.

138. Decisions of national courts are accepted evidence of customary international law according to the I.C.J. Statute, which recognizes “judicial decisions . . . of the various nations . . . ” as among the “subsidiary sources” of international law. I.C.J. Statute, *supra* note 11, art. 38(1)(d).

139. U.N. Charter, *supra* note 29, art. 23, ¶ 1; see U.S. Department of State, International

decisions – some of which reference the statements by the U.N. in resolutions of the General Assembly and Security Council and some of which do not – may be inferred a State practice implementing the norm embodied in the resolutions discussed above, not to derogate from human rights standards while fighting terror. This practice strongly supports finding a customary rule of that nature as “[t]hose solutions that [are] positively received by the international community through State practice or other indications of support will rapidly be absorbed into international law, notwithstanding the technical legal status of the form in which they emerged from the multilateral forum.”¹⁴⁰

1. India

The Supreme Court of India has acknowledged that the War on Terror must be fought in a manner that upholds human rights, in a passage that is consistent with the principles embodied in Security Council Resolutions 1535 and 1566 and G.A. Resolution 57/219, in the case of *People’s Union for Civil Liberties & Anor v Union of India*.¹⁴¹ Declaring that terrorism itself breeds the grossest violations of human rights, the Court nevertheless emphasized:

The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and court’s responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. [...] In all cases, the fight against terrorism must be respectful to the human rights.¹⁴²

The opinion of the Supreme Court of India evinces the government’s affirmation of the desperate need to protect human rights even while bringing to justice those individuals who would disregard such rights.

2. The United Kingdom

Similarly, the House of Lords of the United Kingdom in *R (on the application of Al-Jedda) v. Secretary of State for Defence*,¹⁴³ though not acting pursuant to a specific U.N. resolution, adhered to the principles embodied in those resolutions. The defendant in *Al Jedda* was suspected for smuggling weapons for terrorist acts and complained that he had been held indefinitely, though he had not been charged with any offense.¹⁴⁴ The Court attested to the emerging norm requiring that terror be fought consistent with human rights, recognizing that “[o]n repeated occasions

Contributions to the War Against Terrorism, <http://www.state.gov/coalition/cr/fs/12753.htm> (last visited Nov. 25, 2008).

140. Charney, *supra* note 35, at 545.

141. *People’s Union*, *supra* note 120, at 17.

142. *Id.* at 17.

143. See generally *R (in re Al-Jedda) v. Sec’y of State for Defence*, [2007] UKHL 58, [2008] 1 A.C. 332 (H.L. 2007) (appeal taken from Q.B.), available at 2007 WL 4266094 (HL).

144. *The Queen (in re Hilal Abdul-Razzaq Ali Al-Jedda) v. Sec’y of State for Defence*, ¶ 1-2, Q.B.D., available at 2005 WL 2003226 (DC).

in recent years the U.N. and other international bodies have stressed the need for effective action against the scourge of terrorism but have, in the same breath, stressed the imperative need for such action to be consistent with international human rights standards...."¹⁴⁵ The House of Lords therefore held that though a particular U.N. Security Council Resolution (UNSCR 1546) granted the UK the power to detain, such grant was still not authority to derogate from human rights guaranteed by the European Convention on Human Rights.¹⁴⁶

In many other cases as well, the House of Lords has upheld human rights standards in the context of counter-terrorism measures. Particularly relevant decisions of the House include *R (A) v Secretary of State*,¹⁴⁷ declaring the inadmissibility of evidence obtained by torturing suspected terrorists as a violation of abuse of process and the right to a fair trial,¹⁴⁸ and *R (Gillan & Anor) v Commission of Police of the Metropolis*,¹⁴⁹ holding that extraordinary search powers were not available for the prevention of terrorist acts. Furthermore, in *R (Abassi & Anor) v Secretary of State*,¹⁵⁰ an unusual opinion concerning a UK citizen who was a detainee in the United States' territory of Guantanamo Bay, the House remarked that it was objectionable to the common law idea of habeas corpus that a suspected terrorist "should be subject to indefinite detention... with no opportunity to challenge the legitimacy of his detention before any court or tribunal."¹⁵¹ The opinion can be understood as a message from the U.K. to the U.S., disapproving of the United States' practice of disregarding habeas corpus, even in regards to suspected terrorists, as lacking conformity with human rights.¹⁵²

3. Australia

In a 2007 opinion, *Thomas v. Mowbray*, the High Court of Australia upheld the right of an acknowledged member of a terrorist organization to be free from certain restrictions on his liberty, striking down a law which had the stated purpose of "allow[ing] obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act."¹⁵³ In the face of the defendant's admitted connections to a terrorist organization, the Court held that international law "ratified by and binding on Australia, protects the rights of individuals to be free of arbitrary detention and the unlawful deprivation of liberty."¹⁵⁴

145. *Id.* at 354, ¶ 37.

146. *Id.* at 354-55, ¶ 39.

147. See generally *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68, (H.L. 2004) (appeal taken from Q.B.), available at 2004 WL 2810935 (HL).

148. *Id.* at ¶ 97.

149. *R (Gillan and another) v. Comm'r of Police of the Metropolis and another* [2006] UKHL 12, [2006] 2 A.C. 307 (U.K.).

150. *R (In re Abbasi and another) v. Sec'y of State for Foreign and Commonwealth Affairs and another* [2002] EWCA (Civ) 1598, [2002] All E.R. (D) 70 (Eng.).

151. *Id.* at ¶ 66.

152. Rodney C. Austin, *The New Constitutionalism, Terrorism, and Torture*, 60 CURRENT LEGAL PROBLEMS 2007 79, 99 (Colm O'Cinneide & Jane Holder eds., 2007).

153. *Thomas v. Mowbray and Others* (2007) 237 A.L.R. 194, ¶ 170 (Austl.) (Kirby, J., dissenting).

154. *Id.* at ¶ 379.

4. The United States

Furthermore, the United States Supreme Court, in the cases of *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Hamdan v. Rumsfeld*, has provided that the suspected terrorists are entitled to certain basic due process rights.¹⁵⁵ In *Rasul v. Bush*, the Supreme Court acknowledged that detainees of the naval base at Guantanamo Bay have the right to petition for *habeas corpus*, to have a judicial determination of the constitutionality of their detention.¹⁵⁶ Additionally, the case of *Hamdi v. Rumsfeld*, decided simultaneously with *Rasul*, recognized the rights of suspected terrorists to limited Due Process, including the right to “a meaningful opportunity to contest the factual basis for [their] detention before a neutral decision-maker.”¹⁵⁷ More recently, in *Hamdan v. Rumsfeld*, the Court struck down the use of military tribunals by the U.S. during the prosecution of terrorists as being inconsistent with the procedural rights owed to the defendants in such cases.¹⁵⁸

5. What Follows

The consistent practice of the high courts of these particularly important States is demonstrative of *opinio juris* regarding the obligation to protect international human rights while countering international terrorism. In many of the decisions mentioned, references were made to international law in the reasoning of the opinions. Additionally, both *People’s Union for Civil Liberties & Anor* and *R (on the application of Al- Jedda)*, specifically mentioned the persuasive force of U.N. resolutions on the key issue of the respective cases. From these decisions, it is clear that the States’ ready acquiescence in admitting that countering terrorism must still remain consistent with human rights is “rendered obligatory by the existence of a rule of law requiring it.”¹⁵⁹

V. CONCLUSION

Despite the failure of nations to come to agreement as to what constitutes “terrorism,” a customary rule has emerged which places on States a positive obligation to respect human rights in taking counter-terrorism measures. This rule has its foundation in the long string of both General Assembly and Security Council resolutions enunciating the rule and in the practice of States, evinced in decisions of their High Courts, which confirms that such rule is obligatory. In consideration of such a rule, States must be aware that violations of human rights in the context of counter-terrorism will not be lawful, regardless of whether they have acceded to human rights treaties. Of further consequence, States are on notice that the rule renders them responsible to the international community for violations.

155. See *Hamdan v. Rumsfeld*, 548 U.S. 577 (2007); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 446 (2004).

156. *Rasul*, 542 U.S. at 484.

157. *Hamdi*, 542 U.S. at 509.

158. *Hamdan*, 548 U.S. 557.

159. *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20).

