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

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CHAPTER 6: GENERAL ASSEMBLY EMPOWERMENT OF INQUIRIES AND COURTS

1. Introduction

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

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

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

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

2. Commissions of Inquiry

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

2.1 Legal Foundation of Assembly-established Commissions of Inquiry

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

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

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

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

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

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

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

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

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

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

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

2.2 Duty to Cooperate with Assembly-established Commissions of Inquiry

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

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

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

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

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

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

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

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

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

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

2.3 Context of Establishing Commissions of Inquiry

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Triggering the ICJ's Advisory Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

[1110] *Reservations* (Advisory Opinion) (n 113).

[1111] *Nuclear Weapons* (Advisory Opinion) (n 232).

[1112] *Wall* (Advisory Opinion) (n 108).

[1113] UNGA Sixth Committee, 'Reservations to Multilateral Conventions' (10 November 1950) UN Doc A/1494, [3], [8]-[9]; UNGA, Fifth Session, 305th plenary meeting (16 November 1950) UN Doc A/PV.305, 384-385.

[1114] UNGA Res ES-10/14, preamble; UNGA 23rd meeting (2003) (n 1102), 10 (Malaysia).

[1115] UNGA 23rd meeting (2003) (n 1102), 21 (UK) ('This is not a case in which the General Assembly genuinely needs legal advice in order to carry out its functions. It has already declared the wall to be illegal.'), 22-23 (Singapore) ('[P]osing the question might create the impression that the General Assembly is not very sure about the correctness of its early determination on the legality of its Israel's actions').

[1116] ibid, 12 (Malaysia).

[1117] ibid.

opinions in the framing of recommendations to Members.[1118] Furthermore, to some Member States, it was morally essential that the Assembly make the request, so that the plenary was seen to be doing all that it could within its powers to align itself with the victims of internationally wrongful acts. The request in *Wall* thus demonstrated in 'a tangible way' the Assembly's 'continued concern and sympathy' for the 'dire plight of the Palestinian people'.[1119] Requesting an advisory opinion was thus considered a means of 'implementing' prior Assembly resolutions, by bringing to bear upon a deviant Member State some measure of international judicial supervision over its actions, combined with much greater texture on the legal obligations incumbent upon them to meet.[1120] While Members on the receiving end of an advisory opinion might attack the credibility of the Assembly in requesting it, they seldom criticise the reasoning of the ICJ.[1121] For example, after *Wall*, Israel, while challenging the propriety of the Assembly in making the request, respected the advisory opinion and explained what measures it was taking to observe it.[1122] Even if the advisory opinions did not produce direct effects in securing the alignment of States with their international obligations (the *Nuclear Weapons* advisory opinion, after all, continues to be referenced in resolutions to this day),[1123] then they at least contributed towards the development of the Assembly's response in these broader ways.

It can therefore be said that an advisory opinion is able to support the functions of the Assembly in the field of international justice in various ways.[1124] In addition to those already noted above, a request might further the Assembly's objective of codifying international law, with the advisory opinion planting 'legal seeds' and also potentially buttressing the legal interpretations in quasi-legislative resolutions.[1125] ICJ advisory opinions are also capable of progressively defining the Assembly's role in the interpretation of the UN Charter, as the Court's observations on the impact of Assembly practice on Article 12 make clear.[1126] Where a country situation has been lacking in

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[1118] See eg UNGA Res ES-10/15 (2004), [2] (following *Wall* (Advisory Opinion) (n 108)); UNGA Res 51/45 M (1996), [1]-[3] (following ICJ, *Nuclear Weapons* (Advisory Opinion) (n 232), 226 (reiterated every session since, including most recently: UNGA Res 47/59 (2019); UNGA Res 1854 (XVII) (1962) (following *Certain Expenses* (n 108)); UNGA Res 598 (VI) (1952) (following *Reservations* (Advisory Opinion) (n 113).

[1119] UNGA 23rd meeting (2003) (n 1102), 12 (Malaysia).

[1120] ibid 16 (South Africa) ('All too often the General Assembly has been criticized for passing resolutions that are never implemented. Today we have an opportunity to act.'); UNGA 27th meeting (n 1102), 5 (Mexico) (*Wall* (Advisory Opinion) (n 108) has 'contributed significantly to clarifying the scope of applicable norms of international law').

[1121] That does not mean that various aspects of ICJ opinions have been free from controversy: *Wall* (Advisory Opinion) (Sep op Judge Buergenthal), 219.

[1122] UNGA 27th meeting (n 1102), 7 (Israel). See also, following *Reservations* (Advisory Opinion) (n 113): UNGA, Sixth session, 360th plenary meeting (12 January 1952) UN Doc A/PV.360 (shows general respect for the ICJ).

[1123] See recently UNGA Res 47/59 (2019).

[1124] An advisory opinion might also be used by other UN organs or international institutions as a basis for action, such as international financial institutions denying aid to a State. See further Lee Deppermann, 'Increasing the ICJ's Influence as a Court of Human Rights: The Muslim Rohingya as a Case Study' (2013) 14 Chicago J Intl L 291, 314.

[1125] A role envisaged early on by the Assembly: UNGA Res 171 (III) (1947) (on the value of using the ICJ to review 'difficult and important points of law'). As to effectiveness of these 'legal seeds', Andrea Bianchi, 'Dismantling the Wall: The ICJ's Advisory Opinion and its Likely Impact on International Law' (2004) 47 GYIL 343; Karin Oellers-Frahm, 'Ch.XIV The International Court of Justice, Article 96' in Simma (vol II) (n 72), 1990; Oellers-Frahm (n 65) 1033–56.

[1126] *Wall* (Advisory Opinion) (n 108), 149. As Bianchi notes the ICJ has broached issues which may have a remarkable impact on the interinstitutional equilibrium among the main organs of the United Nations': ibid 363.

judicial scrutiny and where gaps in accountability processes exist, an advisory opinion can provide some measure of judicial supervision.[1127] Yet, even where the Assembly has previously formed a view on an issue (i.e. the Israeli Wall is unlawful), or initiated fact-finding processes, the requesting of an advisory opinion would not be redundant. It is able to add texture to future Assembly debates and resolutions on the situation and provide a means for closer supervision of State conduct in accordance with the standards expressed in the opinion.[1128] It is able to contribute towards the establishment of a historical narrative on a situation and shape wider public attitudes.[1129] It might then influence the bargaining position of States in diplomatic negotiations.[1130] That said, while it is possible for the Assembly to use the advisory mechanism, it is no easy feat to persuade enough States to do so. Aside from the Israel situation, the Assembly is more receptive to making requests in the colonial or institutional powers context , as noted above. However, there is no reason why, in time, as an appreciation of the Assembly's function in atrocity crimes accountability increases, and provided that sufficient evidence exists, that the advisory mechanism is seen as a possible means to also scrutinise the legality of conduct in a Member State, especially where other international judicial mechanisms are lacking.

4. Assembly Power to Establish an *Ad Hoc* Tribunal

A theoretical enquiry is whether the Assembly could establish an *ad hoc* criminal tribunal as a subsidiary organ. The Assembly has played an active role previously in supporting the work of criminal tribunals. It substantially assisted in the creation of the ECCC by establishing a Group of Experts to consider options for accountability and

[1127] A draft resolution intended to condemn the construction of the wall was vetoed by a permanent member of the Security Council: UNSC, 'Draft Resolution' (14 October 2003) UN Doc S/2003/980, [1] ('Decides that the construction by Israel, the occupying Power, of a wall in the Occupied Territories departing from the armistice line of 1949 is illegal under relevant provisions of international law and must be ceased and reversed'); UNSC, Fifty-eighth session, 4842nd meeting (14 October 2003) UN Doc S/PV.4842.

[1128] As to these complementary function, see eg Wall (Advisory Opinion) (n 108) (Sep op Judge Koroma), 206 ('It is now up to the General Assembly in discharging its responsibilities under the Charter to treat this Advisory Opinion with the respect and seriousness it deserves, not with a view to making recriminations but to utilizing these findings in such a way as to bring about a just and peaceful solution'); *WHO and Egypt Agreement* (Advisory Opinion) (n 1027), 87 ('[I]n situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate…').

[1129] Sandrine De Herdt, 'A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic' (*EJIL:Talk!*, 20 May 2020) <https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic/>.

[1130] UNGA, Fifty-first session, 79th plenary meeting (10 December 1996) UN Doc A/51/PV.79, 3 (Gabon) (on the anticipated influence of *Nuclear Weapons* (Advisory Opinion) (n 232) on nuclear disarmament negotiations). However, see also scholarship which strikes a less optimistic tone on the impact of advisory opinions on diplomatic negotiations: Andrew Coleman, 'War Crimes and the ICJ's Advisory Jurisdiction' (2001) 26(1) Alternative LJ 32 ('[i]n the six opinions of the ICJ, where individual nation States requested and indeed were expected to follow the decision and take the appropriate action, none, with the exception of those involved in the *Reparations case*, have done so'); Richard Falk, 'The Kosovo Advisory Opinion: Conflict Resolution and Precedent' (2011) 105 AJIL 50 ('it is almost assured that advisory opinions on controversial issues will almost never be respected by governments whose national policies collide with the legally determined outcomes reached by the ICJ.')

thereafter adopting a framework for an UN-Cambodia hybrid tribunal.[1131] But the ECCC, established as a Cambodian court receiving international assistance, did not possess the legal characteristics of those tribunals established by the Security Council, at least insofar as it was vested with coercive powers flowing from the UN Charter.[1132] In this regard, *ad hoc* tribunals established by the Security Council had three legal characteristics relevant to the analysis here, in that they were able to (i) assert criminal jurisdiction (if necessary) against the will of the territorial States concerned; (ii) compel State cooperation and compliance; and (iii) detain and punish perpetrators, all under a UN mandate.

The suggestion that the Assembly could (or should) establish a subsidiary criminal tribunal with these three characteristics has arisen in different contexts. During the drafting of the ILC Articles on State Responsibility for Internationally Wrongful Acts, it was proposed that the Assembly could establish an independent commission of jurists to determine responsibility for international crimes, a proposal that met its demise given that it was attached to the broader (unsuccessful) proposal to recognise State responsibility for international crimes.[1133] Similarly, when reviewing legal options for the creation of the ICTY, the UN Secretary-General noted that the Assembly's 'authority and prestige' would justify it establishing this *ad hoc* tribunal.[1134] Various (unsuccessful) challenges by defence counsel to the jurisdiction of the ICTY and ICTR have also been brought on the basis that these tribunals were not established by a 'consensual act of nations' (as the Assembly would provide), or that the Security Council's decisions deprived the UN membership (via the Assembly) of the opportunity to consider the desirability of creating this *ad hoc* tribunal.[1135] The DPRK inquiry report also noted the possibility that the Assembly could establish an *ad hoc* tribunal on this situation, particularly where the Security Council has failed to do so, using the Uniting for Peace mechanism, or the 'combined sovereign powers' of Members States to assert universal jurisdiction (these legal bases are returned to below).[1136] Most recently, the Myanmar commission of inquiry report similarly recommended that, in the event of Security Council failure, the Assembly 'should consider using its powers within the scope of the Charter … to advance such a tribunal.'[1137]

Whilst the UN membership has considered the option of an Assembly-created tribunal for the former Yugoslavia, the Security Council was ultimately preferred for numerous reasons. The first stems from the legal premise that only the Security Council has the capacity to exercise compulsory legal authority over individuals and States, a necessary prerequisite in establishing a criminal tribunal with jurisdiction over

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[1131] See UNGA Res 57/228 B (2003). See also UNGA Res 52/135 (1997); UNGA Res 55/95 (2000); 'Report of the Group of Experts' (n 297). The Assembly also appointed judges, a role that has been scrutinised: *Prosecutor v Karadzic* (Disqualification Decision) ICTY-95-5/18-T (31 July 2014), [12].

[1132] See generally Steven Roper and Lilian Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (Ashgate 2006).

[1133] See eg ILC, 'Summary record of 2539th meeting' (2 June 1998) UN Doc A/CN.4/SR.2539, 147; Ottavio Quirico, *International 'Criminal' Responsibility: Antinomies* (Routledge 2019), 237.

[1134] UNSC, 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704, [21]. See also the unsuccessful attempt to have the UNGA establish an *ad hoc* tribunal for the 2003 Iraq intervention, as referenced in: *Kuala Lumpur War Crimes Commission v George W Bush* (Notes of Proceedings), Case No. 1 - CP – 2011 (19 November 2011) (Kuala Lumpur War Crimes Tribunal), 41.

[1135] See defence argument's recounted in *Tadić* (Jurisdiction) (n 125), [15].

[1136] DPRK Report (n 70) [1201]-[1202].

[1137] UNHRC, 'Report of the Independent International Fact-Finding Mission on Myanmar' (8 August 2019) UN Doc A/HRC/42/50, 17.

activities occurring within a State.[1138] It was also considered that the involvement of the Assembly in the creation of an *ad hoc* tribunal would not be as expeditious as one taken by the Security Council, due to its smaller membership and 'executive' character.[1139] Indeed, when the Assembly did support the creation of a criminal tribunal, the ECCC, it was criticised as coming too late.[1140] However, recent failures of the Security Council to address the Syria crisis, despite strong Assembly support for a referral to the ICC, as well as Russia's veto of a proposal to establish an *ad hoc* tribunal for the MH17 airline disaster, bring into renewed focus the possibility for the Assembly to establish such tribunals.[1141] The notion that the Assembly could not act quickly enough could also be addressed through the delegation of authority to a subsidiary organ; one proposal by the Cambodian Group of Experts in this respect was a Assembly established subsidiary organ comprising a small number of Member States that could prepare the constituent instruments of the proposed tribunal expeditiously.[1142]

The more fundamental issue is whether the Assembly has the legal authority to establish an *ad hoc* tribunal. In principle, the creation of an *ad hoc* tribunal falls within the broad purposes of the UN Charter, particularly where such tribunal contributes to the restoration and maintenance of peace.[1143] Furthermore, the Security Council is not the only competent organ to act so as to maintain peace; as the ICJ in *Certain Expenses* noted, the Assembly is also concerned with advancing this purpose.[1144] The issue is not whether a tribunal fulfils a permissible purpose in the UN Charter (it does), but rather whether the Assembly has the power to advance UN purposes by establishing a subsidiary judicial organ. In the interpretation of institutional powers, the ICJ has consistently recognised the broad discretion of the principal organs in defining their own functions, there being a presumed validity to their acts, especially given the absence of judicial review (as conventionally understood) within the UN system.[1145] This point is supported by the implied powers doctrine in recognising a broad discretion for principal organs: ICJ jurisprudence indicates that where action is essential for a permissible UN purpose (here, most obviously, the maintenance of international peace and security), then the presumption is that such power is *intra vires*.[1146] Furthermore, the ICJ also noted in *Application for Review* that the powers of the Assembly should not be interpreted restrictively: accordingly, 'to place a restrictive interpretation on the power of the General Assembly to establish subsidiary organs would run contrary to the clear intention of the Charter'.[1147]

While this dictum would have traction within the ICJ, it would need to be placed on firmer ground in the context of criminal proceedings, particularly given that the subsidiary judicial organ would be able to review the legality of its own creation, as the

[1138] UNSC ICTY Report (n 1134), [21]-[23]; UN, *Yearbook of the United Nations* (1947-1948), 598 (Polish representative noting that a tribunal under the auspices of the Genocide Convention could only be established by the Security Council given the need for enforcement action).
[1139] UNSC ICTY Report (n 1134), [21]-[22].
[1140] Hamilton and Ramsden (n 709), 117.
[1141] Barber, 'Accountability' (n 4); Ramsden, 'Uniting for MH17' (n 4); Lemnitzer (n 103). It has also been raised as a possible solution in the Syria situation, see Beth Van Schaack, *Imagining Justice for Syria* (OUP 2020).
[1142] See 'Report of the Group of Experts' (n 297), [148].
[1143] *Tadić* (Jurisdiction) (n 125), [27].
[1144] *Certain Expenses* (n 108), 151, 163.
[1145] *Certain Expenses* (n 108), 168; *Effect of Awards* (Advisory Opinion) (n 652), 58.
[1146] ibid. See also White, 'Relationship' (n 8) 295-6.
[1147] *Application for Review* (Advisory Opinion) (n 63), 172.

ICTY and ICTR did previously.[1148] The methodology applied by the ICTY in *Tadić* was decidedly more stringent than the implied powers doctrine espoused by the ICJ. There it was acknowledged that UN organs do not have unbounded discretion but were (largely) constrained by text; 'the language of the UN Charter speaks of *specific powers*, not absolute fiat'.[1149] Moreover, it is noteworthy that the ICTY Appeals Chamber, in supporting the power of the Security Council to establish the tribunal, contrasted this with the limited power of the Assembly, which was unable to do so given the 'internal division of power' within the UN.[1150] Some Member States have also contended that the Security Council is the only competent organ able to create subsidiary prosecutorial bodies for the same reasons.[1151]

The legality of a subsidiary judicial organ established by the Assembly is therefore a complex issue, although not unprecedented. In 1949 the Assembly established the United Nations Administrative Tribunal (UNAT).[1152] The UNAT was established to address staff grievances against the UN and was empowered to render final and binding awards of compensation. Whether such awards were binding on the Assembly, thereby placing fetters on its budgetary powers, was a contentious issue: some Members argued that the plenary was unable to bind itself. The ICJ was accordingly requested to advise on the circumstances in which, if any, the Assembly could refuse to give effect to an award of the UNAT. [1153] In turn, the answering of this question required the ICJ to consider the powers of the Assembly and its relationship with the UNAT as a subsidiary judicial organ. The ICJ expressly confirmed that the Assembly in creating the tribunal had not established 'an advisory organ or a mere subordinate committee' but rather had created 'an independent and *truly judicial body* pronouncing final judgements without appeal within the limited field of its functions.'[1154] It started by affirming that the UNAT was validly created: although lacking an express textual basis, the power to establish the UNAT arose impliedly from Article 101 of the UN Charter as a 'necessary intendment' to secure the objectives of administrative justice and efficiency.[1155] The ICJ in a later Advisory Opinion would note the broad nature of this power, the 'sole restriction' under the UN Charter being that the subsidiary organ was 'necessary for the performance of its functions'.[1156]

As to the Assembly's competence to establish this organ, the ICJ deduced this from the power of the plenary under Article 101 to regulate staff relations, as well as Article 7(2) which enabled the creation of '[s]uch subsidiary organs as may be found necessary'.[1157] What is noteworthy from *Effect of Awards* is the rejection of the argument that the Assembly only possessed the competence to establish subsidiary organs that assisted in the performance of its specific functions (i.e. under Articles 10 and 11 to discuss any matters within the scope of the UN Charter and to make recommendations to Member States or to the Security Council). It is readily apparent

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[1148] *Tadić* (Jurisdiction) (n 125); cf *Prosecutor v Ayyash* (Jurisdiction) STL-11-01/PT/TC (27 July 2012), [55] (question was non-justiciable).
[1149] *Tadić* (Jurisdiction) (n 125), [28] (emphasis added). Arguably, the Appeals Chamber's view is inconsistent with that of the ICJ, who previously held that the Security Council possesses 'general powers': *Namibia* (Advisory Opinion) (n 108), 112.
[1150] ibid.
[1151] UNGA 66th plenary meeting (n 642), 24 (Bolivia).
[1152] UNGA Res 351 A(IV) (1949).
[1153] *Effect of Awards* (Advisory Opinion) (n 652).
[1154] ibid 57 (emphasis added).
[1155] ibid 57.
[1156] *Application for Review* (Advisory Opinion) (n 63), 172.
[1157] *Effect of Awards* (Advisory Opinion) (n 652), 58.

that a judicial power does not impliedly arise from Article 10 as plainly to engage in 'discussion' and 'recommendation' does not reasonably extend to the rendering of a binding judicial determination. Therefore, while the Assembly's creation of commissions of inquiry is on firm ground as arising as an incident to the performance of its Charter functions (see above), more work needs to be done to support the plenary creation of an *ad hoc* criminal tribunal. In this regard, another significant conclusion in *Effect of Awards* was the acknowledgment that the Assembly did not have to delegate its powers in order to validly create a subsidiary organ. By establishing the UNAT, the Assembly was not purporting to 'delegate' its judicial functions but rather was exercising a power it had under Article 101 to regulate staff relations. On this basis, the ICJ regarded the Assembly to be doing nothing different than a national legislature, which may create by statute judicial organs that are capable of binding the legislature.[1158] In short, the principles outlined in *Effect of Awards* would therefore support the Assembly in establishing an *ad hoc* tribunal where this is linked to a textually defined function in the UN Charter.[1159]

One possible textual basis derives from Articles 55 and 56 of the of the Charter. Article 55 notes that 'with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations', the UN shall promote, amongst other functions, the 'universal respect for, and observance of, human rights'.[1160] Article 56 provides that '[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'. Given that international criminal law is a means to enforce human rights obligations, an *ad hoc* tribunal with jurisdiction over situations in relevant Member States could be construed as a means to 'promote' observance of human rights under Article 55. This basis would not, however, be free from controversy; some writers consider Articles 55 and 56 to be essentially programmatic in character and therefore not a source of obligation.[1161] In the final analysis, which view is correct – obligation or aspiration – will ultimately be a matter for the Member States to interpret if they were to consider creating an *ad hoc* tribunal. The Assembly would have ample authority to support the view that Articles 55-56 are legal in nature, including a series of its own resolutions as well as pronouncements of the ICJ.[1162] Although the use of Articles 55-56 to create a subsidiary *ad hoc* tribunal is unprecedented, it is theoretically conceivable that an Assembly resolution interprets these provisions in such a permissible manner, with this interpretation, if commanding 'general acceptance', constituting a 'subsequent agreement' of the membership in the interpretation of the UN Charter (see further Chapter 3). This provides one possible basis in which an interpretive claim could be advanced for the creation of an *ad hoc* tribunal, but there are others.

In particular, other writers see merit in inferring the source of a power to establish an *ad hoc* tribunal in Assembly practice, as Rebecca Barber argues.[1163] There

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[1158] ibid 61. Similarly, the Appeals Chamber in *Tadić* did not regard the Security Council to be delegating any judicial functions; rather it was acting pursuant to specific provisions of the UN Charter (art 41) in restoring and maintaining international peace and security: *Tadić* (Jurisdiction) (n 125), [29].

[1159] For further analysis on *Effect of Awards* (Advisory Opinion) (n 652), see: Joanna Gomula, 'The International Court of Justice and Administrative Tribunals of International Organisations' (1991) 13 Mich J Intl L83, 93-94.

[1160] UN Charter, art 55.

[1161] See discussion in Rüdiger Wolfrum, Eibe H. Riedel, 'Ch.IX International Economic and Social Co-operation, Article 55 (c)' in Simma (vol II) (n 72), 1573.

[1162] See Chapter 2, n 414.

[1163] Barber, 'Accountability' (n 4).

is, in this respect, a body of practice, as with creating a peacekeeping force in the Middle East;[1164] requesting the Secretary-General to dispatch a special assistance mission to Afghanistan;[1165] facilitating and approving the establishment of the ECCC;[1166] and creating various commission of inquiry.[1167] Plainly, the Assembly has gone beyond its recommendatory functions in the UN Charter to establish or support the establishment of bodies with a judicial or quasi-judicial character, including those more generally concerned with enforcement of the UN Charter. On this basis, Barber argued that there is no reason why the Assembly could not go one step further to establish an *ad hoc* tribunal.[1168] While an argument from Assembly practice might support the creation of a tribunal it would not be clothed with coercive powers given that none of these subsidiary organs had such powers; it would have to be established with consent of the relevant Member State concerned. There is also an issue whether a subsidiary organ founded with different powers (i.e. peacekeeping) can be used as precedent for the creation of one with judicial powers. The closest would be to reason by analogy to the UNAT, established by the Assembly to resolve employment related disputes within the UN system (as considered above). However, the UNAT was founded on the basis of a textual power in the UN Charter, as the ICJ reasoned.[1169]

An alternative basis is to establish the tribunal (but without coercive powers) with the consent of the Member State in whose territory the organ will operate. The ICJ in *Certain Expenses* has acknowledged that the Assembly is competent to take 'action' to maintain international peace and security, provided that this is achieved with the consent of the relevant States affected by such action (i.e. the placement of a Assembly-established peacekeeping force in a State). The ICJ inferred this from Article 14 of the UN Charter, which permits the Assembly to 'recommend measures for the peaceful adjustment of any situation'.[1170] On this basis, one such measure could be to establish a criminal tribunal with the consent of the State in which the crimes occurred and on terms that would secure their compliance. In effect, this is the model adopted in Cambodia, the Assembly playing a leading role and providing authority for the UN to enter into an agreement with the Cambodia government for a joint, hybrid, tribunal.[1171] Conversely, this avenue would obviously be of no avail where the territorial State resists its creation. It would also not by itself impose a legal duty on third States to cooperate and comply with decisions of the tribunal (or subsequent resolutions of the Assembly made in relation to the tribunal), this having to be found on a different legal basis to the *Certain Expenses* principle.

Another basis in which to underpin the powers of a Assembly-established tribunal would be via the doctrine of universal jurisdiction, which allows criminal jurisdiction to be exercised irrespective of the place in which the crimes occurred or the nationality of the offender.[1172] While there remains some uncertainty as to the scope of this doctrine, 'universal jurisdiction [is] nowadays acknowledged in respect of international crimes', as the Appeals Chamber in *Tadić* observed.[1173] The value of using universal jurisdiction is that it avoids the territorial State consent issue – such

[1164] UNGA Res 998 (ES-I) (1956).
[1165] UNGA Res 48/202 (1993).
[1166] UNGA Res 57/228 B (2003).
[1167] See n 1072.
[1168] Barber, 'Accountability' (n 4), 580.
[1169] *Effect of Awards* (Advisory Opinion) (n 652), 57
[1170] *Certain Expenses* (n 108), 163.
[1171] The history of its creation is recounted in Hamilton and Ramsden (n 709).
[1172] *Milutinović* (Jurisdiction) (Separate op Judge Robinson) (n 343), [3].
[1173] *Tadić* (Jurisdiction) (n 125), [62]; *Pinochet (No 3)* (n 127), 275 (Lord Millett).

jurisdiction is exercisable even if the State in which the crimes occurred does object.[1174] However, the more complicated question is whether a body such as the Assembly (via a subsidiary organ) is able to exercise universal jurisdiction; ultimately it is a power that belongs to States rather than an international organ. Indeed, in the context of the creation of the Security Council's *ad hoc* tribunals, it was Chapter VII that was said to underpin the tribunal rather than universal jurisdiction, despite judicial debate on this issue.[1175] But given that the Assembly does not have Chapter VII powers as such, this might in turn support the use of universal jurisdiction as the juridical basis for its *ad hoc* tribunal.

The route here would be via a theory of delegation - that States can do collectively what they can do individually, and in turn can clothe an international institution with the competence to act on their collective behalf. It was a creative proposal of Judge Kirby in the event that the Security Council failed to act in securing accountability for crimes against humanity committed in the DPRK.[1176] It was also the juridical basis offered for the Nuremberg trials, in that 'they have done together what any one of them might have done singly'; accordingly, the trials derived their jurisdiction 'from such a combination of national jurisdictions of the States parties' to the London Charter.[1177] Although a point of distinction is that the source of authority is a Assembly resolution instead of a treaty, its plausible to argue that the same delegation principle is applicable in both cases provided that the plenary resolution is articulated in unambiguous terms to encapsulate universal jurisdiction. Moreover, the rationale for universal jurisdiction is to ensure redress for conduct detrimental to all States, with any State exercising jurisdiction doing so on behalf of all others; the doctrine is therefore well suited to application in the Assembly as the most representative UN organ in manifesting the collective will for prosecutorial action in a particular situation. The limitation of using a theory of universal jurisdiction is that, while it would allow for the exercise of coercive legal authority over a suspect, the doctrine itself is not clearly articulated as of yet to include a duty on third states to cooperate with the forum State or the body conducting the trial. Accordingly, while universal jurisdiction would supply criminal jurisdiction, it does not resolve the question about imposing legal duties on States to comply, be it the territorial State in which the crimes occurred, or third States.

Finally, the Assembly might also invoke the Uniting for Peace mechanism to establish an *ad hoc* tribunal, although there remains some doubts as to what legal effect this mechanism has over and above the plenary's existing powers under the UN Charter.[1178] Uniting for Peace can be invoked where the Security Council has 'failed' to exercise its primary responsibility due to a lack of unanimity of its permanent members.[1179] This failure might be seen, for instance, when Russia vetoed the creation of an *ad hoc* tribunal for the MH17 airline disaster under Chapter VII authority.[1180] On this basis, the Assembly is able to bypass Security Council deadlock and take measures to maintain international peace and security. In support of this proposition, the text of

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[1174] Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1(3) JICJ 618, 626.
[1175] *Milutinović* (Jurisdiction) (Separate op Judge Robinson) (n 343), [5]-[49].
[1176] DPRK Report (n 70), **[1201]**.
[1177] IMT, 'Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg', 14 November 1945–1 October 1946 (1947), 218; UNSC, 'Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)' (10 February 1993) UN Doc S/25274, [72]-[73].
[1178] See Larry Johnson, 'Uniting for Peace' (n 78).
[1179] UNGA Res 377 (V) A (1950), [1].
[1180] Ramsden, 'Uniting for MH17' (n 4), 344-345.

the Uniting for Peace resolution establishes that the Assembly has a broad spectrum of powers at its disposal where the Security Council fails to act: the discharge of the Assembly's responsibilities 'calls for possibilities of observation which would ascertain the facts and expose aggressors', which could arguably include the creation of a criminal tribunal.[1181] Some argue that the Assembly is unable to exercise 'coercive' powers analogous to those in Chapter VII, and that Uniting for Peace is merely declaratory of the Assembly's discursive powers in the text of the UN Charter.[1182] An *ad hoc* tribunal established under Uniting for Peace would therefore, on this understanding, be lacking in coercive powers. However, it also seems clear from earlier practice (i.e. the Assembly-mandated military action in the Korean peninsula) and debates surrounding the passage of the Uniting for Peace resolution that the Assembly's limited assumption of coercive powers was contemplated as a form of action that might be taken under this mechanism.[1183] This argument is developed further in Chapter 7.

As already noted, while the various theories would support the creation of an *ad hoc* tribunal with jurisdiction, they would not necessarily support the imposition of cooperation duties on Member States. Establishing the *ad hoc* tribunal under Article 55-56 might well support a cooperation duty as an incidence of the obligation to respect human rights, although that reading of these provisions would need to command general acceptance in the Assembly. Still, the absence of a clear legal basis in the UN Charter in which to found a cooperation duty is not necessarily fatal. As Barber argued, a good argument can be made that, as a matter of customary international law, States are under a duty to cooperate in the prosecution of international crimes, which arguably would include to extradite, prosecute or surrender a suspect to an international tribunal.[1184] In turn, an obligation to prosecute or extradite can be derived from numerous relevant international treaties, including the Geneva Conventions,[1185] Convention against Torture,[1186] and the Genocide Convention.[1187] The Assembly has similarly recognised that a refusal to cooperate is inconsistent with 'generally recognised' international law.[1188] If the Assembly established an *ad hoc* tribunal and, with the support of a large number of Member States, affirmed a cooperation duty as deriving from any one or a combination of the above sources then this would also resolve any doubts as to the validity and scope of this norm. Finally, it might also be the case that an Assembly created *ad hoc* tribunal might come to be endorsed by the Security Council, and with it,

[1181] UNGA Res 377 (V) A (1950), preamble.
[1182] Reicher (n 78) 48; see also Kenny (n 3) 25; Krasno and Das (n 78).
[1183] White, 'Relationship' (n 8), 308–11.
[1184] Barber, 'Accountability' (n 4), 581-583. See also ILC, 'Third Report on Crimes against Humanity' (23 January 2017) UN Doc A/CN.4/704, 9-10; Raphael van Steenberghe, 'The Obligation to Extradite or Prosecute: Clarifying its Nature' (2011) 9 JICJ 1089, 1115. See also M Cherif Bassiouni and Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers 1995); Christopher Soler, *The Global Prosecution of Core Crimes under International Law* (TMC Asser Press 2019), 324; Eveylon Mack, 'Does Customary International Law Obgate States to Extradite or Prosecute Individuals Accused of Committing Crimes Against Humanity' (2015) 24 Minnesota J Intl L 73, 74.
[1185] *Prosecutor v Tihomir Bkaskic* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) ICTY-95-14-AR (29 October 1997), [29]; Sonja Boelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?' (2000) 5 JCSL 63, 63; Jean-Marie Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7 JICJ 683.
[1186] Torture Convention (n 170), art 7.
[1187] Lee Steven, 'Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligation' (1999) 39 Virginia J Intl L 425, 461.
[1188] See Chapter 2 and UNGA Res 2840 (XXVI) (1971), [4]; UNGA Res 2712 (XXV) (1970), [2].

a requirement to cooperate under Chapter VII. This is a possibility where, as Beth Van Shaack argued, the 'geopolitical winds shift course' leading the Security Council to favour international justice in a situation that they might have been previously resistant.[1189] Yet, even without Security Council support, there are good legal arguments for the proposition that the Assembly, provided that significant political will exists, is able to establish an *ad hoc* tribunal that is vested with legal authority to assert jurisdiction over a situation and to compel the cooperation of the membership.

5. Conclusion

This Chapter considered three avenues in which the Assembly is able to empower investigations or courts to address impunity for atrocity crimes. First, in relation to the creation of commissions of inquiry these are now an established feature of Assembly practice, also underpinned by its discursive powers in the UN Charter. These investigations now extend to the preparation of individual case files to support prosecutions of those suspects in the future, a recent innovation taken in both the Syria and Myanmar situations (albeit the latter established in the UNHRC). Second, there is also some practice in which the Assembly has requested advisory opinions that address components of international justice. In this regard, there is a clear textual power for the Assembly to request an advisory opinion which the ICJ will accept absent 'compelling reasons'. The real limits on this power do not derive from any judicial principle of restraint but rather from the Assembly's own conceptions as to the limits of this power, embracing considerations of both political and judicial propriety in making a request. Third, although contentious and unprecedented, the Assembly could establish an *ad hoc* tribunal without the consent of the territorial State concerned. Being underpinned by a combination of different sources of international law (Articles 55-56 of the UN Charter, Uniting for Peace, universal jurisdiction, and the customary international law duty to cooperate with prosecutions), the Assembly could create a tribunal analogous to one established under Chapter VII.

These three avenues provide some basis for the Assembly to promote accountability for serious violations of international law. The empowerment of investigations and requesting advisory opinions fit within the classic functions of the Assembly as a discursive body in using the findings of such mechanisms to inform its future discussions and resolutions. As noted in Chapter 4, such fact-finding is an essential component of quasi-judicial resolutions. Yet, in relation to commissions of inquiry and advisory opinions, even if they do assist the Assembly's monitoring of a situation, they might influence the direction of international affairs on a situation in their own right. For example, the use of the advisory mechanism to address State responsibility for atrocity crimes serves the function of obtaining an international judicial finding (albeit non-binding) on the steps that a State needs to take to bring itself back into compliance with international law. Furthermore, not only will the IIIM-Syria augment the Assembly's function, but also serve the purpose of assisting international and domestic prosecutorial authorities. The Assembly's efforts at building the capacity of international justice institutions might, at some point, prompt closer reflection on the possibility that the Assembly could play a more direct role in the enforcement of international justice, particularly in creating an *ad hoc* tribunal to prosecute suspects, where other efforts at securing prosecutions have failed. There is a legal basis for the Assembly to do so; the question as ever is whether political will exists to move these

[1189] Van Schaack, 'Imagining Justice' (n 1141), 174.

suggested creative solutions into action. The IIIM-Syria has made a start in this direction.