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Abstract

Since the 1990s, the UN Security Council has been at the center of the institutionalization of international criminal justice in the UN system. This article discusses the lesser well-known role and creative possibilities of the UN General Assembly. It shows that the Assembly has played a crucial role in shaping key normative foundations of the field, by affirming the Nuremberg Principles in 1946, approving the 1950 Genocide Convention, adopting the definition of the aggression under Resolution 3314 (1974) or shaping the creation of the Extraordinary Chambers in the Courts of Cambodia. With the creation of the International, Impartial and Independent Mechanism for Syria, the General Assembly has established a quasi-prosecutorial body in a case, where the accountability was blocked due to the veto power of the Security Council. In March 2022, the Assembly invoked its powers under the "Uniting for Peace" resolution in 1950 to support its resolution on aggression against Ukraine (Res. ES-11/1). This contribution discusses two important elements of the GA's ability to use its authority under "Uniting for Peace" to unite for justice, namely its power to create a criminal tribunal and its authority to make a referral to the International Criminal Court. It examines different layers of debate: issues of legality, including the relevance of "Uniting for Peace" as institutional precedent, questions of effectiveness, as well as consideration of political feasibility. It argues that there is space to make greater creative use of the powers of the Assembly in relation to accountability. It identifies three models, in which the General Assembly may become involved in the creation of a criminal tribunal (treaty approval, establishment of a criminal tribunal

with consent of the territorial state, and creation of a tribunal without such consent). It claims that the General Assembly may use its powers under UN law to make a referral to the ICC, but shows that such an option requires amendment of the ICC Statute and may cause problems in relation to jurisdiction over non state parties and, in particular, criminal jurisdiction over the crime of aggression. It cautions at the same time against romanticizing the role of the Assembly in relation to accountability. It shows that "Uniting for Peace" may also promote adverse effects, namely "Uniting for Impunity."

Keywords

UN General Assembly, Uniting for Peace, Investigative Mechanisms, Criminal Tribunal, International Criminal Court, ICC referral, Crime of aggression, Special Tribunal Ukraine, Cooperation, Immunity, Uniting for Impunity

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I. Introduction

The Ukraine war has brought renewed attention to the complex power relations between the UN General Assembly (GA) and the Security Council. This issue has been debated since the creation of the UN. Many previous contributions have focused on the role of the General Assembly in relation to peace and security and the impact of the 1950 Uniting for Peace Resolution (Res. 377).[1] In this context, it is often sidelined that the General Assembly has a long-standing record in relation to accountability.[2] The Security Council has become closely associated with international criminal justice with the creation of the ICTY and the ICTR in the 1990s.[3] However, the Assembly can, in fact, look back to a much longer track record in the field.[4]

On 11 December 1946, the Assembly affirmed the famous "principles of international law recognized by the Charter of the Nürnberg Tribunal."[5] This affirmation triggered a process, which gradually turned them from mere principles "into general

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1. *See generally* G.A. Res. 377 (V) A, Uniting for Peace (Nov. 3, 1950). For discussion, see generally Larry D. Johnson, *"Uniting for Peace": Does It Still Serve Any Useful Purpose?*, 108 Am. J. Int'l L. Unbound 106, 106-07 (2014); Michael P. Scharf, *Power Shift: The Return of the Uniting for Peace Resolution*, 55 Case W. Rsrv. J. Int'l L. 165 (2023).

2. *See generally* Michael Ramsden, International Justice in the United Nations General Assembly 1-2, 7-11 (2021).

3. *See, e.g.*, Rebecca Barber, Asia-Pacific Centre for the Resp. to Protect, The Powers of the UN General Assembly to Prevent and Respond to Atrocity Crimes: A Guidance Document 30 (2021).

4. *See generally id.* at 19-52; Michael Ramsden & Tomas Hamilton, *Uniting Against Impunity: The UN General Assembly as a Catalyst for Action at the ICC*, 66 Int'l & Compar. L. Q. 893, 905 (2017); Beth Van Schaack, *The General Assembly & Accountability for International Crimes*, Just Sec. (Feb. 27, 2017), www.justsecurity.org/38145/general-assembly-accountability-international-crimes/ [https://perma.cc/J8CC-YGTL]; Michael Ramsden, "*Uniting for Peace" in the Age of International Justice*, 42 Yale J. Int'l L. Online 1, 1, 3-4 (2016).

5. G.A. Res. 95 (I) (Dec. 11, 1946) (emphasis omitted).

principles of customary law."[6] In 1950, the Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide and proposed it for signature and ratification or accession by states in General Assembly resolution 260 A (III).[7] Later, it qualified apartheid as a crime against humanity[8] and adopted the text of the international Convention on the Suppression and Punishment of the Crime of Apartheid.[9] In 1974, it adopted a definition on aggression, which defined a war of aggression as "crime against international peace".[10] This definition became an important cornerstone of the modern practice of defining the crime of aggression through its use in Kampala in 2010.[11]

Over time, the role of the Assembly has shifted from a contribution to norm development on crimes to institutional mechanisms. In 1997, the Assembly created the Group of Experts[12] which led to the creation of the Extraordinary Chambers in the Courts of Cambodia.[13] In 2006, it established the Human Rights Council by resolution 60/251[14] and the General Assembly became the formal authority behind the creation of numerous accountability-related commissions of inquiry or investigative missions created by the Council.[15] At that time, the

6. Antonio Cassese, U.N. Audiovisual Library of International Law, Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal (2009), https://legal.un.org/avl/ha/ga_95-I/ga_95-I.html [https://perma.cc/4MSU-PF68].

7. G.A. Res. 260 (III) A, at 174 (Dec. 9, 1948).

8. G.A. Res. 2202 (XXI) A, at 20 (Dec. 16, 1966); *see* John Dugard, *The Role of International Law in the Struggle for Liberation in South Africa*, 18 Soc. Just. 83, 89 (1991).

9. G.A. Res. 3068 (XXVIII), at 75 (Nov. 30, 1973).

10. G.A. Res. 3314 (XXIX), annex, at 144 (Dec. 14, 1974).

11. *See* Review Conference Res. RC/Res.6 (June 11, 2010).

12. G.A. Res. 52/135, at 4 (Dec. 12, 1997).

13. *See Introduction to the ECCC*, Extraordinary Chambers in the Cts. of Cambodia, www.eccc.gov.kh/en/introduction-eccc (creating the Group of Experts after the Cambodian National Assembly passed a law establishing the Court in 2001) [https://perma.cc/P5DZ-JFKC].

14. G.A. Res. 60/251, at 2, Human Rights Council (Mar. 15, 2006).

15. Sarah Tudor, *UN Commissions of Inquiry and Fact-Finding Missions*,

Assembly was already involved with the creation of international criminal courts and tribunals, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC).[16] The Assembly's role was further exemplified in 2016, when it established a quasi-prosecutorial body, the International, Impartial and Independent Mechanism for Syria.[17] The Assembly further established its precedent for creating corresponding investigative commissions when the Human Rights Council created an investigative commission for Myanmar.[18] With these precedents, the Assembly seems to have transformed halfway into a judicial body.[19] Observing this progression, some authorities have asked whether the Assembly could go a step further and turn these quasi-prosecutorial bodies into tribunals.[20] Such a move would not be precluded by the legendary 1995 Interlocutory Appeal on *Tadić*,

UK Parliament: House of Lords Library (June 14, 2022), https://lordslibrary.parliament.uk/un-commissions-of-inquiry-and-fact-finding-missions/ [https://perma.cc/68QZ-JMS8].

16. Hans Corell, U.N. Audiovisual Library of International Law, Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuch ea (2020), https://legal.un.org/avl/ha/abunac/abunac.html (marking an agreement with the UN in 2003 for international assistance and participation in the ECCC) [https://perma.cc/F2U 8-NPLY].

17. G.A. Res. 71/248, at 2 (Dec. 21, 2016) ("Noting the repeated encouragement by the Secretary-General and the High Commissioner for Human Rights for the Security Council to refer the situation in the Syrian Arab Republic to the International Criminal Court[.]"). For a discussion, see Alex Whiting, *An Investigation Mechanism for Syria: The General Assembly Steps into the Breach*, 15 J. Int'l Crim. Just. 231, 232 (2017).

18. *See* Human Rights Council Res. 39/2, U.N. Doc. A/HRC/ RES/39/2, at 3 (Sept. 27, 2018). It was endorsed in G.A. Res. 73/264, at 1-2 (Dec. 22, 2018)).

19. Rebecca Barber, *Accountability for Crimes Against the Rohingya: Possibilities for the General Assembly Where the Security Council Fails*, 17 J. Int'l Crim. Just. 557, 580 (2019); Michael Ramsden, *Uniting for MH17*, 7 Asian J. Int'l L. 337, 357 (2017).

20. Beth Van Schaack, Imagining Justice for Syria 233 (2020) ("The IIIM could conceivably be 'upgraded' by the General Assembly, or even by the Security Council, to a stand- alone ad hoc court.").

which affirmed the legality of the establishment of the ICTY by the Security Council. In this case, the Defense challenged the establishment of the tribunal by the Council inter alia on legitimacy grounds, namely the fact that the General Assembly "was not involved in its creation," although its "participation would at least have guaranteed full representation of the international community."[21] In its decision, the ICTY Appeals Chamber confirmed not only the power of the Security Council to create a tribunal, but also noted that the General Assembly does not "have to be a judicial organ possessed of judicial functions and powers in order to be able to establish" a tribunal under the *Effects of Awards* jurisprudence.[22]

The debate has gained a new spin with the discussion relating to a special tribunal for Ukraine.[23] One of the options is its creation through an international agreement between the UN and Ukraine, based on a recommendation of the Assembly.[24] Factors, such as the expansion of the powers of the Security Council in the 1990s, the establishment of the ICC or increased reliance on hybrid or domestic courts have served as disincentives to go step further and to give the GA a role in the creation of criminal tribunals. The geopolitical winds, however, are changing. Historical developments show a constant expansion of the role of the Assembly in the field of accountability. In cases where the Security fails to act and the ICC lacks jurisdiction, there is an institutional vacuum on the international level. The exercise of universal jurisdiction by states may not suffice to close the gap. This poses the question to what extent there is further room to move from Uniting for Peace to "Uniting for Justice" under the umbrella of the Assembly.

21. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

22. *Id.* ¶ 38.

23. Kevin Jon Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis*, J. Genocide Rsch., July 6, 2022, at 1, 7-8.

24. Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, Just Sec. (Sept. 20, 2022), www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/ [https://perma.cc/K9BK-J6YD].

The preamble of Uniting for Peace expresses an important principle, namely that the "failure of the Security Council to discharge its responsibilities on behalf of all the Member States" does not "relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security", nor "deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security."[25] This contribution investigates to what extent the Assembly developed from an organ with residual responsibilities in the field of peace maintenance to an agent of accountability.[26] It shows that the constraints on General Assembly action under Article 2(7) or Article 12(1) of the UN Charter[27] have been reduced over time. For instance, in the *Wall* opinion, the ICJ has recognized "an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security", which turned into "accepted practice" in the UN system.[28]

This article argues that the Assembly would be legally empowered to play an even more active role in the institutionalization of international criminal justice. It examines two dimensions: the power of the Assembly to create an international criminal tribunal and to make a referral to the ICC under the "Uniting for Peace" powers. It demonstrates both the prospects and the drawbacks of a new "Uniting for Justice" approach. It distinguishes three layers of debate: legality, impact and legitimacy. It shows that the impediments and constraints do

25. G.A. Res. 377 (V) A, *supra* note 1, at 10.

26. On the powers of the Assembly, see Rebecca Barber, *A Survey of the General Assembly's Competence in Matters of International Peace and Security: In Law and Practice*, 8 J. on Use Force & Int'l L. 115, 126 (2021).

27. U.N. Charter art. 2, ¶ 7; *id.* art. 12, ¶ 1.

28. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 136, ¶ 27-28 (July 9).The Court argued that the restriction under Art. 12 (1) of the Charter, according to which the Assembly 'shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests', has been interpreted through 'accepted practice' in a way which allows both organs can deal with situations in parallel.

not lie within the UN system, but rather in external factors, and that they are often more political than legal.[29] It cautions at the same time against romanticizing the role of the Assembly. "Uniting for Justice" may also turn into "Uniting for Impunity."

II. The Assembly and the Creation of international criminal tribunals: Foundations and prospects

In its institutional history, the General Assembly has not yet formally established its own international criminal tribunal through a General Assembly resolution. In legal doctrine, it has been occasionally contested whether the Assembly enjoys such a power. For instance, Meinhard Hilf[30] and Daniel Erasmus Khan[31] have argued in the commentary on the Charter of the United Nations that the Assembly could not rely on its power to establish a subsidiary body under Article 22 of the Charter to "establish an International Court of Criminal Justice," since the Charter only "allows the transfer of such powers to subsidiary organs" which the General Assembly holds itself.[32] This argument suggests that the General Assembly lacks the institutional power to establish a criminal tribunal, since this is not among its enumerated powers under the Charter. In 2014, Derek Jinks[33] further argued that "the legal basis for a GA criminal tribunal is, at a minimum, highly questionable."[34] Russia has defended this

29. For example, fears about disempowering the ICC or setting a precedent for future practice could have a greater impact than concerns about the weaker nature of the power of the Assembly *per se*.

30. Professor Emiritus at Bucerius Law School, in Hamburg.

31. Professor at University of the Bundeswehr Munich and the Bavarian School of Public Policy in Germany.

32. Meinhard Hilf & Daniel-Erasmus Khan, *Article 22*, *in* 1 The Charter of the United Nations 420, 427 (Bruno Simma et al. eds., 2d ed. 2002).

33. Professor at the University of Texas School of Law and a Senior Fellow at the Robert S. Strauss Center for International Security and Law at the University of Texas.

34. Derek Jinks, *Does the U.N. General Assembly Have the Authority to Establish and International Criminal Tribunal for Syria?*, JUST SEC. (May 22, 2014), www.justsecurity.org/10721/u-n-general-

positoin in relation to the IIIM. It argued that the mechanism was illegally established since "prosecutions, criminal investigations and support of criminal investigations are not among the functions of the General Assembly."[35]

However, the UN Charter is a living instrument. It is significantly shaped by institutional practices. The fact that a GA-created tribunal was not foreseen by its drafters does not mean that it is excluded from possibility. The creation of the *ad hoc* tribunals for the former Yugoslavia and Rwanda by the Security Council under the Chapter VII powers of the Council was also not directly foreseen in 1945.[36]

In recent years, there have been several calls to rely on the Assembly to create a tribunal. In 1999, the Group of Experts for Cambodia envisaged several options to create a tribunal for Cambodia, including a tribunal created by the Security Council under Chapter VI, rather than Chapter VII the UN Charter,[37] and also a tribunal established by the GA.[38] The Experts justified the possibility of the Assembly to create a tribunal by utilizing "its recommendatory powers under Chapter IV of the Charter, especially Articles 11 (2) and 13."[39] The Experts stated that both "a Chapter VI court" and an "Assembly-created court" would have to "rely exclusively on the voluntary compliance of States."[40] However, the Experts added that the difference to Chapter VII

assembly-authority-establish-international-criminal-tribunal-syria [https://perma.cc/7SD4-WEYY].

35. Permanent Rep. of the Russian Federation to the U.N., Note Verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. A/71/793 (Feb. 14, 2017).

36. For instance, Art. VI of the Genocide Convention envisages a treaty-based "international penal tribunal." Convention on the Prevention and Punishment of the Crime of Genocide art. VI, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277.

37. Rep. of the Group of Experts for Cambodia, transmitted by Letter dated 15 March 1999 from the Secretary-General Established Pursuant to Resolution 52/135 ¶ 144, U.N. Doc. A/53/850 (Mar. 16, 1999) (noting that the difference in effectiveness might be less striking than assumed).

38. *Id.* ¶ 146.

39. *Id.*

40. *Id.*

might be less striking in practice since "voluntary cooperation of States is essential in either case" and "not even a Chapter VII mandate has ensured compliance with the orders of the existing tribunals."[41]

In 2014, the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (DPRK) suggested that the General Assembly could rely on the "Uniting for Peace" resolution to "set up an ad hoc International Tribunal for the Democratic People's Republic of Korea," which would operate on the basis of delegated universal jurisdiction.[42] The Commission stated:

> In the event that the Security Council fails to refer the situation to the ICC or set up an ad hoc tribunal, the General Assembly could establish a tribunal. In this regard, the General Assembly could rely on its residual powers recognized inter alia in the "Uniting for Peace" resolution and the combined sovereign powers of all individual Member States to try perpetrators of crimes against humanity on the basis of the principle of universal jurisdiction.[43]

The Independent International Fact-Finding Mission on Myanmar made a similar proposition in 2019. It recommended the creation of an "ad hoc international criminal tribunal for Myanmar" and stated:

41. *Id.* ¶ 145 ("[T]he difference between Chapter VI and Chapter VII may turn out to be rather small in practice. The experiences of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda suggest that voluntary cooperation of States is essential in either case; and not even a Chapter VII mandate has ensured compliance with the orders of the existing tribunals. Moreover, even if a court were created under Chapter VI, the Council could nonetheless decide to make individual decisions under Chapter VII on specific issues where the consent of the States concerned was not forthcoming, and enforce them accordingly.").

42. Hum. Rts. Council, Rep. of the Detailed Findings of the Comm'n of Inquiry on Hum. Rights in the Democratic People's Republic of Korea, ¶ 1201, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014).

43. *Id.*

> Should the Council be unwilling to establish such a tribunal, the General Assembly should consider using its powers within the scope of the Charter of the United Nations to advance such a tribunal.[44]

Several scholars have expressly backed the possibility of the General Assembly creating an international criminal tribunal. For instance, Beth van Schaack[45] has argued that such an option "would break new ground," but "is within the realm of the possible."[46] Another scholar, Michael Ramsden,[47] has used an *a fortiori* argument in relation to the use of "Uniting for Peace" powers:

> If the Assembly is able to recommend coercive measures of a military nature, then there is no reason why it would not be able to also enforce its will against an individual accused of committing international crimes.[48]

Rebecca Barber[49] has further demonstrated in a systematic study on the powers of the General Assembly in relation to atrocity crimes that "the UNGA is arguably also competent to establish ad hoc criminal tribunals" based on its implied powers.[50]

However, thus far, the move to create an international criminal tribunal have remained dead letter. This might be due to political concerns, rather than compelling legal arguments. The rise of fact-finding mechanisms and the exercise of quasi-judicial

44. Hum. Rts. Council, Report of the Indep. Int'l Fact-Finding Mission on Myanmar, ¶ 106, U.N. Doc. A/HRC/42/50 (Aug. 8, 2019).

45. Professor at Santa Clara University School of Law and State Department's sixth Ambassador-at-Large for Global Criminal Justice.

46. Van Schaack, *supra* note 20, at 222.

47. Michael Ramsden is a professor of law at the Chinese University of Hong Kong. He previously held positions on the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia and currently serves on the advisory boards of the Universal Rights Group.

48. Ramsden, *supra* note 19, at 348.

49. Research fellow at the Asia Pacific Centre for the Responsibility to Protect, and a PhD scholar with the TC Beirne School of Law, University of Queensland.

50. Barber, *supra* note 3, at 29.

powers is both a blessing and a curse in this regard. It increases the case for the legal authority of the Assembly to create a criminal tribunal, but also shows the political sensitivities caused by fears of path-dependency. States are concerned that the establishment of GA tribunal would set a precedent that would open a floodgate for similar demands in other contexts, where fact-finding or investigative mechanisms have been established.

A. The Case for Legal Authority

Legally, it is plausible to argue that the General Assembly enjoys the legal authority to create a criminal tribunal to advance the purposes of the UN. The General Assembly lacks a power that is equivalent to Article 41 of the UN Charter, which has enabled the Security Council to establish judicial entities.[51] From the perspective of UN law, however, the question is less whether the Assembly might be entitled to assert legal authority to establish a tribunal, but rather what impact and obligations such a move would trigger.[52]

In its previous practice, the General Assembly has been mainly involved in the creation of criminal tribunals by agreement, namely with the consent of the state concerned.[53] It has not created a tribunal by resolution as such.[54] For instance, in the case of Cambodia, the General Assembly approved the agreement between the Government of Cambodia and the United Nations that led to the establishment of the ECCC in its resolution 57/228 in 2003.[55]

The closest institutional precedent for the direct creation of a tribunal is the establishment of the UN Administrative Tribunal (UNAT) in 1949.[56] In the *Effect of Awards* advisory opinion, the ICJ confirmed that the Assembly was empowered to create the tribunal. It rejected the view that "General Assembly is

51. *See* U.N. Charter art. 41.

52. *See infra* Section C.

53. Barber, *supra* note 3.

54. *Id.*

55. *Id.*; *see* G.A. Res. 57/228 B (May 22, 2003).

56. The tribunal was vested with the power to render final judgments that were binding on the U.N. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 59 (July 13).

inherently incapable of creating a tribunal competent to make decisions binding on itself."[57] The Court relied on an analogy to domestic law where "it is common practice" that national parliaments "create courts with the capacity to render decisions legally binding on the legislatures which brought them into being."[58] However, this judgment has only limited value as a precedent for an atrocity crime tribunal, since it relates to internal UN staff disputes, i.e. an area that comes within the authority of the Assembly under Article 101 of the Charter.[59] The Court stressed that the General Assembly did not delegate "the performance of its own functions" but rather exercised "a power which it had under the Charter to regulate staff relations." [60] It is more difficult to establish the power to create a tribunal that does not concern the administration of justice within the UN system, but rather crimes affecting the international community more broadly. A General Assembly resolution may take on binding effects inside the organization,[61] but it is more difficult to make the case that it imposes legal obligations on states.

The exercise of quasi-judicial powers, such as the establishment of the IIIM,[62] is not a direct precedent. It merely involves investigative powers.[63] They are less intrusive from a sovereignty perspective since they leave judicial action and determination of guilt or innocence of individuals up to the prerogative of domestic jurisdictions or other courts.[64]

57. *Id.* at 61.

58. *Id.*

59. *Id.* at 60.

60. *Id.* at 61.

61. *See* Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, Advisory Opinion, 1955 I.C.J. 67, 90, 115 (June 7) (separate opinion by Lauterpacht, J.) ("[D]ecisions of the General Assembly are endowed with full legal effect in some spheres of the activity of the United Nations and with limited legal effect in other spheres.").

62. The establishment of the IIIM was supported by 105 Member States. Russia claimed that the establishment of the IIIM by the General Assembly was *ultra vires*, because it goes beyond the powers of the Assembly enumerated in the UN Charter. Whiting, *supra* note 17, at 232, 234.

63. *See id.* at 232.

64. *See generally id.* at 233.

The existing Charter provisions on the powers of the Assembly are remarkably vague. Their mere wording does not directly support the Assembly's power to create a tribunal. Such a power can only be derived by their reading in conjunction with institutional practice.[65]

A first set of provisions allow the Assembly to discuss matters or make recommendations to states and/or the Security Council. These provisions suggest that the powers of the Assembly are deliberative, rather than authoritative in nature. As an example, Article 10 allows the Assembly to "discuss any questions or any matters" relating to "the powers and functions of any organs" and to "make recommendations to the Members of the United Nations or to the Security Council."[66] Another example is Article 13, which grants the Assembly the power to "make recommendations" for the purpose of "assisting in the realization of human rights and fundamental freedoms."[67] That said, the fundamental concept of "recommendation" has undergone change since its initial penning. In practice, the Assembly has interpreted these powers in a way which goes beyond mere recommendations. It has adopted resolutions with a "determinative effect."[68] This turn to more authoritative forms of decision-making, taking the form of determinations, has become an accepted form of action through practice. For example, the ICJ noted already in 1970 in its advisory opinion on Namibia that:

> . . . it would not be correct to assume that, because [the Assembly] is in principle vested with recommendatory powers, it is debarred from adopting, in special cases within the framework of its competence, resolutions which make determinations or have operative design.[69]

65. The Vienna Convention on the Law of Treaties art. 31, ¶ 3(b), May 23, 1969, 1155 U.N.T.S. 331 allows for the interpretation of treaty in light of "any subsequent practice" which "establishes the agreement of the parties regarding its interpretation."

66. U.N. Charter art. 10.

67. *Id.* art. 13.

68. *See* Barber, *supra* note 3, at 26-28.

69. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security

By such an example, the recommendatory powers clearly enable the Assembly to support an agreement establishing a criminal tribunal. They have been read to allow more determinative forms of decision-making in the area of peace and security, in conjunction with the Uniting for Peace Resolution.[70]

As another deliberative power, Article 22 grants the Assembly the power to establish subsidiary bodies, marking another potential basis to establish an ad hoc criminal tribunal.[71] In 1973, the ICJ stated in its *Application for Review* advisory opinion that a restrictive interpretation of "the Assembly's powers to establish subsidiary organs" would "run contrary to the clear intention of the Charter."[72] In legal scholarship, it has been proposed that the General Assembly may establish a subsidiary organ to investigate or prosecute international crimes, based on the mandate of the Assembly to promote human rights under Articles 13, 55, and 56 of the Charter.[73] Since its inception, human rights have become one of the pillars of the UN system.[74] It can thus be argued that the establishment of a criminal tribunal may under certain circumstances be necessary for the performance of the functions of the Assembly in the field.[75]

Another possibility is to ground the powers to establish a criminal tribunal in the "General Assembly's inherent powers in relation to international peace and security" under the Uniting for Peace Resolution.[76] The resolution was initially adopted to

Council Resolution 276, Advisory Opinion, 1970 I.C.J. 16, 50 (June 21).

70. Ramsden, *supra* note 4, at 19.

71. Barber, *supra* note 19, at 578.

72. Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166, 172 (July 12).

73. *See* Ramsden, *supra* note 2, at 181-207.

74. *The 4 Pillars of the United Nations*, United Nations, www.un.org/en/model-united-nations/4-pillars-united-nations [https://perma.cc/RH3M-K9J2].

75. Van Schaack, *supra* note 20, at 227.

76. Barber, *supra* note 19, at 580.

address acts of inter-state violence.[77] The interpretation of the concept of international peace and security is not static, however, but rather has been widely extended since the 1990s. The text of the resolution itself is non-exhaustive and leaves room for non-forcible measures to secure peace maintenance. The Resolution states:

> [T]hat if the Security Council, because of a lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[78]

The Assembly has relied on the powers of the resolution in relation to a wide range of issues, such as self-determination and human rights.[79] Given the link of the establishment of the ICTY or the ICTR to peace maintenance, it would not be a far stretch to invoke "Uniting for Peace" for the same purposes.[80]

The case for the legality of the establishment of a criminal tribunal is not only supported by dynamic interpretation of the Charter provision on the powers of the Assembly, but also through the continuing restriction of constraints which the Charter imposes on the Assembly. The first one is Article 12(1). Article 12(1) was deemed to bar parallel action by the Council and the Assembly,[81] but has been applied in a way which allows the Assembly to take action "on items on the agendas of both

77. Christian Tomuschat, U.N. Audiovisual Library of International Law, Uniting for Peace, at 1, https://legal.un.org/avl/ha/ufp/ufp.html [https://perma.cc/E2FG-EHXJ].

78. G.A. Res. 377 (V) A, *supra* note 1, at 10. It was adopted with 52 votes in favor, 5 against, and 2 abstentions.

79. *See generally* Tomuschat, *supra* note 77, at 2-3.

80. Ramsden, *supra* note 19, at 5-9.

81. U.N. Charter art. 12, ¶ 1 ("[T]he General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.").

bodies."[82] The second one is Article 2(7). It prohibits the UN from intervening "in matters which are essentially within the domestic jurisdiction of any state", except in case of "enforcement measures under Chapter Vll."[83] UN practice has made it clear that the investigation and prosecution of atrocity crime is not *per se* a matter protected by the domestic jurisdiction of a state, barring the Assembly from taking action.[84]

B. Three Models

Based on the different powers, there are at least three modalities through which the Assembly can become involved in the creation of a tribunal.

1. The 'Treaty Plus' Model - ECCC Model

The most moderate form of action is the approval of a treaty-based criminal tribunal through a General Assembly resolution (the ECCC model). In this context, the Assembly is not, strictly speaking, the creator of the tribunal. Rather, the tribunal is created through the treaty. General Assembly approval clears the way for treaty approval, reinforces the international status of the tribunal and provides an additional layer of legitimacy. This formula was used in context of the ECCC, where the Assembly approved the UN agreement with Cambodia.[85] It then became a binding legal instrument within the Kingdom of Cambodia through both UN approval of the agreement and domestic ratification.[86] This modality is covered by the recommendatory powers of the Assembly.

82. Johnson, *supra* note 1, at 109.

83. U.N. Charter art. 2, ¶ 7.

84. *See, e.g.*, Hum. Rts. Council, Rep. of the Detailed Findings of the Comm. of Inquiry on Hum. Rts. in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/63, at 361-62 (2014) [hereinafter DPRK Rep.].

85. *See* G.A. Res. 57/228, *supra* note 55.

86. *See id.*, annex, art. 30 (binding the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea).

A similar format has been suggested in the context of Ukraine. For instance, Jennifer Trahan[87] has suggested that the General Assembly should recommend the creation of a hybrid criminal tribunal for the crime of aggression "to be negotiated and agreed between the United Nations and the Government of Ukraine."[88] She has argued that this approach "stands heads and shoulders above" other proposals and has several advantages of the Nuremberg model.[89] It would be the "most multilateral approach" given the impasse in the Security Council, has a legal precedent through the ECCC, and would be able to address immunity hurdles through the international nature of the tribunal.[90] Alexander Komarov[91] and Oona Hathaway[92] have defended such an approach based on the idea that "a tribunal created by a few states would not have the legitimacy of one created by an organization that represents the international community."[93]

87. Jennifer Trahan is a professor at New York University's Center for Global Affairs and Director of its Concentration in International Law and Human Rights. She is a scholar and expert in the areas of international law and international justice.

88. Jennifer Trahan, *U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal for Ukraine: Nuremberg Is Not the Model*, Just Sec. (Mar. 7, 2022), www.justsecurity.org /80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/ [https://perma.cc/K33C-X3FS].

89. *Id.*

90. *Id.*

91. Alexander Komarov is a professor of anti-corruption and comparative constitutional law at Ukrainian Catholic University Law School. Additionally, Mr. Komarov is an anti-corruption expert with the European Union Anti-Corruption Initiative (EUACI) in Kyiv, Ukraine.

92. Oona Hathaway is the Gerald and Bernice Latrobe Smith Professor of International Law at Yale Law School. Since 2005, Ms. Hathaway has been a member of the Advisory Committee on International Law for the Legal Adviser at the U.S. Department of State and was awarded the Office of the Secretary of Defense Award for Excellence in 2014-15 when she served as Special Counsel to the General Counsel at the U.S. Department of Defense.

93. Alexander Komarov & Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, Just Sec. (Apr. 11, 2022), www.justsecurity.or

The treaty-plus model has been taken up by the Parliamentary Assembly of the Council of Europe. On April 28, 2022, the Parliamentary Assembly expressly invited the UN General Assembly to support the:

> . . . setting up an ad hoc international criminal tribunal to prosecute the crime of aggression allegedly committed by the political leaders and military commanders of the Russian Federation against Ukraine and encourage United Nations member States to step up their efforts to provide full support to the establishment of such a tribunal.[94]

2. GA-Created Tribunal with State Consent

A second model would be the creation through a GA resolution, with the consent of the territorial state, which has jurisdiction over a certain crime. Such a step would be unprecedented. It is more difficult to reconcile with the recommendatory powers of the Assembly, since constitution of an independent judicial body is a determinative act.[95] The jurisprudence of the ICJ suggests that this cannot be done under the powers of Articles 10, 11 or 13,[96] but rather under Article 22, if this is "necessary for the performance" of the GA's "functions."[97] A possible textual basis is the mandate to promote the observance of human rights (e.g., Articles 55 and 56). Such consensual action is not necessarily enforcement action and may thus not conflict with the prerogatives of the Council under the Charter. As the ICJ stated in *Certain Expenses*, the main particularity of the powers of the Council under the Charter lies in its ability to "impose an explicit obligation of compliance" even

g/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/ [https://perma.cc/4PAT-T5F7].

94. Eur. Parl. Ass. Res. 2436 (Apr. 28, 2022).

95. *See* Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 57 (July 13).

96. *See, e.g.*, *id.* at 55; Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166, 172, 174 (July 12).

97. *Application for Review*, 1973 I.C.J. at 172.

against the will of states.[98] Consensual action, based on state consent, would be a logical corollary of the practice of the Assembly in the area of international peace and security, where it has established peace operations with the consent of the host state.[99] The downside of such a model is that the resolution itself would not directly impose legally binding obligations on third States to cooperate with the GA-created tribunal and to comply with its decisions. In line with Article 2(2) of the Charter, it would at best trigger an obligation to apply the resolution in good faith for those states who abstained or voted against the resolution.[100]

3. GA Created Tribunal without State Consent – GA Resolution as Quasi-treaty of Delegation

The most contentious option would be the creation of a criminal tribunal without the consent of the territorial state. This option has been suggested by the DPRK Commission of Inquiry.[101] It would come closest to a Chapter VII tribunal and compete most with the coercive powers of the Security Council under the Charter. It would thus require reliance on the "Uniting for Peace" formula.[102] It could not be justified by the powers of the Assembly alone but would need additional state support. The DPRK Commission has suggested that such an approach would have to rely on both the powers of the Assembly under "Uniting for Peace" and the "combined sovereign powers of all individual Member States."[103] It would thus be a Nuremberg model in the form of a General Assembly resolution. The resolution would have to make clear that UN member states delegate their jurisdiction to the tribunal through the resolution, rather than a treaty. The

98. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 163 (July 20).

99. For instance, UNEF, the United Nations Emergency Force in Egypt (1956-1967) is the 'archetype' of a peacekeeping operation based on the consent of the host state. *See* Jack Israel Garvey, *United Nations Peacekeeping and Host State Consent*, 64 Am. J. Int'l L. 241, 241 (1970).

100. *See* U.N. Charter art. 2, ¶ 2.

101. DPRK Rep., *supra* note 84.

102. *Id.*

103. *Id.*

legality of such an approach is partly supported in legal doctrine. For instance, Michael Ramsden has argued that:

> although contentious and unprecedented, the Assembly could establish an ad hoc tribunal without the consent of the territorial State concerned [. . .] 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).[104]

However, the delegation of universal jurisdiction over crimes would only give the tribunal coercive authority over individuals. It would not automatically require third States to comply or cooperate. The effect would be limited to states supporting the resolution.

C. Effectiveness

These findings suggest that the main issue regarding the creation of a criminal tribunal by the General Assembly is not so much the question whether the Assembly possesses the competencies to create such a body, but rather what legal authority such a tribunal would enjoy. UN member states are required to abide by decisions of the Security Council and ICJ.[105] There is no corresponding obligation in relation to resolutions of the Assembly. General Assembly resolutions carry authority but, legally, the Assembly cannot directly bind UN members through resolutions in areas of international peace and security or human rights.[106] A resolution made under the recommendatory powers of the Assembly does not create an 'obligation' under Article 103 of the Charter and cannot override other legal obligations of states. This has repercussions for the effectiveness of a General Assembly created criminal tribunal. Two issues require particular consideration in this regard: the applicability of personal immunities and cooperative obligations. The first issue may pose greater obstacles than the latter.

104. Ramsden, *supra* note 2, at 207.

105. *See* U.N. Charter arts. 25, 94.

106. *See* Ramsden, *supra* note 2, at 3.

1. The Problem of Personal Immunity

In legal doctrine, it is questioned to what the General Assembly can "create an 'international court' with the power to set aside personal immunity."[107] Personal immunities cease after terms of office but are key to the capacity of states to exercise their functions on the international plane.[108]

The law in this area is in flux. The ICJ found in the *Arrest Warrant* case that personal immunities may be inapplicable in "criminal proceedings before certain international criminal courts."[109] The entities mentioned as examples included the Chapter VII created tribunals, which may override competing obligations of states by virtue of Article 103 of the charter, and treaty systems, such as the ICC, where members lift immunities through consent to the treaty.[110] The reasoning of the ICJ thus seemed to imply that immunity may be discarded through coercive Chapter VII powers or state consent to a treaty system.[111] The ICC went a significant step further in the *Al-Bashir Appeal* decision, by holding that there is no rule under customary law which bars "'an international court in its exercise of its own jurisdiction."[112] The Court argued that the 'principle of *par in parem non habet imperium*' which protects immunity in inter-state relations, cannot be opposed to international courts.[113] It adopted a rather vague definition of "international court."[114]

107. Heller, *supra* note 23, at 16.

108. *See id.* at 15-16.

109. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 61 (Feb. 14, 2002).

110. *Id.*

111. Carsten Stahn, A Critical Introduction to International Criminal Law 258 (2018).

112. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 2 (May 6, 2019).

113. *Id.* ¶ 115.

114. *Id.* ("While [domestic jurisdictions] are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, [international courts], when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole.").

This made the ICC jurisprudence vulnerable to the critique that a few states could join to create a new court to evade the applicability of personal immunities in inter-state relations.[115]

A GA-created tribunal sits between these two extremes. It is a mid-point between a Chapter VII created tribunal and a treaty-based international court to which immunity may not apply under the ICC jurisprudence. In terms of its multilateral nature, it might represent the collective will of states more than an "international court" created between a handful of states. However, it does not benefit from coercive powers under Chapter VII, which may discard immunity in inter-state relations.

One may doubt whether a GA-endorsed or a GA-created tribunal would satisfy the requirements of the "international court" exception under the *Arrest Warrant* jurisprudence.[116] General Assembly resolutions lack the binding force of Council resolution and do not override state obligations to respect immunity in inter-state relations under Article 103 of the Charter. From a legitimacy perspective, such a tribunal might enjoy greater multilateral backing than a treaty-based court. As Kevin Heller[117] has noted:

> if any tribunal not created by the Security Council could plausibly claim to be an "international court" within the meaning of Arrest Warrant, it would be a Special Tribunal overwhelmingly endorsed by the General Assembly.[118]

However, in the absence of Council support, a GA-created court would not benefit from the necessary authority to override state obligations in relation to immunities or bind states against their will.[119] This would compromise the chances of arrest of

115. *See generally* Carsten Stahn, *Le droit des immunités en droit international pénal, vers le meilleur des mondes?*, *in* L'Hirondelle et la Tortue: Quatrièmes Journées de la Justice Pénale Internationale 63, 63-78 (Julian Fernandez & Olivier de Frouville eds., 2020).

116. Al-Bashir, Case No. ICC-02/05-01/09 OA2, ¶ 2.

117. Professor of International Law and Security at the University of Copenhagen and Professor of Law at the Australian National University.

118. Heller, s*upra* note 23, at 15.

119. The closest precedent is Special Court of Sierra Leone (SCSL), which was not created under Chapter VII, but through agreement

individuals of states, who do not consent to a GA-endorsed treaty (treaty-plus model) or abstain or oppose a GA resolution creating a novel tribunal.

One intriguing question is whether a creation under the umbrella of "Uniting for Peace" would make a difference in this regard. The exact effect of the invocation of "Uniting for Peace" on state obligations remains disputed.[120] It is controversial whether it might preclude the wrongfulness of state conduct or allow UN members to carry out actions that would otherwise violate international law.[121] Judge Hersch Lauterpacht's reading of the permissive effect of recommendations points in this direction. He has argued that even non-binding 'recommendations' may take on a permissive effect, in the sense that they provide "a legal authorization for Members determined to act upon them individually or collectively."[122] Based on Lauterpacht's reading, one could argue that the creation of a GA-established tribunal under "Uniting for Peace" might enable states to comply with requests for arrest or surrender, even though this would conflict with the rights of other states to assert

between the UN and Sierra Leone. In the *Taylor* immunity decision, the Court argued that immunities are inapplicable towards the SCSL, because it qualifies as an "international court." It relied on its establishment through the Security Council. *See* Prosecutor v. Taylor, SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 37 (May 31, 2004) ("[T]he power of the Security Council to enter into an agreement for the establishment of the Court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone.").

120. *See* Michael Ramsden, *"Uniting for Peace" and Humanitarian Intervention: The Authorising Function of the UN General Assembly*, 25 Wash. Int'l L.J. 167, 271 (2016).

121. *See* Van Schaack, *supra* note 20, at 228 ("Whether or not such a General Assembly resolution offers a legal justification to act, or would preclude wrongfulness on the part of states that implement its recommendations, remains an open legal question.").

122. *See* Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, Advisory Opinion, 1955 I.C.J. 67, 90, 115 (June 7) (separate opinion by Lauterpacht, J.).

immunity. The General Assembly resolution would thus not legally remove immunity in interstate relations but protect states from facing responsibility in case of non-compliance, in the same way as states, which contributed to enforcement action under "Uniting for Peace" in 1950, were not held accountable for a violation of Article 2 (4), despite the absence of a Security Council resolution. This view has been defended by some scholars. For instance, Michael Ramsden has argued that a state "would be authorized to transfer foreign state nationals" to an "Assembly-mandated ad hoc tribunal," even if doing so would implicate it in "conflicting rights of the other state."[123]

2. Cooperation

Cooperative duties are a second area of contention. Legally, a GA-created tribunal faces obstacles, since a General Assembly resolution may not require states to cooperate.[124] Based on the authority of the Assembly, a tribunal could not compel states to cooperate or enforce its findings. However, one may doubt whether this would make a great difference in practice to other courts and tribunals. The lessons from the ICTY or the ICTR show that the success of cooperation depends not much on the existence of coercive powers, but rather on incentives for voluntary compliance.[125] The global movement and civil society pressure behind the creation of GA-established tribunal might in itself provide a certain leverage or stimulus, certainly among like-minded states[126], or even carry greater moral authority than a mandate by the "increasingly discredited Security Council."[127]

Legal duties of cooperation may not flow directly from the powers of the Assembly, but rather from general duties of cooperation in relation to international crimes. As Rebecca Barber has noted, states might comply with their duties to

123. Ramsden, *supra* note 4, at 21.

124. Barber, *supra* note 3, at 31.

125. *See* Victor Peskin, International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation 10 (2008); Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach 544-47 (Carsten Stahn et al. eds., 2020).

126. Ramsden, *supra* note 2, at 22.

127. Barber, *supra* note 19, at 583.

extradite or prosecute international crimes under international law "by surrendering a suspect to a UNGA-established tribunal."[128] A GA-created tribunal might further benefit from the fact that states have a general duty to cooperate among themselves in order to prevent and punish atrocity crimes.[129]

D. Political feasibility

The greatest obstacle to the creation of a criminal tribunal by the Assembly is neither the issue of legal powers, nor the alleged ineffectiveness, caused by the lack of power of the General Assembly to bind states, but rather the political backing for such an approach.

The creation of a tribunal by the General Assembly qualifies as an important question within the meaning of Article 18 of the Charter. The creation of a tribunal is linked to the "maintenance of international peace and security" and thus it requires thus the support of a two-thirds majority of the members present and voting in the Assembly.[130] This is a high, often unobtainable, threshold.

Politically, the suggestion to involve the Assembly more strongly in "Uniting for Accountability" faces a "catch 22' dilemma. It affects not only the relationship between the Assembly and the Council, but also the relationship to the ICC. Many of those states, who support accountability and might theoretically be inclined to expand the powers of the General Assembly in this field, shy away from doing so, because they fear that this might come at the detriment of the ICC. They argue that we would be better off by strengthening or reforming the ICC, rather than investing in new accountability avenues under the umbrella of the Assembly.

Those states, who are cautious about increasing accountability or at the receiving end of international inquiries and investigations, fear that the precedent of a GA-created tribunal might trigger quasi-automatic calls for such action in the future, stifle new regional initiatives for accountability or further reduce the space of immunities on the international plane,

128. Barber, *supra* note 3, at 31.

129. Barber, *supra* note 19, at 581-83.

130. U.N. Charter art. 18.

enabling the investigation or prosecution of "their own heads of state and foreign ministers."[131]

Finally, the prospect of awarding greater power to the Assembly would meet objection by certain permanent members of the Security Council. While specific Council members support this route on particular occasions, as in the Korea crisis or now in relation to Ukraine,[132] they would be reluctant to accept it if it turns against them.[133] The move towards "Uniting for Accountability" is thus caught within very different political battles. They might stifle further progress, sometimes based on ill-founded objections, different political agendas, or the wrong reasons.

The Assembly itself is also not free from criticism. It faces similar selectivity critiques as the Security Council or the ICC. Additionally, General Assembly action can also have a flipside: it can not only be used to mobilize for accountability, but also for the opposite purposes, namely to promote impunity. All of these factors makes it likely that the political will to support the creation of criminal tribunals by the General Assembly will remain a rare exception.

III. General Assembly referrals to the ICC

An alternative proposal is to give the General Assembly the power to make a referral to the ICC.[134] This option would have a less radical effect on the Charter system and the architecture of international criminal justice. It is closer line with the interest of those states, who want to strengthen the role of the ICC, in cases where the Council is blocked. It also has a certain appeal, because it would alleviate the lengthy and burdensome road of

131. *See* Heller, *supra* note 23, at 16-17.

132. *See* Isobel Koshiw & Jennifer Rankin, *France Backs Plans for Tribunal Russian Officials Over Ukraine War*, The Guardian, www.theguardian.com/world/2022/dec/01/france-backs-plans-for-tribunal-for-russian-officials-over-ukraine-war (Dec. 1, 2022, 9:43 AM) [https://perma.cc/8NTK-2VQ3].

133. Heller, *supra* note 23, at 14.

134. For discussion, see Fergal Gaynor, *General Assembly Referral to the International Criminal Court*, *in* The Past, Present and Future of the International Criminal Court 325, 325 (Alexander Heinze & Viviane E. Dittrich eds., 2021).

establishing a new tribunal.[135] Furthermore, it addresses the concern of some states who argue that the dependence of the Court on the political authority of the Security Council compromises its independence.

The idea of extending to the Assembly a referral power is not a novel concept, rather, it has a longer history. It was already contemplated in the discussions of the ILC on the creation of an international criminal court. The discussions reflected the contrasting views in the report on its forty-sixth session (2 May-22 July 1994) as follows:

> Some members were of the view that the power to refer cases to the court under article 23, paragraph 1, should also be conferred on the General Assembly, particularly in cases in which the Security Council might be hampered in its actions by the veto. On further consideration, however, it was felt that such a provision should not be included as the General Assembly lacked authority under the Charter of the United Nations to affect directly the rights of States against their will, especially in respect of issues of criminal jurisdiction.[136]

In the negotiations of the Rome Statute, several states from the Global South supported the option to extend referral powers to the Assembly. Some countries advocated for referral powers in the context of the crime of aggression. For example, Egypt defended the position that the Assembly should be entitled to make a referral in cases where the Security Council fails to act in the context of aggression.[137] Other delegations (e.g., Thailand, Oman) advocated an application the formula used in the Uniting

135. However, from an accountability perspective, an ICC referral also has weaknesses compared to the creation of a new tribunal, since the Court deals with only a handful of case in each situation.

136. *Report of the International Law Commission on the Work of Its Forty-sixth Session*, 49 U.N. GAOR Supp. 10, at 44, U.N. Doc. A/49/10 (1994), *reprinted in* [1994] 2 Y.B. Int'l L. Comm'n 44, U.N. Doc. A/CN.4/SER.A/1994/Add.l (Part 2).

137. Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, Just Sec. (Mar. 16, 2022), www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/ [https://perma.cc/P55X-57DT].

for Peace Resolution.[138] David Scheffer, the head of the US delegation, defended a contrary position. He argued at the 29th meeting of the Committee of the Whole on July 7, 1998, that "[c]ontrary to some suggestions, the General Assembly was not equivalent to the Security Council as far as the Council's responsibilities under the Charter were concerned."[139] Ultimately, this pragmatic view prevailed. Referral powers were limited to the states (Article 14) and the Security Council (Article 13(b)) under the Statute.

However, in recent years, this limitation has come under renewed critique. The path of Security Council referrals has not functioned as many had expected. Council referrals have been criticized as "Trojan horses" which shift responsibility to the ICC without enjoying sufficient funding or follow up-support through the UN system.[140] The situations relating to Syria or Ukraine have shown the political price of this concession. This has led to increased calls to consider the avenue of referrals by the General Assembly as a means to provide a follow-up to the work of investigative commissions, such as the IIIM or the Myanmar mechanism or to address aggression in the context of Ukraine. For instance, Fergal Gaynor[141] has taken the view that the General Assembly enjoys the power to make referral under the Charter in case of Council inaction and "might provide a legitimate basis for the exercise of the Court's jurisdiction."[142]

138. *Id.*

139. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Meetings of the Committee of the Whole*, ¶ 46, U.N. Doc. A/CONF.183/13 (Vol. II) (2002).

140. *See* Louise Arbour, President & CEO, Int'l. Crisis Grp., Opening Speech at Global Briefing 2013: Doctrines Derailed?: Internationalism's Uncertain Future (Oct. 25, 2013), www.crisisgroup.org/global/doctrines-derailed-internationalism-s-uncertain-future [https://perma.cc/MF66-UL5N].

141. Gaynor served inter alia as Reserve International Co-Prosecutor at the Extraordinary Chambers in the Courts of Cambodia (ECCC) and counsel for the prosecution at the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia between 2001 and 2013. He represents victims at the International Criminal Court and is Judge at the Kosovo Specialist Chambers..

142. Gaynor, *supra* note 134, at 326.

Shane Darcy has argued that "the Rome Statute could be amended to allow the General Assembly, acting under the "Uniting for peace" resolution, to make referrals to the ICC in order to provide accountability for the crime of aggression in the context of Ukraine."[143]

Such proposals raise issues of legality under the UN Charter and the ICC Statute, as well as broader questions of political will and feasibility.

A. Legality

The first question is whether the General Assembly would be allowed to make a referral to the ICC under the UN Charter. There are persuasive arguments that the General Assembly enjoys such a power. Some voices have questioned this authority based on the view that referrals would be "coercive acts,"[144] i.e., acts entailing enforcement power. This view is open to challenge, however. Technically, a referral is not binding on the Court.[145] It does not require the court to act. The referral only opens the possibility of the exercise of jurisdiction. It does not directly oblige the target state to comply.[146] The referral produces effects in relation to individuals, rather than states. It has synergies with "the category of non-coercive action concerning mass atrocities in non-consenting States that the General Assembly now routinely takes."[147]

If one accepts that the General Assembly enjoys the power create a tribunal without the consent of the territorial state or the state of the nationality of the accused under the Uniting for Peace formula, as outlined above,[148] a referral to the ICC would constitute a lesser include measure.

143. Darcy, *supra* note 137.

144. Heller, *supra* note 23, at 7.

145. *See* Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 61 (July 13).

146. Gaynor, *supra* note 134, at 339.

147. *Id.* at 339 ("Referral by the General Assembly to the ICC would therefore fall within the category of non-coercive action concerning mass atrocities in non-consenting States that the General Assembly now routinely takes.").

148. *See supra* Section II.B.

A second question is what impact such a referral would have under the ICC Statute. A General Assembly referral is not foreseen under the legal order of the ICC.[149] It is clear that the ICC Statute would have to be amended in order to allow the General Assembly to make valid referral within the meaning of the ICC Statute. A follow-up problem is whether such a referral would open ICC jurisdiction over crimes committed in non-states parties, such as Syria.[150] Under the current ICC Statute, Security Council referrals enable the Court to exercise such jurisdiction. The argument in favor of ICC jurisdiction over third parties is based on the binding Chapter VII powers of the Council, which allow the Council to confer jurisdiction on the Court.[151] This argument is more difficult in the context of a General Assembly resolution. Some have argued that the "the non-availability of Chapter VII-type enforcement action" is not necessarily "a legal or practical barrier to the inclusion of a referral function for the General Assembly in the ICC Statute."[152] This position can be defended if one accepts the premise that the exercise of powers under "Uniting for Peace" has a permissive effect or precludes wrongfulness of action. However, those who do not share such a reading of the "Uniting for Peace" precedent would contest the power of the General Assembly to confer criminal jurisdiction in relation to a non-party state. For instance, Kevin Heller has challenged this authority based on the argument that the ICC is a treaty system with binding obligations between state parties.[153]

This objection might be overcome if one takes different reading of the jurisdictional regime of the ICC, namely the view that Court's jurisdiction is not exclusively grounded in delegated consent, but in a *jus puniendi*, namely, right to punish based on a responsibility of individuals towards the society of world citizens

149. *See* Darcy, *supra* note 137.

150. In the context of Ukraine, such a referral is not necessary since Ukraine has accepted the jurisdiction of the Court under Art. 12 (3). *See id.*

151. Madeline Morris*, The Jurisdiction of the International Criminal Court Over Nationals of Non-Party State (Conference Remarks)*, 6 ILSA J. Int'l. & Comp. L. 363, 363 (2000).

152. Gaynor, *supra* note 134, at 353.

153. Heller, *supra* note 23, at 7 ("Because the ICC is a treaty-based court, its jurisdiction cannot exceed the jurisdiction delegated to it by its member states.").

(*ubi societas ibi ius puniendi*).[154] As Claus Kress has convincingly argued, such a reading is not excluded by the narrow jurisdictional regime of the Court under Art. 12 of the Statute, which relies on territoriality and nationality, rather than universal jurisdiction. The *jus puniendi* concept predates the ICC and is grounded in the 'very concept of [international] crime under customary international law.[155] According to this logic,

> . . . ratification of the Statute does not necessarily establish a title for ICC jurisdiction. It rather authorizes, as Antonio Cassese put it, "the ICC to substitute itself for a consenting state, which would thus waive its right to exercise its criminal jurisdiction." Following this reading, the authority of the ICC to exercise jurisdiction does not depend on a corresponding domestic jurisdictional title of the state. The act of accession to the Statute merely activates the power of the ICC to exercise a jurisdiction grounded in international law.[156]

In this case, a GA referral could be read to activate ICC jurisdiction to exercise a *jus puniendi* of the international community over crimes under international law, similar to a Security Council referral.

This approach has been defended by scholars[157] and is reflected in some existing decisions. For instance, the ICC Pre-Trial Chamber, has held that

154. On jus puniendi as a "one possible end point in a constellation of possibilities," see Frédéric Mégret, *The International Criminal Court: Between International Ius Puniendi and State Delegation*, 23 Max Planck Y.B. U.N. L. 161, 220 (2019).

155. See Claus Kress, *Art. 98*, *in* Rome Statute of The International Criminal Court 2585, 2650 (Kai Ambos ed., 2022).

156. Carsten Stahn, *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine–A Reply to Michael Newton*, 49 Vand J. Transnat'l L. 443, 446-48 (2016).

157. Claus Kress, Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal 19 (2019) ("[T]he ICC has been established to exercise the *ius puniendi* of the international community with respect to crimes under international law. The ICC Statute has not created this ius puniendi and the latter can also not be properly conceived of as having resulted from a delegation of national criminal jurisdiction titles. Instead, the *ius puniendi* of the

> when cooperating with the ICC and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this court when States have failed to prosecute those responsible for the crimes within its jurisdiction.[158]

Under this theory, a GA referral might be deemed to activate ICC jurisdiction over core crimes under the ICC Statute, which also have a firm basis under customary international law.

A third question is whether the General Assembly could make a referral of the crime of aggression under Article 15 *ter* of the ICC Statute, i.e., as substitute of the Council under "Uniting for Peace." This option was discussed in the negotiations on the Kampala amendments. It was ultimately decided to leave this privilege with the Security Council. It would extend the Court's authority even more,[159] since the crime of aggression is tied to special jurisdictional regime under the Statute, requiring an additional declaration of acceptance of jurisdiction. Amending the Statute in this direction would be tied to a very high threshold, namely ratification by a 7/8 majority.[160] This is highly unlikely, given the limited number of states who have ratified the Kampala amendments. It would mark a significant departure, since it would enable the General Assembly the trigger the power of the ICC "to prosecute any act of aggression committed anywhere in the world."[161] There might thus be valid reasons to retain the

international community with respect to crimes under international law has come into existence through the ordinary process of the formation of a rule of (general) customary international law.").

158. Prosecutor v. al Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad al Bashir, ¶ 46 (Dec. 12, 2011), www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_21722.PDF [https://perma.cc/N66B-6TWQ].

159. Heller, *supra* note 23, at 7.

160. *Id.* at 6-7.

161. *Id.* at 7.

prerogative of the Security Council to make referrals under Article 15 *ter* in relation to aggression.[162]

B. Political Feasibility

Empowering the General Assembly to make referrals also raises delicate political sensitivities. For some states, the majority within the Assembly does not provide sufficient protection against an unmeritorious referral. Although the General Assembly is a more representative forum than the Security Council, it is also open to critique of selective enforcement or "friend/enemy" divides.

Moreover, giving the General Assembly the power to make referrals has a potential flipside. It raises the important question, whether the Assembly should also enjoy the authority to make deferrals. "Uniting for Peace" could thus be used to impede accountability. This would significantly curtail the effectiveness of the ICC. A prominent example is the effort of the African Union (AU) to mobilize support to give the General Assembly the authority to make deferrals under Article 16 of the Statute, in order to suspend investigations or prosecutions against acting heads of states or governments.

In 2009, South Africa made a proposal to amend the Statute to this effect. It relied expressly on the "Uniting for Peace" precedent to support such an option. The proposal suggested that a state with "jurisdiction over a situation before the Court" may '"request the UN Security Council to defer the matter before the Court" under Article 16.[163] It then added:

> Where the UN Security Council fails to decide on the request of the State concerned within six (6) months of the receipt of the request, the requesting party may request the UN General Assembly to assume the Security Council's responsibility [. . .] consistent with Resolution 377 (V) of the UN General Assembly.[164]

162. Darcy, *supra* note 137.

163. South Africa, Proposed Amendments to Article 16 of Rome Statute of the International Criminal Court (Nov. 30, 2009), https://treaties.un.org/doc/Publication/CN/2009/CN.851.2009-Eng.pdf [https://perma.cc/C9UH-JVYG].

164. *Id.*

It was ultimately rejected. But it showed that reliance on "Uniting for Peace" can be used in two ways, namely, to strengthen accountability or to promote impunity.

IV. Conclusions

The future role of the General Assembly in the institutionalization of international criminal justice depends largely on political will. This contribution has to sought to demystify some of the alleged legal obstacles. It has shown that the Assembly has built a long-standing and expanding track record in the area of accountability. It can be linked to both the residual powers of the Assembly in relation to international peace and security and its responsibility to promote human rights.

The premise that the General Assembly cannot establish a criminal tribunal or refer a situation to the ICC because this would constitute enforcement action reserved to the Security Council is increasingly open to question. Not all modes of creation of a criminal tribunal involve coercive power against states. There are three models: the treaty-plus model, the option of the creation of a tribunal by resolution with state consent and its establishment without consent. The "Uniting for Peace" formula would only be needed in the last scenario. Technically, jurisdiction is not enforced on the target state, if it is derived from universal jurisdiction delegated by states through an Assembly resolution.[165] The General Assembly tribunal would thus be a modern UN supported version of the Nuremberg model.

Similarly, a referral to the ICC is not coercive in itself, since it does not require the ICC to investigate or prosecute. It is closer to enforcement, if it is used to extend jurisdiction over non-state parties or to establish a basis for prosecution of the crime of aggression. Here again, legality depends on the reading of the "Uniting for Peace" precedent and the underlying model of jurisdiction of the ICC (e.g., delegated power v. *jus puniendi*). A plausible argument can be made that the Assembly would be legally entitled to make a referral opening jurisdiction in relation to non-state parties, following an amendment of the ICC Statute. The claim to replace the role of the Security Council under Article 15 *ter* is more controversial and less realistic.

165. *See* Gaynor, *supra* note 134, at 339.

Ultimately, the debate about extending the powers of the General Assembly is more a question of political feasibility than legal constraints. The claim that a GA-created tribunal would be less effective, because it lacks the power to impose legally binding duties of cooperation on states, is open to challenge. A GA-created tribunal would not necessarily constitute a paper tiger. States might well comply in light of their duties of cooperation in relation to atrocity crimes under general international law. In practice, the binding powers of the Security Council have not made a decisive difference in relation to state cooperation in the context of the *ad hoc* tribunals or the ICC. In the context of existing ICC referrals, the Council has not effectively followed up on lack of compliance. More difficulties might arise in relation to the ability of a General Assemvly tribunal to discard personal immunity. The existing ICJ *Arrest Warrant* jurisprudence does not necessarily imply that a GA-created tribunal would come within the immunity exception for "certain international criminal courts" under paragraph 61. The ICC jurisprudence is more permissive. A GA-created tribunal would qualify as international criminal court, if it is viewed as a collective project of states supporting the resolution.