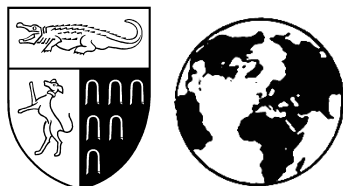


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“UNITING FOR PEACE” IN THE AGE OF INTERNATIONAL JUSTICE

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I. INTRODUCTION

The United Nations Security Council (“Council”) has performed a central role since the end of the Cold War in establishing mechanisms to hold perpetrators of international crimes accountable. Notably, the Council has established commissions of inquiry (“COIs”) and *ad hoc* tribunals and was endowed with the power to refer situations to the International Criminal Court (“ICC”).¹ Despite these advancements in addressing impunity for mass crimes, the Council’s record is inconsistent and controversial.² Decision-making in the Council by the three big permanent members (the United States, Russia, and China) has been characterized by double standards, which has impeded the ICC’s scrutiny of the conduct of their own nationals and those of their client states.³ A damning indictment of obstructed justice is evident from Russia’s veto of a proposed *ad hoc* tribunal for Malaysia Airlines Flight 17 (“MH17”), which arose after the flight was allegedly shot down by Russian-backed separatist forces.⁴

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1. David P. Forsythe, *The UN Security Council and Response to Atrocities: International Criminal Law and the P-5*, 34 HUM. RTS. Q. 840, 842-843 (2012).

2. Nigel White and Robert Cryer, *The ICC and the Security Council: An Uncomfortable Relationship*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT 455 (Jose Doria et al. eds., 2009).

3. Forsythe, *supra* note 1; Salvatore Zappalà, *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, 1 J. INT’L CRIM. JUST. 114 (2003).

4. See S.C. Draft Res. S/2015/562 (2015), ¶ 6. See also the criticisms of Russia’s veto by

While the selective regulation of international security is an accepted feature of the UN system, there is growing criticism over the legitimacy of tying the attainment of international justice to such a politicized decision-making model.⁵ Indeed, the veto is a recognized technique in the UN Charter and is underpinned by the principle of selective Council engagement in international affairs.⁶ The broad discretion of the Council in matters pertaining to international peace and security also means that its veto power is not readily susceptible to legal scrutiny by judicial organs such as the International Court of Justice (“ICJ”), as it is difficult to determine when such power is exercised “unreasonably.”⁷ These considerations have not, however, prevented disaffection in the international community with Council failures to act and, with it, mounting calls for collective security responses outside of Chapter VII. The aspiration in 1945 that Council members would act as “trustees” for the international community, setting aside national interests to act in the common good, has been largely disproved in practice.⁸ Recent tensions among the permanent members over Russia’s intervention in the Crimean Peninsula have provoked casual references to a “new Cold War” and a belief that such tensions “will affect nearly every important dimension of the international system.”⁹ This emerging belief is reinforced by the increasingly isolationist posture of Russia and China, which have been recently on the receiving end of adverse pronouncements by the international community on their territorial claims in Crimea and the South China Sea respectively; to convey their isolationist positions, Russia and China reaffirmed in a 2016 Declaration the importance of sovereignty and non-intervention in the internal affairs of a state.¹⁰

As divisions among permanent members of the Council resurface against the tide of a broad UN consensus on doctrines that emphasize a duty to protect civilian populations, they prompt a re-examination of the Council’s central role

Council members. U.N. GAOR, 70th Sess. 7498th mtg., U.N. Doc. S/PV.7498 (July 29, 2015). For a further critique, see Michael Ramsden, *Uniting for MH17*, 6(2) ASIAN J. INT’L. L. (forthcoming 2016).

5. For an application of this idea to the Libya context, see Louise Arbour, *The Rise and Fall of International Human Rights*, GLOBAL POLICY FORUM, Apr. 27, 2011, <https://www.globalpolicy.org/international-justice/general-articles-on-international-justice/50174-the-rise-and-fall-of-international-human-rights.html?ItemId=658>. For further discussion of Security Council legitimacy, see David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L. L. 552 (1993).

6. Philippa Webb, *Deadlock or Restraint? The Security Council and the Use of Force in Syria*, 19 J. CONFLICT & SEC. L. 1, 16 (2014).

7. Ian Johnstone, *When the Security Council is Divided: Imprecise Authorizations, Implied Mandates, and the “Unreasonable Veto”*, in THE OXFORD HANDBOOK ON THE USE OF FORCE IN INTERNATIONAL LAW 245 (Marc Weller ed., 2015). One ICJ judge did opine that Council vetoes are reviewable where there is an “abuse of rights.” Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 13 (Mar. 3) (dissenting opinion of Judge Alvarez). Still, the absence of any effective adjudicative means to scrutinize Council decision-making adds further weight to the notion that this organ enjoys unfettered discretion. On the possibility and limitations of ICJ judicial review of other U.N. organs, see Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of the Political Organs of the United Nations*, 46(2) INT’L COMP. L. Q. 309 (1997).

8. Nigel D. White, *From Korea to Kuwait: The Legal Basis of United Nations’ Military Action*, 20 INT’L HIST. REV. 597, 603 (1998).

9. Robert Legvold, *Managing the New Cold War*, FOREIGN AFF., July-Aug. 2014, at 74-75.

10. For analysis, see Lauri Malksoo, *Russia and China Challenge the Western Hegemony in the Interpretation of International Law*, EJIL: TALK! (July 15, 2016) <http://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/>.

in international criminal justice. As Louise Arbour, former UN High Commissioner for Human Rights, noted, “The responsibility to protect and international criminal justice cannot be sheltered from political considerations when they are administered by the quintessential political body.”¹¹ These concerns have led to calls for root-and-branch reform, including the conferral of a power on the Human Rights Council (“HRC”) to refer situations to the ICC, and for the voluntary suspension of the veto in situations where the UN Secretary-General has certified the existence of atrocity crimes within a state.¹² As a result of Council shortcomings, a “forum-shopping” trend has emerged, where relevant states have invoked alternative mechanisms to investigate atrocities, such as by looking into the establishment of *ad hoc* tribunals in other international organizations or by a group of states, or to initiate investigations in domestic courts.¹³ As such, it has never been timelier to take a fresh look at the viable alternatives within the UN to the present Council-dominated structure and, in particular, to consider the potential of the UN General Assembly (“Assembly”) to better fulfill the UN’s mandate on international justice.

A possibility that is gaining traction is for the Assembly to assume greater powers in addressing the impunity gap through the invocation of the Uniting for Peace (“UfP”) mechanism established by Assembly Resolution 377 (1950).¹⁴ This mechanism envisages the Assembly assuming analogous functions to the Council where the latter has failed to exercise its primary responsibility to maintain or restore international peace and security. The Assembly, constituted by a near universal membership of states, has been at the forefront in developing international criminal law over the past seventy years, augmenting the formation of customary international law and facilitating treaty-making, including the Rome Statute.¹⁵ It has also increasingly investigated human rights and humanitarian abuses by establishing COIs and other fact-finding missions.¹⁶ Furthermore, the Assembly has confronted

11. Arbour, *supra* note 5.

12. *Fabius Evoque un “Code de Conduit” pour Debloquer le Conseil de Securitie*, AGENCE FRANCE PRESSE, Sept. 2012. See also U.N. Docs S/PV6849 and S/PV6849 (Sept. 12 2012), at 23 (noting that a French delegate referred to the “Code of Conduct” in a Council debate on the ICC); Navi Pillay, *The ICC in the International System*, Remarks at the Retreat on the Future of the International Criminal Court, Liechtenstein (Oct. 16-18, 2011).

13. Julian Borger and Bastien Inzaurre, *Russia Vetoes are Putting UN Security Council’s Legitimacy at Risk, Says US*, THE GUARDIAN, Sept. 23 2015, <http://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us>.

14. G.A. Res. 377 (V) (Nov. 3, 1950).

15. G.A. Res. 95 (I) (Dec. 11, 1946) (crystallizing the Nuremberg principles); G.A. Res. 44/39, (Dec. 4, 1989) (requesting the International Law Commission to initiate a study on establishing an international criminal court); G.A. Res. 96 (I) (Dec. 11, 1946) (leading to the Genocide Convention 1968); G.A. Res. 3314 (XXIX), (Dec. 14, 1974) (explaining definition of aggression, subsequently included in the text of Article 8bis, ICC Statute). In the Genocide Convention preamble the contracting parties considered that the Assembly’s declaration confirmed that genocide was an international crime. See also G.A. Res. 260 (III)A (Dec. 9, 1948).

16. Human Rights Council Res. 22/13, U.N. Doc. A/HRC/RES/22/13 (Apr. 9, 2013); Rep. of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014) [hereinafter DPRK Report]; Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/30/48 (Sep. 3, 2015). For the Assembly’s contribution to *ad hoc* tribunals, see Rep. of the Group

Council inaction: for example, the Assembly “deplore[d]” the failure of the Council to enact resolutions that would address the Syrian crisis.¹⁷ It is therefore worthwhile to consider the latent potential of the Assembly to trigger the *UfP* mechanism, so as to bolster international justice processes.

The Assembly first invoked the *UfP* mechanism to recommend the continuation of UN action in Korea (1950), following the Soviet Union’s veto of this mandate. *UfP* has since been used to condemn acts of aggression and alien occupation, to support peacekeeping operations, and to augment the claims of a people to self-determination.¹⁸ Recently, there have been calls to use *UfP* in the specific context of international justice. For instance, UN monitors have proposed that the Assembly use *UfP* to bypass possible Council vetoes on ICC referrals with respect to the situations in Gaza and the Democratic People’s Republic of Korea (“DPRK”).¹⁹ In particular, Judge Kirby, in assessing possible routes to hold the North Korean leadership accountable for crimes against humanity, noted that the Assembly could establish an *ad hoc* tribunal based on its “residual powers” in the *UfP* resolution.²⁰

Guided by the *UfP* mechanism, the purpose of this article is threefold. First, the article will consider the extent to which the Assembly and its subsidiary organ, the HRC, have been able to exert meaningful pressure on the Council to take measures to end impunity, such as by referring a situation to the ICC. The development of HRC-supported COIs has helped to strengthen the language of UN resolutions generally, suggesting an important dialogic role in shaping the terms of the institutional debate on international justice. Second, the article will show how the Assembly and HRC are able to expand the scope of jurisdiction and work of the ICC through the passing of “quasi-judicial” resolutions. This analysis reveals that the Assembly, embodying the collective will of states, can mitigate Council deadlock on ICC referrals. Third, the article will advance the proposition that the Assembly is able to establish *ad hoc* tribunals somewhat analogously to those founded by the Council, which may be of particular relevance in future situations of Council deadlock.

These three arguments rely on *UfP* to varying degrees. The first and second propositions concerning the scope for inter-organ dialogue and Assembly action are no longer contentious, and are grounded in UN practice that has its antecedents in, or within the spirit of, the *UfP* resolution. The third

of Experts for Cambodia established pursuant to General Assembly resolution 52/135, U.N. Doc. A/53/850 (Mar. 16, 1999).

17. G.A. Res. 66/253B (Aug. 7, 2012) (133 votes to 12 opposed, with 31 abstentions).

18. For analysis of its uses, see generally Christina Binder, *Uniting for Peace Resolution (1950)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013); Keith Petersen, *The Uses of the Uniting for Peace Resolution since 1950*, 13 INT’L ORG. 219 (1959); Michael Ramsden, “Uniting for Peace” and Humanitarian Intervention: The Authorising Function of the UN General Assembly, 25 WASH. INT’L. L. J. 267 (2016).

19. Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, ¶ 197, U.N. Doc. A/HRC/12/48, (Sep. 25, 2009); League of Arab States, *Independent Fact-Finding on Gaza to the League of Arab States*, ¶ 610 (2009); DPRK Report, *supra* note 16, ¶ 1201.

20. DPRK Report, *supra* note 16, ¶ 1201. See generally Michael Kirby, *UN Commission of Inquiry on Human Rights Violations in the Democratic People’s Republic of Korea: Ten Lessons*, 15 MELBOURNE J. INT’L L. 291, (2014).

proposition, on the other hand, turns on a particular reading of the *UfP* resolution that has fallen out of favor amongst states and scholars: the Assembly may assume analogous constitutional powers to those of the Council, where the latter has failed to appropriately act in the interests of international security.²¹ The article considers the implications of these different approaches to *UfP*.

II. CONTEMPORARY USE OF *UNITING FOR PEACE*

At the outset, it is necessary to clarify three aspects of the *UfP* resolution: (i) how it is triggered, (ii) the scope of Assembly powers under it, and (iii) the contemporary relevance of the mechanism.

(i) *Triggering Uniting for Peace*

The *UfP* mechanism may be triggered in circumstances where the “Security Council, because of the 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”²² In such a scenario, 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.”²³ To trigger *UfP*, the Council must exercise its veto, which results in the Council “failing” to exercise its primary responsibility. There is thus also room for a finding that the Council has not failed even though a permanent member has exercised its veto power, as the veto is a legitimate technique within the UN Charter to ensure the selective regulation of international peace and security.²⁴

This raises two questions: what constitutes a Council “failure” and which organ should make this determination. One approach is to borrow from domestic public law principles, such as the “abuse of rights” or “unreasonableness” doctrines, which render *ultra vires* a decision that is arbitrary, taken for an extraneous purpose, or in bad faith.²⁵ For example, China’s veto to end the peacekeeping mission in Macedonia, apparently

21. For an elaboration of the “weak” and “strong” theories of *UfP*, see Ramsden, *supra* note 18.

22. G.A. Res. 377 (V), *supra* note 14, ¶ 1.

23. *Id.*

24. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 262 (1994); Webb, *supra* note 6, at 16.

25. Judge Alvarez first spoke of abuse of rights by the Council members in the context of the veto. Competence of the General Assembly, Advisory Opinion, 1950 I.C.J. 5, 15 (Mar. 3) (dissenting opinion of Judge Alvarez); See also BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE 175 (1998); Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389 (2002). The doctrine does have resonance in the U.N. Charter: Article 2(2) obliges members to act in “good faith”. U.N. Charter art. 2, ¶ 2. Article 24(2) requires the Council to “act in accordance with the Purposes and Principles of the United Nations,” which may reasonably include abuse of rights as a general principle of law.

because Yugoslavia recognized Taiwan's statehood, would constitute an abuse of rights.²⁶ However, the abuse of rights doctrine is too narrowly focused because most decision-making will ostensibly be within the broad purposes of maintaining international security. Thus, when Russia and China vetoed a proposed Council resolution on Syria, they did so by preferring "peace" over "justice" solutions; a referral of the situation to the ICC would throw "oil on the fire" while Syrian hostilities continued.²⁷ In short, while states may disagree with the exercise of the veto, it does not necessarily constitute an "abuse" within the narrow public law sense.

For the trigger of *UfP* to be effective in measuring Council "failure," it must be predicated on a broader normative conception that accords with the UN's contemporary global mandate to protect human rights and maintain international peace and security. This could be based on the Responsibility to Protect doctrine and the view that the Council should take appropriate action in circumstances where atrocity crimes have or are occurring in a state.²⁸ Indeed, the French-proposed "Code of Conduct" for the voluntary suspension of the veto may provide one such basis in instances where there is evidence of "overwhelming human catastrophe" and "mass atrocity," respectively.²⁹ When the *UfP* mechanism was first used, the imperatives of security maintenance were more narrowly defined; thus, the Assembly extension of the UN mandate in Korea arose as a response to an act of aggression. Yet ever increasingly, the UN as an institution has recognized the protection of human rights as integral to maintaining peace and security. The Assembly, too, has used *UfP* to recommend that states take measures to protect civilian populations.³⁰ This accords with the Assembly's primary mandate to promote human rights, a view reinforced in the ICJ's *Israeli Wall* Advisory Opinion, where it was noted that "while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects."³¹

If Council "failure" under *UfP* is to be measured in terms of evidence documenting atrocity crimes, the issue remains as to which organ is best suited to determine such failure to act. The *UfP* resolution ultimately vests power in the Assembly to take various measures in place of, or alongside, the Council. Therefore, it falls on the plenary organ to make such determination of Council

26. Marc Weller, *Undoing the Global Constitution: UN Security Action and the International Criminal Court*, 78 INT'L AFF. 693, 706 (2002).

27. Meetings Coverage, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Meetings Coverage SC/11407 (May 22, 2014).

28. See generally Int'l Comm'n on Intervention and State Sovereignty, *The Responsibility to Protect*, INT'L DEV. RES. CTR. (2001).

29. *Fabius Evoque un "Code de Conduit" pour Debloquer le Conseil de Securitie*, supra note 12.

30. See, e.g., G.A. Res. 1004 (ES II), (Nov. 4, 1956), (stating that the "intervention of Soviet military forces in Hungary has resulted in grave loss of life and widespread bloodshed among the Hungarian people" and calling for cooperation in providing humanitarian aid).

31. See U.N. Charter arts. 1, 13(1), 55, 60; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136, ¶¶ 27-28 (July 9) [hereinafter *Legal Consequences of the Construction of a Wall*].

“failure,” where a majority of UN members make such a request.³² But equally, the *UfP* resolution also recognizes a potential role for the Council to certify its own failings; thus, it may by way of a procedural vote (not subject to a veto override) request the Assembly to convene an emergency special session.³³ Practice under the resolution shows that both principal organs have triggered *UfP*. When a delineation of Council failure has been made, the Council has triggered the mechanism where armed forces were to be engaged, and the Assembly has taken the initiative in non-conflict situations, such as in dealing with decolonization and self-determination.³⁴ Therefore, good authority exists for the Assembly to define Council “failure” and then properly trigger *UfP*; by applying the *UfP* resolution, the Assembly may identify the existence of atrocity crimes that warrant international condemnation and investigation. Indeed, it is in this spirit that the Assembly has criticized Council failures to act in referring the situation in Syria to the ICC.³⁵

Finally, the use of *UfP* in the context of international justice may be subject to criticism, as some may argue that it can be counterproductive and unravel the measures taken by the Council and other actors to secure and maintain peace within a state. In other words, greater UN plenary involvement may lead to a prioritization of “justice” over “peace,” to the detriment of international security. Furthermore, an important premise in enforcing international criminal law is state cooperation. Yet, given that *UfP* inevitably undercuts the interests of at least one permanent member of the Council, problems may arise in securing the accountability of that member state. For instance, if the Assembly was to establish an *ad hoc* tribunal for the MH17 aviation disaster in response to Russia’s veto of such a proposal in the Council, Russia would be unlikely to cooperate with the tribunal, and Russian cooperation would be critical to the tribunal meeting its mandate. In this view, *UfP* is an early Cold War product of a polarized world, a premise that is ill-suited to enforcing international criminal law. The inevitable consequence, as initial U.S. opposition in the Council to the ICC shows, is that the exertion of pressure on the interests of permanent members may hurt the long-term prospects for effective international justice.

This article is primarily concerned with identifying the trends of Assembly activism in the field of international justice, along with an analysis of the latent legal potential of the *UfP* resolution in this field, but it would be remiss not to engage with this consequentialist argument. Support for the status quo inevitably rests on the proposition that only the Council can effectively weigh competing security imperatives and that selective justice in the exercise of collective enforcement measures is justifiable. This argument is open to challenge, especially when action within the Assembly promoting international justice is supported by a majority of the permanent members, as with various

32. Juraj Andrassy, *Uniting for Peace*, 50 AM. J. INT’L L. 563, 578 (1956).

33. G.A. Res. 377 (V), *supra* note 14.

34. Petersen, *supra* note 18; Dominik Zaum, *The Security Council, the General Assembly, and War: The Uniting for Peace Resolution*, in UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 166 (Vaughan Lowe et al. eds., 2008).

35. G.A. Res. 69/189 (Dec. 18, 2014), at preamble.

Syrian resolutions.³⁶ Furthermore, there is recent evidence of accelerating Assembly activism in the field of international justice, such as the creation of COIs and country-specific resolutions that condemn the occurrence of international crimes within these states, as developed further below. However, this does not necessarily mean that such activism will automatically lead to the UN plenary recommending collective enforcement action to address impunity: member states still must make important political calculations that will also factor into considerations of maintaining international peace. The point, rather, is that the Assembly offers greater collective legitimation for action than the Council, which has become increasingly tainted in upholding international justice. If Council deadlock occurs in situations where the imperatives of justice clearly warrant an investigation and which have attracted universal state support, such as into the downing of MH17, a good argument can be made for the Assembly to trigger *UfP*, so as to unite against impunity.

The greater challenge, though, is whether acting against the interests of certain permanent members will, in the long term, impede international justice. This consequentialist assessment is complex: U.S. enthusiasm for the ICC has, after all, come in waves.³⁷ Some would argue that the hostility of certain permanent members should not bar strategies to achieving international justice, but the reality is that the political dimension is material: for example, the failings of the ICC and the Council to secure the cooperation of states in the Darfur situation damaged the ICC's credibility. Still, the very reason why the Assembly contemplates *UfP* is because of general dissatisfaction with the Council and a belief that the realignment of powers towards the Assembly may enhance international justice. A system whereby permanent members obstruct action and even subvert decisions of the Council, as China did in 2015 in receiving Sudanese President Omar Al-Bashir, prompts reflection on the extent to which certain permanent members (specifically China and Russia) offer significant support to international justice in the first place. Even so, whether a permanent member disengages and opposes international justice is sensitive to the circumstances and the importance of the issue to such state's national interests. It also depends on whether the Assembly, in breaking actual or potential Council deadlock, acts in a way that directly challenges the essential interests of a permanent member. For instance, the Assembly took the lead in facilitating the establishment of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), at least in part because of China's threat to veto any resolution endorsing its creation in the Council.³⁸ The end result, however, was that the Assembly established a tribunal that was not harmful to China's alliance with the Hun Sen regime, given that the Cambodian authorities could

36. *E.g.*, G.A. Res. 69/189 (Dec. 18, 2014), recommending that the Council refer the situation in Syria to the ICC and regretting past exercises of the veto thereto, was supported by the U.S., U.K., and France in the Assembly.

37. *See generally* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 12-22 (1999); Leila N. Sadat and Mark A. Drumby, *The United States and the International Criminal Court: A Complicated, Uneasy, Yet at Times Engaging Relationship* (Wash. U. in St. Louis Legal Stud. Res. Paper No. 16-07-02, July 2016).

38. Steven Roper and Lilian Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (2006), at 39.

retain a high degree of control over future prosecutions.³⁹ However, where an issue subject to UN plenary activism implicates a strong national interest of a permanent member, it may be that *UfP* is invoked for the strategic, diplomatic purposes of expressing broad condemnation and isolating the relevant regime (be it in the Crimean Peninsula or Syria), which may assist in building momentum for the prosecution of relevant perpetrators.

(ii) *Scope of Powers Under the Uniting for Peace Resolution*

Having set out the triggers for *UfP*, it is also necessary to briefly consider the legal effect of resolutions taken under this mechanism before moving on to evaluate specific instances of Assembly activism in the field of international justice. In this respect, scholars have generally been divided on the legal legacy of *UfP*.

Some believe that the resolution is simply declaratory of the limited textual powers of the Assembly under the UN Charter, with recommendations to states amounting to a mere invitation for them to act in accordance with international law. To the extent that *UfP* holds constitutional significance, it has modified Article 12(1) of the UN Charter, which provides that where the Security Council is “exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”⁴⁰ Taken literally, Article 12(1) precludes a plenary response to mass crimes where the Council is already acting, for instance in Israel or Syria. However, as the ICJ *Israeli Wall* Advisory Opinion confirmed, subsequent practice has modified Article 12(1) to allow the Assembly to act concurrently with the Council.⁴¹ In this way, *UfP* has laid the foundation for modern day Assembly activism in initiating investigations into mass crimes and making various recommendations to the Council and states in relation to these situations. With respect to this weak interpretation of *UfP*, the need to trigger this resolution has been dispensed with: it is now firmly part of Assembly practice for it to make recommendations on any matter, even when the Council has already acted, and even in circumstances when the Council has not “failed.” If *UfP* is still relevant to the exercise of “non-coercive” Assembly powers, it is in its inspiration for UN plenary activism.

A stronger reading of *UfP*, however, treats this resolution as representative of a constitutional moment that prompted the conditional realignment of security powers within the UN where the Council “failed.”⁴² Such a moment arose in 1950, when Russia’s veto of continued enforcement action in Korea precipitated the urgent necessity for the Assembly to act.

39. See generally Tomas Hamilton and Michael Ramsden, *The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia*, 14 INT’L CRIM. L. REV. 115-47 (2014).

40. U.N. Charter art. 12, ¶ 1; for a close analysis of Article 12, see Andrew Carswell, *Unblocking the U.N. Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SEC. L. 453, 468-70 (2013).

41. See Legal Consequences of the Construction of a Wall, *supra* note 31, at 149–50.

42. See generally Ramsden, *supra* note 18.

Indeed, it is apparent from the Korea intervention that the Assembly went beyond merely noting that a state of affairs existed for collective self-defense to be justified. In response, the Assembly issued Resolution 376, which sought to achieve “a unified, independent and democratic government of all Korea,” including the crossing of the Thirty-eighth Parallel, objectives that manifestly go beyond the stricter confines of self-defense principles.⁴³ As Nigel White noted, there was a general recognition amongst states and other actors that the intervention in Korea was a UN operation.⁴⁴ The implication of this conclusion is that Resolution 376 served to preclude any wrongful act in the use of force; it constituted enforcement action by the Assembly.⁴⁵

The relevance of this distinction between weak and strong interpretations of the powers under the *UfP* resolution will be explicated in the sections that follow, but it is apparent that there is room to recognize both interpretations based on Assembly practice. One obvious criticism of the stronger approach is that its example in practice (Korea, 1950) may be said to constitute an outlier. There are also less obvious, subsequent examples of coercive enforcement action being employed by the Assembly where it has united for peace, let alone contemporary practice.⁴⁶ While the absence of practice may be used by some states to resist a reactivation of plenary collective enforcement action, such a power, even where exercised by the Council, is a rarity. Indeed, the plain text of the *UfP* resolution, which references “collective measures,” supports the proposition that the plenary can authorize enforcement action in extreme circumstances. In any event, an Assembly interpretation of its own powers will enjoy a strong, perhaps irrefutable, presumption of validity, as the ICJ acknowledges.⁴⁷ Therefore, the absence of recent practice need not be an impediment to enforcing the powers set out in the *UfP* resolution, where such powers are affirmed by the UN members.

(iii) *General Assembly Politics and Uniting for Peace*

Some commentators may question the continued utility of *UfP* in a post-Cold War era and the more central role of the Assembly in enforcing international criminal law. Specifically, it is undeniable that the Assembly is also a political body, like the Council, and therefore will also perpetuate the impunity gap due to the forces of international politics. These forces are manifest in the Assembly’s checkered history in scrutinizing human rights abuses within states, with its disproportionate focus on Israel and its failure to do so with any rigor in the “global south.”⁴⁸ Furthermore, the composition of

43. See G.A. Res. 376 (Oct. 7, 1950); Nigel D. White, *The Relationship between the UN Security Council and General Assembly in Matters of International Peace and Security*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 311 (Marc Weller ed., 2015).

44. See White, *supra* note 8, at 614.

45. See also conclusions reached by the *UfP*’s Collective Measures Committee: G.A., First Report, *Official Records G.A.*, 6th Session, Supp No. 13, UN Doc A/1891 (1951), ¶ 167.

46. Another example that offers some support is the United Nations Operation in the Congo. See NIGEL D. WHITE, KEEPING THE PEACE, 254-61 (1990).

47. Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion, 1962 I.C.J. 151, 168 (July 20) [hereinafter Expenses].

48. For general criticisms, see M.J. PETERSON, THE UN GENERAL ASSEMBLY 103-131 (2006).

the Assembly has changed dramatically since idealizing of UN plenary activism began in the 1950s. Now, any use of the mechanism would be a “double-edged sword” for its power-brokering sponsors.⁴⁹ These criticisms justify close analysis of the claim that the Assembly is able to secure international justice, and there is interesting empirical research to be undertaken to assess state behavior within the Assembly in this field. It suffices to note, for the purposes of this article, that states within the Assembly have generally been supportive of the ICC’s mandate when voting on relevant resolutions.⁵⁰ Indeed, the Assembly and its subsidiary organs have provided the only effective UN mechanism to investigate and condemn international crimes occurring within a state in the face of Council deadlock, such as in the situations in Syria, the DPRK, and Israel.

This is not to say, however, that the Assembly has been consistent in its selection and application of country-situations to investigate and condemn where international crimes have occurred.⁵¹ While the legal process within a criminal tribunal ought to be procedurally independent from such politics, the circumstances which lead a situation to be selected and prioritized for prosecution, so-called “victor’s justice,” is an unavoidable feature of international criminal law.⁵² The question then is not whether international criminal law can be divorced from politics; rather it is whether international politics are of a nature and quality that upholds the global legitimacy of justice institutions (for example, in the creation of *ad hoc* tribunals or the referral of a situation to the ICC).⁵³ In this respect, one of the major criticisms of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) was that it reflected the priorities of certain Council permanent members; a “consensual act of nations,” such as an Assembly resolution, would have endowed greater legitimacy on such a tribunal.⁵⁴ Thus, the position taken here is that the Assembly, given its broad plenary status, has the potential to offer greater legitimacy in the enforcement of international criminal law than the Council, whose basis for action depends on obtaining unanimity between states with increasingly divergent global views.

49. Andrew Carswell, *Unblocking the Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SEC. L. 453, 456 (2013).

50. See generally Stuart Ford, *The ICC and the Security Council: How Much Support is There for Ending Impunity?*, IND. INT’L & COMP. L. REV. (forthcoming 2016).

51. For a criticism of the “friend-enemy” distinction perpetuated by the Assembly in the Libya situation, see Kevin J. Heller, *The International Commission of Inquiry on Libya: A Critical Analysis*, in INTERNATIONAL COMMISSIONS: THE ROLE OF COMMISSIONS OF INQUIRY IN THE INVESTIGATION OF INTERNATIONAL CRIMES (Jens Meierhenrich ed., forthcoming 2016).

52. For an analysis of these complexities, see William A. Schabas, *Victor’s Justice: Selecting “Situations” at the International Criminal Court*, 43 J. MARSHALL L. REV. 535 (2010); Sarah M. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT’L L. 941 (2011).

53. Nouwen & Werner, *supra* note 52, at 964.

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

III. INTER-INSTITUTIONAL DIALOGUE BETWEEN THE UN AND ICC

A. The “Catalytic Council” and Security Council Referrals

This section discusses the extent to which the Assembly may exert meaningful pressure on the Council to exercise its Chapter VII powers in the field of international justice. The section’s focus is limited to the Council’s power under the ICC Statute, which, pursuant to Article 13, permits the court to exercise its jurisdiction if the Council has referred a situation acting under Chapter VII. So far, the Council has referred two situations to the ICC: Sudan (2005) and Libya (2011).⁵⁵ A Council referral serves as both a source of jurisdiction and a trigger for the initiation of an investigation. Crucially, it can put a non-States party in an analogous position to a States-party to the ICC Statute with respect to the court’s exercise of jurisdiction.⁵⁶

In turn, the Assembly and its subsidiaries have increasingly engaged in dialogue with the Council on international justice, from urging the Council to establish the ICTY to requesting that an ICC referral be made for the situation in Syria.⁵⁷ A key component of this dialogue has been the creation of COIs, particularly under the auspices of the HRC. Indeed, the HRC was established by the Assembly to bring human rights closer to the work of the Council.⁵⁸ The HRC has created COIs in a wide array of country-situations: Palestine (2006), Lebanon (2006), Darfur (2006), Libya (2011), Côte d’Ivoire (2011), Syria (2012), Eritrea (2014) and North Korea (2014). Some of these situations have received little to no attention from the Council, due in large part to political disagreement amongst the permanent members. This is the case in North Korea, where the Council has solely focused on disarmament obligations, and Syria, where investigations were impeded.⁵⁹ Although the Council has the prerogative to establish COIs in deciding whether to exercise its ICC referral powers, the fact that the HRC has established these commissions indicates the gap that is being filled due to Council inaction. Thus, despite Council deadlock on Syria, the HRC became the most important organ of the UN in isolating the Assad regime and expressing broad condemnation.⁶⁰

Still, the fundamental issue is whether COI findings and Assembly/HRC

55. See S.C. Res. 1593, ¶ 1 (Mar. 31, 2005); S.C. Res. 1970, ¶ 4 (Feb. 26, 2011).

56. For recent elucidation on this point, see Nerina Boschiero, *The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on Resolution 1593*, 13 J. INT’L. CRIM. JUST. 625, 653 (2015).

57. See G.A. 69/189, at 1-2 (Dec. 18, 2014); G.A. Res. 47/121, ¶ 10 (Dec. 18, 1992); CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 570 (2d ed., 2013).

58. See Marisa Viegas e Silva, *The United Nations Human Rights Council: Six Years On*, SUR INT’L J. HUM. RTS., June 2013, at 99. Established by the Assembly in 2006 to replace the Commission on Human Rights, the HRC is responsible for promoting respect for human rights. See generally G.A. Res. 60/251 (Mar. 15, 2006).

59. See Michael Kirby, *supra* note 20; Spencer Zifcak, *The Responsibility to Protect after Libya and Syria*, 13 MELBOURNE J. INT’L L. 59 (2012); Annika Jones, *Seeking International Criminal Justice in Syria*, 89 INT’L L. STUD. 802 (2013) (noting the unlikelihood that permanent member unanimity will ever be reached). It is also necessary to acknowledge that in certain instances the U.N. as a whole has failed to act quickly enough, be that the Assembly or Council, such as in the case of Burundi. Romana Schweiger, *Late Justice for Burundi*, 55(3) INT’L & COMP. L.Q. 653 (2006).

60. Daniel Chardell, *Gaining Ground at the UN Human Rights Council*, INTERNATIONALIST (Oct. 3, 2014) <http://blogs.cfr.org/patrick/2014/10/03/gaining-ground-at-the-un-human-rights-council/>.

resolutions based upon such findings are able to act as a catalyst for an ICC referral by the Council. Establishing the causal relationship between a Council referral and pressure from the Assembly/HRC is not easy, particularly given the multitude of factors that go into UN decision-making as well as the influential role of powerful states, which tend to attribute changes in policies to their own wisdom.⁶¹ Indeed, the two referrals by the ICC to date are explicable on multiple grounds and are not solely due to pressure from the Assembly or HRC. For instance, the United States’ vote to refer the Darfur situation to the ICC was influenced by pressure from domestic religious constituencies.⁶² Similarly, the referral in Libya arose because the ailing Gaddafi regime lacked support amongst the permanent members and the Arab League favored a referral, thus undercutting the traditional non-intervention objections of China and Russia.⁶³ Still, the hard case is Syria due to Russia’s unwavering support for the Assad regime, which undermines a clear conclusion about the catalyzing effect of the Assembly and HRC. Here, Russia’s veto came despite multiple Assembly/HRC resolutions and COI deliberations pointing to the occurrence of mass crimes in the territory that justified the opening of an investigation.⁶⁴

Even so, there is evidence of cooperation between the Council and the HRC in supporting each other’s functions. Bellamy noted that the DPRK COI persuaded the Council to at least consider the question of human rights in the DPRK.⁶⁵ The Council has also added credibility to HRC investigations by showcasing them as the standard for domestic investigations conducted by states. When renewing the mandate of the United Nations Operation in Côte d’Ivoire, the Council instructed this subsidiary organ to act in “close cooperation” with the HRC’s Independent Experts in facilitating compliance with international humanitarian law.⁶⁶ The Council has also endowed HRC commissions with Chapter VII authority, by calling upon all sides to cooperate with commission investigations in Côte d’Ivoire.⁶⁷

Furthermore, while the Assembly/HRC’s role cannot be identified as the most dominant factor causing the Council to respond, these organs have at least contributed to Council decision-making. In Resolution 1970 (2011), the Council endorsed the HRC’s deliberations and its dispatch of a fact-finding mission as a basis for referring the Libya situation to the ICC.⁶⁸ Similarly, Council resolutions have increasingly “mirrored” (whether deliberately or otherwise) the language in HRC resolutions and COI reports, especially

61. See Theodor Rathgeber, *New Prospects for Human Rights?*, FES INT’L POL’Y ANALYSIS 8-9 (March 2012) <http://library.fes.de/pdf-files/iez/global/08961.pdf>.

62. Forsythe, *supra* note 1, at 851.

63. *Id.* at 852.

64. Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Doc. SC/11407 (Jan. 25, 2001), www.un.org/press/en/2014/sc11407.doc.htm.

65. Alex Bellamy, *A Chronic Protection Problem: The DPRK and the Responsibility to Protect*, 91 INT’L AFF. 225 (2015).

66. S.C. Res. 2226, ¶ 17 (June 25, 2015).

67. S.C. Res. 1975, ¶ 8 (Mar. 30, 2011). See also S.C. Res. 2134 (2014), ¶ 19 (Jan. 28, 2014) (encouraging cooperation with the HRC commission in the Central African Republic).

68. S.C. Res. 1970, ¶ 5. (Feb. 26, 2011).

regarding how certain conduct may be characterized as international crimes.⁶⁹ In addressing the events in Yemen, the Council expressed its support for an HRC resolution that called for investigations into alleged violations of international humanitarian law.⁷⁰ Although the human rights situation in Yemen had been on the Council's agenda, the Council did not address the necessity for an investigation until the HRC recommended this course of action. These examples provide some evidence of how HRC determinations may be woven into Council deliberations on international justice and contribute to its crisis response framework.

It remains to be seen whether the Assembly/HRC are able to catalyze the Council into action in a hard case where the permanent members have a vested interest in a particular situation, such as the United States with Israel or China with North Korea. The degree to which the Assembly/HRC are able to be influential also depends on the continued leadership of powerful states, as renewed U.S. engagement with these organs has shown.⁷¹ Furthermore, criticisms remain over the even-handedness of certain COI reports, which can weaken the extent to which they are perceived to be legitimate and sufficiently free from political considerations; for example, criticism was directed at the Lebanon inquiry for investigating crimes perpetrated by Israeli forces but not those of Hezbollah.⁷² Although problems remain with the investigatory methodologies that underpins COI reports, these findings are increasingly held up as reliable, in turn shaping action at the ICC both by the prosecutor acting *proprio motu* and by the chambers in authorizing investigations.⁷³ It may therefore be cautiously said that the HRC and its COIs have made a positive contribution in shaping the Council's response to a crisis, and will continue to do so as this organ gains institutional expertise in investigating mass crimes.

B. "Quasi-Judicial" Resolutions to Augment the ICC's Jurisdiction

The previous section looked generally at the scope of the Assembly and HRC to exert pressure on the Council to refer a situation to the ICC. The purpose of the following section, on the other hand, will be to examine ways in which the Assembly is able to bypass the Council so as to enable the ICC to exercise jurisdiction over a matter it would ordinarily be precluded from. The ICC is a treaty-based court that derives its jurisdiction from the consent of

69. See John Cerone, *International Enforcement in Non-International Armed Conflict: Searching for Synergy among Legal Regimes in the Case of Libya*, 88 INT'L L. STUD. 370, 375 (2012).

70. S.C. Res. 2014, preamble (Oct. 21, 2011).

71. See Suzanne Nossel, *Advancing Human Rights in the UN System*, COUNCIL ON FOREIGN REL., May 2012, www.cfr.org/international-organizations-and-alliances/advancing-human-rights-un-system/p28414.

72. James G. Stewart, *The UN Commission of Inquiry on Lebanon: A Legal Appraisal*, 6 J. INT'L CRIM. JUST. 1039, 1059 (2007); Samuel Totten, *The UN International Commission of Inquiry on Darfur: New and Disturbing Findings*, 4 GENOCIDE STUD. AND PREVENTION: AN INT'L J. 354 (2009).

73. See, e.g., H.R.C., *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, U.N. Doc. S/2005/60 (Jan. 25, 2005) cited by Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-3, Pre-Trial Chamber I, ¶¶ 62-64, 76-77, 85, 88, 94, 97 and 100 (Mar. 4, 2009); Situation in the Republic of Côte d'Ivoire, Request for an authorisation of an investigation pursuant to article 15, ICC-02/11-3-OTP, Pre-Trial Chamber III, ¶¶ 20, 28, 63, 82 and 152, (June 23, 2011).

states, either by virtue of being State Parties or by lodging a declaration pursuant to Article 12(3) of the Rome Statute. Outside of state consent, the Council’s power to make a referral serves the purpose of putting a non-State Party in an analogous position to a State Party to the Rome Statute. The issue is whether the Assembly is also able to augment the other sources of jurisdiction aside from a Council referral. It is true that Assembly resolutions do not possess intrinsic legal or legislative effects. Still, the Assembly, comprising a near universal membership of States, is able to certify the existence of a state of affairs in international relations relevant to the ICC’s jurisdiction.⁷⁴ Assembly resolutions are capable of having a “quasi-judicial” character, resolving questions that are not readily susceptible to judicial determination without strong signaling from the international community.⁷⁵ This includes questions related to statehood, governmental legitimacy, and issues of state responsibility.⁷⁶

Two recent examples illustrate the scope of the Assembly’s ability to bypass Council deadlock by augmenting the ICC’s jurisdiction. The first concerns the possibility (albeit rare) for the Assembly to characterize an entity’s statehood for the purpose of acceding to the Rome Statute, as with the case of Palestine. Accountability for alleged crimes in Israel and Palestine is a divisive issue within the UN: the United States would almost certainly veto any proposal to refer these events to the ICC for investigation.⁷⁷ Yet, the Assembly’s characterization of Palestine as a “State” has helped to bypass the necessity of a Council referral. In 2012, the Assembly adopted Resolution 67/19 recognizing the Palestinian “right” to statehood and according it non-member observer “State” status in the UN.⁷⁸ Crucially the Office of the Prosecutor noted that Resolution 67/19 was “*determinative* of Palestine’s ability to accede to the [ICC] Statute . . . and equally, its ability to lodge an Article 12(3) declaration.”⁷⁹

The second example concerns a question as to the territorial scope of an “accepting State” and which governmental entity may accept the court’s jurisdiction pursuant to Article 12(3) of the Rome Statute. For instance, Crimean secessionists have purported to enter into an annexation agreement with Russia. If valid, this annexation would remove the situation in Crimea from the ICC’s reach, as Crimea would then constitute territory of a non-State

74. ROSSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 5 (1963).

75. See, e.g., Oscar Schachter, *The Quasi-Judicial Role of the Security Council and General Assembly*, 58 AM. J. INT’L L. 960, 961 (1964).

76. BASSIOUNI, *supra* note 57, at 718.

77. Indeed, the Israel and Palestine issue has accrued the largest number of vetoes in the Council, twenty in total. See Dag Hammarskjöld Library, *Security Council - Veto List* (Aug. 12, 2016), <http://research.un.org/en/docs/sc/quick>.

78. G.A. Res. 67/19, ¶¶ 1-2 (Dec. 4, 2012).

79. Press Release, ICC, Office of the Prosecutor, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine (Jan. 16, 2015), www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx (emphasis added). See also earlier pronouncements of the OTP, stating that it would not resolve the issue of statehood without the U.N. making a determination first. Press Release, ICC, Office of the Prosecutor, Situation in Palestine ¶ 6 (Apr. 3, 2012), <https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>.

Party (Russia) which has not accepted the court's jurisdiction. The Ukrainian government lodged an Article 12(3) declaration, thus requiring the ICC to resolve the territorial and governmental issues in Crimea as a precondition to jurisdiction.⁸⁰ In this respect, the ICC would derive considerable assistance from Assembly Resolution 68/262 (2014), finding that the Crimea annexation by Russia had "no validity."⁸¹ The quasi-judicial character of this resolution thus resolves a contentious issue of international law so as to provide a stronger foundation for the court's exercise of jurisdiction.⁸²

Admittedly, the circumstances in which the Assembly will be able to buttress the ICC's jurisdiction will not always arise and thus could not provide a comprehensive response where there is Council deadlock on an ICC referral. For instance, had the Council not referred the situations in Sudan and Libya to the ICC it is difficult to see how the Assembly could have bypassed these decisions through the passage of quasi-judicial resolutions equipping the ICC with jurisdiction. However, if there had been doubts over which authority legitimately represented the government of Sudan and Libya, the Assembly could perhaps have pronounced that issue as an alternative to the incumbent regimes lodging an Article 12(3) declaration. The scope for the Assembly to augment the ICC's jurisdiction will therefore be highly context specific.

IV. CREATION OF *AD HOC* TRIBUNALS IN THE UN GENERAL ASSEMBLY

The previous section examined the persuasive effect of Assembly resolutions as they pertain to Council referral powers and the ICC's exercise of jurisdiction. The following section will look at the powers of the Assembly to establish *ad hoc* tribunals in the absence of Council action. The need to explore solutions outside of the framework of the Rome Statute may arise because of the Council's failure to exercise its referral power, or because the ICC is ill-suited to investigate and prosecute a given crime.⁸³ In the past, *ad hoc* tribunals have been established by a Charter VII decision, treaty, or domestic law.⁸⁴ But in an era where the permanent members disagree on the creation of *ad hoc* tribunals, as was the case with respect to the *ad hoc* tribunal proposed to investigate crimes arising from the MH17 aviation disaster, it is important to consider whether the Assembly, acting under the *UfP* resolution, may assume

80. Press Release, ICC, Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Between 21 November 2013 and 22 February 2014 (Apr. 17, 2014), www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr997.aspx.

81. G.A. Res. 68/262, ¶ 5, U.N. GAOR, 68th Sess., U.N. Doc. A/RES/68/262 (Apr. 1, 2014).

82. Indeed, the Office of the Prosecutor is now undertaking a preliminary investigation in Crimea. See Niklas Jakobsson, *ICC Prosecution 'Likely' to Look Into MH17 Downing*, JUSTICE HUB (Sept. 10, 2015), <https://justicehub.org/article/icc-prosecution-likely-look-mh17-downing>; Press Release, ICC, Office of the Prosecutor, Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Since 20 February 2014 (Sept. 8, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1146>;

83. See, e.g., Ramsden, *supra* note 4 (discussing the unsuitability of the ICC for prosecuting the MH17 disaster); Van Schaack, *Mapping War Crimes in Syria*, 92 INT'L L. STUD. (forthcoming 2016) (discussing limitations in prosecuting the Syria situation at the ICC, and the merits of an *ad hoc* tribunal in the alternative).

84. SARAH WILLIAMS, HYBRID AND INTERNATIONALISED TRIBUNALS: SELECTED JURISDICTIONAL ISSUES 7 (2012).

analogous functions to the Council so as to provide an alternative solution.⁸⁵

Assembly involvement in establishing *ad hoc* tribunals is by no means unprecedented. While the Assembly has not endowed an *ad hoc* tribunal with legal powers, it has provided necessary institutional support to assist domestic authorities in establishing hybrid, *ad hoc* tribunals containing both international and domestic elements. For example, the Assembly has played a pivotal role in facilitating the establishment of the ECCC, as noted above.⁸⁶ The question that remains is whether an *ad hoc* tribunal mandated by the Assembly would be granted the same legal powers as those established by the Council for international crimes, as was the case in the former Yugoslavia and Rwanda. Unlike resolutions and investigations conducted by the Assembly and its subsidiary organs, which reasonably fall within the discursive functions of this organ, the creation of an *ad hoc* tribunal, particularly one that possesses extensive powers to compel state cooperation, does not.

In assessing the constitutionality of an Assembly-mandated *ad hoc* tribunal, three issues need to be addressed.

The first issue is whether an *ad hoc* tribunal created by the Assembly is consistent with the broader purposes of the UN. This is manifestly the case based on Council practice of establishing COIs and *ad hoc* tribunals as a means of maintaining international peace and security.⁸⁷ The consistency is further reinforced by the ICTY Appeals Chamber decision in *Tadić*.⁸⁸ The ICTY was established pursuant to Council Resolution 827 on the basis that it “would contribute to the restoration and maintenance of peace.”⁸⁹ The Appeals Chamber noted that the Council had wide discretion under Article 39 to determine whether there existed a “threat to the peace, breach of the peace, or act of aggression.” This discretion was not unfettered, however, but must be “within the limits of the Purposes and Principles of the Charter.”⁹⁰ The Appeals Chamber deemed the existence of an international or internal armed conflict, which was present in the former Yugoslavia, to satisfy the requirement under Article 39.⁹¹ Although this dictum pertains to the powers of the Council acting within the purposes of the UN Charter, it is reasonable to conclude that the Assembly should also enjoy the same margin of discretion to determine the existence of a threat to international peace and security. The *UfP* resolution itself is underpinned by the imperative for the UN to act in order to maintain peace and security, even though the Council has the primary responsibility to

85. See, e.g., Frédéric Mégret, *A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice*, 21 LEIDEN J. INT'L L. 485, 485-6 (2008) (examining the history leading up to the creation of the Lebanon tribunal, where China and Russia abstained due to fear that a tribunal would encroach on Lebanese sovereignty).

86. G.A. Res. 52/135 (Feb. 27, 1998); G.A. Res. 55/95 (Feb. 28, 2001).

87. See, e.g., UNSC, *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, (Feb. 10, 1993) U.N. Doc. S/25274 (1993); UNSC, *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1125 (1994).

88. *Tadić*, *supra* note 54; Prosecutor v Milošević, Case No. IT-99-37-PT, Decision on Preliminary Motions (Nov. 8, 2001).

89. S.C. Res. 827 (May 25, 1993).

90. *Id.* at para. 29.

91. *Id.*

do so.⁹² Furthermore, as the ICJ in *Certain Expenses* observed, the UN Charter makes it “abundantly clear” that the Assembly shares responsibility for the maintenance of peace and security with the Council.⁹³

Second, this leads to the issue of whether it is within the Assembly’s powers to establish an *ad hoc* tribunal. The ICTY Appeals Chamber in *Tadić* noted that the creation of the tribunal by the Council was *intra vires* because of a specific provision in Article 41, which conferred power on the Council to “decide what measures not involving the use of armed force are to be employed to give effect to its decisions.”⁹⁴ Similarly, Article 22 of the UN Charter empowers the Assembly to “establish such subsidiary organs as it deems necessary for the performance of its functions.”⁹⁵ The problem with this specific power is its explicit reference to the Assembly’s “functions,” which, under a traditional understanding, do not extend to the creation of judicial bodies with coercive powers.⁹⁶ Within the text of the UN Charter, the Assembly’s functions are deliberative: it may “discuss,” “promote,” and “recommend.”⁹⁷ This view was confirmed somewhat by the ICJ in *Effect of Awards*, where the creation of the United Nations Appeal Tribunal (UNAT) could not be derived from Article 22, as the rendering of judicial decisions via a subsidiary organ was not a permissible function of the Assembly.⁹⁸ Furthermore, the ICTY Appeals Chamber in *Tadić* also noted that constructing the appropriate scope of powers possessed by an organ ultimately derives from the “internal division of power” within the UN.⁹⁹ From this view, the creation of a judicial organ with the capacity to make findings of criminal responsibility would exceed the Assembly’s deliberative functions.

While the decision of the ICTY Appeals Chamber in *Tadić* conforms to the principle of “specialty” in defining the limited scope of an organ’s powers, the UN’s judicial organ itself has shied away from declaring *ultra vires* teleological assertions of power by the principal UN organs. In *Reparations*, the ICJ found that “[u]nder international law, the Organi[z]ation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by *necessary implication*, as being essential to the performance of its duties.”¹⁰⁰ Thus, in considering whether peacekeeping forces outside of a Council mandate were valid UN expenses, the ICJ in *Certain Expenses* noted broadly that “when the Organization takes action

92. See, e.g., the text of Resolution 377, stating 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.” G.A. Res. 377 (V), *supra* note 14, at 10.

93. Expenses, *supra* note 47, at 163.

94. *Tadić*, *supra* note 54, ¶ 34.

95. U.N. Charter, art. 22.

96. BRUNO SIMMA ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 731-34 (3d ed. 2002).

97. U.N. Charter, arts. 11-17, 55.

98. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory opinion, 1954 I.C.J. Rep. 47, at 56.

99. *Tadić*, *supra* note 54, ¶ 28.

100. Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949, I.C.J. Rep. 174, 182-184 (emphasis added) [hereinafter *Reparations*].

which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.”¹⁰¹ The ICJ departed from a textual interpretation of the UN Charter where doing so would leave the UN “impotent in the face of an emergency situation.”¹⁰² The creation of a peacekeeping force, furthering international security, was thus *intra vires*.¹⁰³ In short, the ICJ has adopted a broad approach to implied powers as far as the acts of principal organs are concerned. Provided that the act falls within the purposes of the UN, the Assembly is deemed to have the power to advance that purpose.

This is further reinforced by the text and history of the *UfP* resolution, which provide relevant factors for interpreting the Assembly’s “functions” under Article 22 of the UN Charter.¹⁰⁴ It is a well-established principle of treaty interpretation that the text of a treaty should be read in light of subsequent practice within the treaty body.¹⁰⁵ In this respect, there is some practice of the Assembly assuming functions that go beyond the strictly discursive. Thus, as the ICTY Appeals Chamber in *Tadić* recognized, the Assembly did not need “military and police functions” to establish a peacekeeping force in 1956 under the *UfP* resolution.¹⁰⁶ The expansion of Assembly functions in the event that the Council fails to act is indeed contemplated in the text of Resolution 377, in that it “calls for possibilities of observation which would ascertain the facts and expose aggressors”¹⁰⁷ Thus, the Assembly has since investigated interstate acts of aggression and has used its powers to establish fact-finding subsidiary organs to investigate human rights violations, as in South Vietnam (1963), Mozambique (1973), Cambodia (1998), and Afghanistan (1998).¹⁰⁸ More recently, the creation of COIs by the HRC has contributed to the Assembly’s subsequent interpretation of the UN Charter and the determination of the powers of the Assembly and its subsidiary organs.

Still, the creation of these fact-finding subsidiary organs is quite different from the creation of an *ad hoc* tribunal with coercive powers to assert jurisdiction over events in a particular state and against its nationals. However, as it will be recalled from Section II above, the *UfP* resolution has been interpreted to encompass “strong” powers permitting the Assembly to recommend UN enforcement action. If the Assembly can recommend coercive measures of a military nature, then it should also be able to enforce its will against an individual accused of committing international crimes. Indeed, this same reasoning underpinned the expansion of the Council’s Chapter VII authority to include the creation of *ad hoc* tribunals as a form of enforcement

101. Expenses, *supra* note 47, at 168.

102. *Id.*, at 167.

103. Nigel White, *The UN Charter and Peacekeeping Forces: Constitutional Issues*, 3 INT’L PEACEKEEPING. 43, 45 (1996).

104. Vienna Convention on the Law of Treaties art. 31(1)(b), May 23, 1969, 1155 U.N.T.S. 331; Reparations, *supra* note 100, at 182.

105. *Id.*

106. *Tadić*, *supra* note 54, ¶38.

107. G.A. Res. 377 (V), *supra* note 14, at 10.

108. See generally Michael Kearney, *Humanitarian Action Through Legal Institutions*, in ROUTLEDGE HANDBOOK ON HUMANITARIAN ACTION (MacGinty & Peterson eds., 2015).

action.¹⁰⁹

The third and final issue is whether an Assembly-mandated *ad hoc* tribunal would possess mandatory powers to secure the cooperation of UN members in the investigation and prosecution of suspects. While a binding resolution is not a guarantee of cooperation, as recently indicated by the failure of states to enforce the ICC's arrest warrant for Omar Al Bashir, it does express an obligatory rule that may support further enforcement measures.¹¹⁰ A binding UN resolution also takes precedence, pursuant to Article 103 of the UN Charter, over competing international obligations that may otherwise hinder state cooperation with an *ad hoc* tribunal.

However, it is inconsistent with the text of the UN Charter to interpret the Assembly's powers as being capable of binding the members.¹¹¹ In the UN Charter, members are only bound by decisions of the Council and ICJ, with no equivalent provision for the Assembly.¹¹² Conversely, Assembly resolutions possess binding force with respect to internal organizational matters, such as budget apportionment and membership approval.¹¹³ Outside of this narrow category, resolutions are simply recommendatory, as was confirmed by the drafters of the UN Charter in rejecting the Philippine delegation's proposal to bestow legislative powers on the Assembly.¹¹⁴

Assembly resolutions may acquire binding legal effects over time, but this would require a long gestation period to occur. As Sloan argued, the presumption against Assembly resolutions being binding may be rebutted with practice.¹¹⁵ The UN Charter is a living instrument that is informed by subsequent practice, and thus it is not inconceivable that the Assembly could assume powers that were not originally contemplated at the drafting stage of the treaty.¹¹⁶ Indeed, given that the Assembly comprises all UN members, there is greater scope for the members to more directly and promptly express their authoritative interpretation of the UN Charter with respect to the Assembly's powers.¹¹⁷ By way of example, the power of the Assembly to determine which

109. See U.N. Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶28, U.N. Doc S/25704 (May 3, 1993). Furthermore, it is possible that the Assembly's *ad hoc* tribunal could be also justified on the basis that states pool their power to exercise universal jurisdiction and delegate this to the tribunal. See DPRK Report, *supra* note 16, at 362. The limitation of this approach, though, is that the nature of crimes within the *ad hoc* tribunal's statute would inevitably be limited to only those crimes that are identified to attract universal jurisdiction and thus may lack the flexibility inherent in *ad hoc* tribunals in being able to apply an appropriate normative regime.

110. On non-compliance with the ICC, see International Criminal Court, *Report of the International Criminal Court*, U.N. Doc. A/69/321 (Sep. 18, 2014).

111. John Dugard, *The Legal Effect of United Nations Resolutions on Apartheid*, 83 S. AFR. L. J. 44, 46-48 (1966) (including authorities cited there).

112. See U.N. Charter, arts. 25, 94.

113. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. Rep. 6, 50-51 (July 18). See also Dugard, *supra* note 111, at 46-48 (including authorities cited there).

114. Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782, 783 (1966).

115. F. Blaine Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1, 16 (1948).

116. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331; Reparations, *supra* note 100, at 174.

117. OSCAR SCHACHTER, *Law and the Process of Decision in the Political Organs of the United Nations*, in 109 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 171,

territories fall under Article 73 of the UN Charter, as former colonial territories, has received continuous support from UN members. This power arose from the need for one UN organ to determine the ambit of this treaty provision, with the Assembly being regarded as best positioned within the UN system to identify the right of a people to self-determination.¹¹⁸

While, in theory, the Assembly may be vested with authoritative competencies, the lack of any prior Assembly practice binding states to cooperate with international criminal tribunals would render contentious any assertion of such power upon the creation of an *ad hoc* tribunal. Unlike the rights of colonial peoples – grounded in customary law and possessing an *erga omnes* character – the Assembly would be taking the more profound step of compelling states to cooperate, even in the face of conflicting international obligations (such as the duty to respect immunities of state officials).¹¹⁹ In the absence of a more permissible cooperation regime as a matter of customary law, it is unlikely that any *ad hoc* tribunal established by the Assembly would possess mandatory powers. This outcome would also be consistent with *UfP* practice, as reflected in the ICJ Advisory Opinion *Certain Expenses*, where the ICJ referred to the Council as having a monopoly only on mandatory enforcement action, rather than on voluntary action that could be authorized by the Assembly.¹²⁰

Nevertheless, although an Assembly-mandated *ad hoc* tribunal would lack binding powers, *UfP* would remove a major impediment to cooperation – that of competing obligations to states whose nationals are wanted for trial in the tribunal. Action taken under *UfP* has been interpreted as authorizing conduct that would otherwise contravene international law, a point that is reflected in the view of Judge Lauterpacht, who noted that Assembly resolutions may “on proper occasions” provide a “legal authori[z]ation” for action by UN members.¹²¹ Accordingly, states that contributed to the Assembly voluntary enforcement action in Korea in 1950 were shielded from any legal responsibility under Article 2(4) of the UN Charter on the prohibition on the use of force. Similarly, and by way of example, if a state cooperated with an Assembly-mandated *ad hoc* tribunal, the state would be authorized to transfer foreign state nationals to the tribunal, even if in doing so it implicated conflicting rights of the other state.¹²²

In sum, the Assembly possesses the constitutional powers to establish an

180 (Hague Academy of International Law ed., 1963).

118. M.K. Nawaz, *Colonies, Self-Government and the United Nations*, INDIAN Y.B. INT’L AFF. 3 (1962).

119. On the need for significant recitation of Assembly resolutions to acquire legal force, see Samuel A. Bleicher, *The Legal Significance of Re-citation of General Assembly Resolutions*, 63 AM. J. INT’L L. 444, 457 (1969).

120. *Expenses*, *supra* note 47, at 163.

121. *Voting Procedure on Questions Relating to Reports and Petitions Concerning Territory of South-West Africa*, Advisory Opinion, 1955 I.C.J. Rep. 67, at 115 (June 7).

122. There is some recognition that inter-state obligations do not apply where a state national is surrendered to an international court with jurisdiction. See *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. Rep. 3, ¶ 33 (Feb. 14). Still, the customary scope of immunities remains controversial. See Michael Ramsden & Isaac Yeung, *Head of State Immunity and the Rome Statute: A Critique of the PTC’s Malawi and DRC Decisions*, 16 INT’L. CRIM. L. REV. 1 (2016).

ad hoc tribunal which could authorize states to take voluntary enforcement action. However, this tribunal would not be granted the power to render cooperation mandatory on states. It is possible that the Council could subsequently inject mandatory elements to the *ad hoc* tribunal, a solution noted previously by experts to address the lack of binding powers on hybrid tribunals.¹²³ However, given that the very premise of the Assembly acting is due to Council inaction, this occurrence is unlikely. Still, the lack of binding powers need not undermine the success of an Assembly-mandated tribunal, especially given that cooperation will turn on a host of factors, including the economic, social, and political environment of states. Indeed, given that the Assembly contains nearly a universal membership of states, its actions inherently assume a degree of legitimacy. As a result, the creation of a tribunal would provide a strong normative foundation for each member state to cooperate with.

V. CONCLUSION

This article surveyed some possible means for the Assembly to actively pursue the enforcement of international criminal law, be it through the establishment of an *ad hoc* tribunal under UN auspices, or by influencing action at the ICC. The article has been necessarily selective. There are other ways in which the Assembly could play a role in building diplomatic momentum, such as by using strong *UfP* powers to authorize trade or targeted sanctions against recalcitrant states or perpetrators. Further, the Assembly could encourage state engagement with an international criminal tribunal. It could also consider more fundamental aspects of the current relationship between the UN and the ICC, including a reform of the referral mechanism.

This article has served to test the relevance of *UfP* in a new post-Cold War era characterized by quite different circumstances, including its use to promote human rights and to enforce international criminal law. Although *UfP* was initially passed to deal with inter-state acts of aggression, it inspired subsequent Assembly action in a variety of fields, including upholding human rights and self-determination of peoples. Indeed, as noted, the Assembly's exercise of recommendatory powers, even in contravention of the text of Article 12, was certainly inspired by *UfP*. It has provided the basis for the UN plenary organ to assume a greater role in conducting investigations and pronouncing on the existence of atrocity crimes within a state, even when the Council is acting concurrently on the relevant situation. The article has also acknowledged that the more expansive aspects of *UfP*, particularly its ability to authorize voluntary enforcement action, have remained dormant for decades. Despite this, the article has identified ways in which the invocation of *UfP* may make a tangible legal difference, in particular via the creation of an *ad hoc* tribunal vested with coercive powers. Further, the rationale underpinning *UfP* may also provide inspiration for plenary action that serves to modify an international state of affairs. This can be seen from examples of Assembly

123. Rep. of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, ¶ 145, U.N. Doc. A/53/850 (Mar. 16, 1999).

resolutions regarding Palestine and Crimea, which originally arose from Council deadlock but subsequently serve to provide a basis for the ICC’s exercise of jurisdiction.

Nonetheless, it is important to acknowledge the challenges and limitations faced in ensuring continued and enhanced UN plenary activism in the future. There is the need to retain cohesion in the coalition of states that have sought to address the impunity gap in the UN plenary body; this includes retaining the active engagement of the major states that have been instrumental in forging coalitions in support of country-specific resolutions on atrocity crimes. In addition, it would be important to mitigate potential regional fragmentation that could arise from challenges to the ICC’s legitimacy. However, despite these concerns, it is critical that states recognize the latent potential for the Assembly to perform analogous functions of the Council, so as to unite for peace and prevent impunity.