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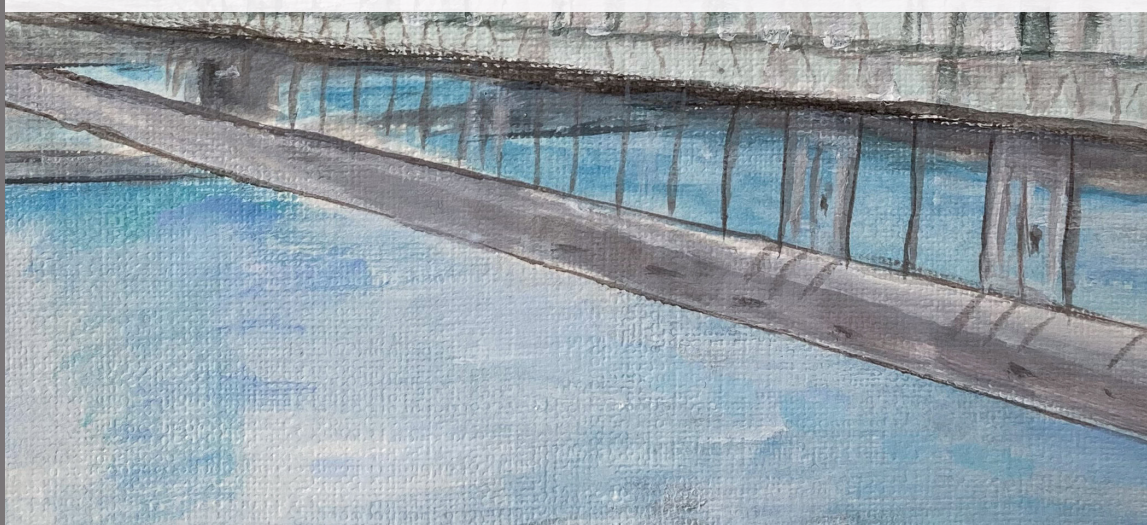
The Past, Present and Future of the International Criminal Court

Alexander Heinze and Viviane E. Dittrich (editors)



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Front cover: *An artistic rendering of the permanent premises of the International Criminal Court in The Hague, by Katrin Heinze, 2021.*

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General Assembly Referral to the International Criminal Court

Fergal Gaynor*

9.1. Introduction

"In the face of blatant inhumanity, the world has responded with disturbing paralysis", said the United Nations ('UN') Secretary-General in late October 2015, following a round of vetoes at the UN Security Council ('Security Council') on the situation in Syria, which, *inter alia*, prevented referral of Syria to the ICC. "This flouts the very *raison d'être* of the United Nations", he added.[1] The future of the International Criminal Court ('Court' or 'ICC') in the decades ahead depends to some degree on whether the ICC's Assembly of States Parties ('ASP') decides to amend the Rome Statute of the International Criminal Court ('ICC Statute')[2] to facilitate referral of situations to the Court by the UN General Assembly. This turns on the legal question of whether the General Assembly has authority under the UN Charter ('Charter') to refer crimes committed on the territory of an ICC non-party State to the ICC for investigation and prosecution. If the General Assembly has such authority, a two-thirds majority of the ICC's States Parties could amend the ICC Statute to facilitate referral by the General Assembly.[3]

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1 International Committee of the Red Cross ('ICRC'), "World at a Turning Point: Heads of UN and Red Cross Issue Joint Warning", 30 October 2015.

2 Rome Statute of the International Criminal Court, 17 July 1998 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

3 Any State Party may propose an amendment to the ICC Statute. The adoption of an amendment is by consensus, failing which amendment requires a two-thirds majority of States Parties (Article 121 of the ICC Statute, *ibid.*).

The ICC Statute currently envisages referral of crimes on the territory of non-party States only by the Security Council.[4] Vetoes by permanent members of the Security Council have prevented referral of large-scale atrocity crimes to the ICC,[5] against the express wishes of a great majority of members of the General Assembly.

Following repeated instances of Security Council inaction on accountability, and in the absence of meaningful progress on Security Council reform, creative responses have emerged. Acting through the General Assembly and the Organisation for the Prohibition of Chemical Weapons ('OPCW'), dozens of States from all parts of the world have taken historic steps to promote accountability in the face of Security Council inaction; these are discussed below. But there has been little effort to reassess the Security Council's exclusive function, in Article 13 of the ICC Statute, to refer a situation in a non-party State to the ICC. In particular, there has been little discussion of whether General Assembly referral would be *intra vires* and therefore might provide a legitimate basis for the exercise of the Court's jurisdiction. This chapter therefore aims to address the legal question[6] of whether the General Assembly has power to refer under the Charter.

ICC States Parties will be unlikely to approve a new basis for exercise of jurisdiction unless they are persuaded that General Assembly referral does not unlawfully invade on the Security Council's powers under the Charter. Any amendment of the ICC Statute to facilitate General Assembly referral should observe the principle that the Security Council has primary, and the General Assembly has subsidiary, responsibility for peace and security under the Charter. General Assembly referral should be additional to, rather than a replacement of, the Security Council's existing referral func-

4 The ICC Statute envisages the exercise of jurisdiction over war crimes, crimes against humanity, and genocide where a State Party refers crimes committed in a State Party or by nationals of a States Party; where the Security Council refers crimes committed in, or by nationals of, any State; or where the Prosecutor decides *proprio motu* to exercises jurisdiction over crimes in a State Party or by nationals of a State Party, Articles 12(2) and 13 of the ICC Statute, see above note 2. Specific provisions address the Court's jurisdiction over the crime of aggression, Articles 15*bis* and 15*ter* of the ICC Statute, see above note 2.

5 See Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, Cambridge University Press, 2020.

6 But, as the International Court of Justice has pointed out, "most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise", ICJ, *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, 20 July 1962, p. 8 ('Certain Expenses') (http://www.legal-tools.org/doc/72e883/).

tion under ICC Statute Article 13(b).[7] It should leave unaffected the Security Council's exclusive function to defer an ongoing investigation or prosecution under Article 16,[8] and its exclusive competence over the crime of aggression under Articles 15*bis* and 15*ter* of the ICC Statute.[9] To ensure it is adopted by the margin required by Article 18(2) of the UN Charter, a General Assembly referral should be passed by two-thirds of the States voting. To ensure the solidity of a General Assembly referral as a basis for the exercise of jurisdiction, the ICC's States Parties should invite the International Court of Justice ('ICJ'), as the primary interpreter of the Charter, to issue an advisory opinion on the lawfulness of the first referral to the ICC approved by a two-thirds majority of the General Assembly.[10]

An amended Article 13 of the ICC Statute would enable the Court to exercise jurisdiction where "a situation in which one or more acts of genocide, crimes against humanity or war crimes appears to have been committed is referred to the Prosecutor by the General Assembly in a decision passed by a two-thirds majority of its members present and voting". States Parties would also have to approve consequential amendments to other Articles of the ICC Statute.[11]

The structure of this chapter is as follows. It addresses first the inadequacy of the existing Security Council referral function, and responses to Security Council inaction. It focuses on steps by the OPWC and the General Assembly to promote accountability for chemical weapons attacks, and massive crimes in Syria and Myanmar, and on the decisions of two Pre-Trial Chambers of the ICC to uphold the Court's jurisdiction concerning deportation of Rohingya from Myanmar to Bangladesh. The chapter goes

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7 Article 13(b) of the ICC Statute, see above note 2, permits the Court to exercise jurisdiction over "a situation in which one or more [crimes referred to in Article 5] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations".

8 Article 16 of the ICC Statute, see above note 2:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a Resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

9 These Articles envisage the participation of the Security Council in determining whether a State has committed an act of aggression, and in determining whether an investigation into it should proceed.

10 Article 119(2) of the ICC Statute, see above note 2, envisages referral to the ICJ of disputes between States Parties relating to the interpretation or application of the ICC Statute.

11 Consequential amendments, providing for referral by the General Assembly, would be necessary to Articles 87(7), 115(b), 53(2)(c) and 87(5)(b) of the ICC Statute, see above note 2.

on to assess whether the General Assembly has an implied power under the UN Charter to refer crimes in a non-consenting State to the ICC. The chapter addresses the strong presumption of legality that attaches to all actions approved by a two-thirds majority of by the General Assembly. It discusses the purposive interpretation of the Charter which underlies the legal basis of the Security Council's power to refer situations to the ICC and to establish international criminal tribunals, and assesses whether a similarly purposive interpretation of the General Assembly's powers could embrace referral to the ICC. The chapter addresses the growing acceptance of the duty, on all UN Member States, to end impunity for genocide, war crimes, and crimes against humanity by effective investigation and prosecution. It addresses briefly the obvious practical difficulties when investigating and prosecuting crimes concerning a non-consenting State: securing access to witnesses, documentary evidence, and fugitives. It argues that the presence or absence of Chapter VII powers is not necessarily determinative of the success of an international investigation. It concludes with a brief overview of the safeguards in the UN Charter and the ICC Statute to address the concern that the General Assembly might refer unmeritorious situations to the ICC.

9.2. The Necessity for Change: The Inadequacy of the Security Council's Referral Function

The Security Council referral function is not working as its drafters intended. The Council has referred two situations to the ICC: Darfur and Libya. But its failure to take Chapter VII enforcement action in those two situations to secure the arrest of fugitives and the delivery of evidence has drawn criticism from the ICC Prosecutor,[12] a Pre-Trial Chamber,[13] and

[12] See, for example, ICC-OTP, "Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council (2005)", 13 December 2016, paras. 19–22:

> I can only underscore the necessity of this Council taking swift and concrete action to ensure compliance with all arrest warrants against the fugitives in Darfur situation. This includes action against Sudan for its continued and open defiance of the Court's orders and Resolution 1593. The Pre-trial Chamber has now issued 13 decisions finding non-compliance and/or requesting for appropriate action to be taken against Sudan and States Parties for failing to arrest Mr Al-Bashir and other fugitives. […] It is not enough for Council Members to continue calling for support for the Court. Such calls have to be matched by concrete action.

[13] "In the absence of follow-up actions on the part of the Security Council any referral to the Court under Chapter VII of Charter of the United Nations would become futile and incapable of achieving its ultimate goal of putting an end to impunity", ICC, *Prosecutor v. Omar*

some States Parties.[14] The Council has refused to permit the UN to refund the Court for expenses incurred by the two referrals.[15]

But it is the Council's refusal to refer obvious situations of atrocity crimes to the ICC that is the most striking indicator of inaction. Between October 2011 and April 2018, 12 Security Council resolutions relating to Syria were vetoed. These included draft resolutions intended to refer Syria to the ICC, and to secure accountability for the use of chemical weapons in Syria.[16] It has been argued that some vetoes may have played a role in preventing an uncontrolled escalation of hostilities in Syria.[17] But the General Assembly criticized the Security Council's inability to act in the face of massive crimes by Syrian authorities. In February 2012, the General Assembly "[s]trongly condemn[ed]", by overwhelming majority, "the continued widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities".[18] In August 2012, the General Assembly issued a rare criticism of the Security Council, "deploring the failure of the Security Council to agree on measures to ensure the compliance of Syrian authorities with its decisions."[19]

Hassan Ahmad Al-Bashir, Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09, para. 17 (http://www.legal-tools.org/doc/a09363/).

14 The Netherlands, for example, stated:

> It is the responsibility of the Council to follow up on its referrals. […] [W]e feel very strongly that the Council should discuss any findings of non-cooperation. The Council should determine which of the tools it has at its disposal for the most appropriate response. […] But if the Council does not take action on non-compliance, we feel that the credibility and reputation of the Security Council is damaged.

The Netherlands, "Statement by H.E. Karel J.G. van Oosterom, Permanent Representative of the Kingdom of the Netherlands to the United Nations in New York", 6 July 2018.

15 Expenses incurred due to those referrals of have been borne by the ICC States Parties. Article 115(b) of the ICC Statute, see above note 2, envisages that the Court would receive funds from the UN "in particular in relation to the expenses incurred due to referrals by the Security Council."

16 UN News, "Security Council fails to adopt three resolutions on chemical weapons use in Syria", 10 April 2018.

17 See Philippa Webb, "Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria", in *Journal of Conflict & Security Law*, 2014, vol. 19, no. 3, pp. 471–488.

18 The situation in the Syrian Arab Republic, UN Doc. A/RES/66/253, 21 February 2012 (http://www.legal-tools.org/doc/4z6anh/).

19 The situation in the Syrian Arab Republic, UN Doc. A/RES/66/253 B, 7 August 2012 (http://www.legal-tools.org/doc/7wwl6y/).

The concern that the Security Council will lose credibility and effectiveness due to overuse of the veto has been voiced by three of its permanent members. The US representative to the UN warned 2015 that repeated vetoes would lead to efforts to have atrocities investigated elsewhere.[20] The UK warned of consequences for the standing of the Security Council.[21] France has long argued that the five permanent members should adopt a code of conduct requiring restraint in the use of the veto.[22] The UN Secretary-General emphasized the Security Council's responsibility to hold accountable those responsible for crimes in Syria, and decried its inability to do so.[23]

In the medium term, it appears likely that at least one permanent member will veto referral of a situation to the ICC against the wishes of a significant majority of UN Member States.

9.3. Responses to Security Council Inaction

Security Council paralysis on accountability for atrocity crimes has led to creative responses. A hundred and nineteen States have pledged to support

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[20] The US permanent representative to the UN, Samantha Power, said that the US and other countries had increasingly been going elsewhere to have atrocities investigated, and that a "forum-shopping" trend was likely to continue, Julian Borger and Bastien Inzaurralde, "Russian vetoes are putting UN security council's legitimacy at risk, says US", in *The Guardian*, 23 September 2015:

> It's a Darwinian universe here. If a particular body reveals itself to be dysfunctional, then people are going to go elsewhere […] And if that happened for more than Syria and Ukraine and you started to see across the board paralysis [...] it would certainly jeopardise the security council's status and credibility and its function as a go-to international security arbiter.

[21] The United Kingdom representative to the UN, Matthew Rycroft, said: "Syria is a stain on the conscience of the security council. I think it is the biggest failure in recent years, and it undoubtedly has consequences for the standing of the security council and indeed the United Nations as a whole", *ibid*.

[22] France, "Déclaration de M. François Hollande, Président de la République, sur les défis et priorités de la communauté internationale notamment de l"ONU", 24 September 2013.

[23] United Nations, "Deputy Secretary-General 'Pleads' with Security Council Members to Set Aside Differences, End Syrian People's 'Long Nightmare'", 22 May 2014, DSG/SM/776-SC/11408:

> The Security Council has an inescapable responsibility [to bring accountability in Syria] [...] For more than three years, this Council has been unable to agree on measures that could bring an end to this extraordinarily brutal war [...] If members of the Council continue to be unable to agree on a measure that could provide some accountability for the ongoing crimes, the credibility of this body and of the entire Organization will continue to suffer.

Security Council action aimed at preventing or ending crimes against humanity, war crimes or genocide.[24] The demise of the OPCW-UN Joint Investigative Mechanism ('JIM') led to an expansion of the OPCW's mandate. The JIM produced seven detailed reports identifying perpetrators of chemical weapons attacks in Syria before its mandate came to an end, due to veto at the Security Council, in October 2017. In June 2018, the OPCW States Parties, by large majority, approved a resolution in which they regretted that the JIM's mandate had not been renewed, and directed the OPCW Secretariat to "put in place arrangements to identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic".[25] In September 2018 and in November 2019, two ICC Pre-Trial Chambers upheld the Court's jurisdiction to scrutinize crimes in Myanmar that contained an element physically committed in Bangladesh.[26]

The most expansive exercise of the General Assembly's powers, in the face of Security Council paralysis, was its establishment of investigative mechanisms for Syria and Myanmar with unprecedented reach. In December 2016, the General Assembly created an independent, impartial in-

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[24] Nine of the 15 members of the Security Council in June 2018 had signed the Code of Conduct. Signatories pledge:

> to support timely and decisive action by the Security Council aimed at preventing or ending the commission of genocide, crimes against humanity or war crimes [and] to not vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, or to prevent such crimes.

Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, UN Doc. A/70/621-S/2015/97814, 14 December 2015 (http://www.legal-tools.org/doc/udgscv/); Accountability, Coherence and Transparency Group, "Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes", 23 October 2015 (available on the Global Centre for the Responsibility to Protect's web site). As of January 2019, the Code of Conduct has been signed by 117 member states and two observers. Permanent Mission of Liechtenstein to the United Nations, "List of Signatories to the ACT Code of Conduct", 20 June 2019 (available on the Global Centre for the Responsibility to Protect's web site).

[25] Organization for the Prohibition of Chemical Weapons, Decision: Addressing the Threat from Chemical Weapons Use, Resolution C-SS-4/DEC.3, 27 June 2018 (http://www.legal-tools.org/doc/lmqyd4/).

[26] ICC, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37 (http://www.legal-tools.org/doc/73aeb4/); ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 4 November 2019, ICC-01/19-27 (http://www.legal-tools.org/doc/kbo3hy/).

vestigative mechanism for Syria ('Syria Mechanism').[27] The UN Human Rights Council, a subsidiary body of the General Assembly, created a similar mechanism for Myanmar ('Myanmar Mechanism') in September 2018.[28] The mechanisms have no authority to arrest or prosecute. But their founding resolutions contain identical wording requiring them "to collect, consolidate, preserve and analyse evidence", and to "prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over"[29] serious crimes in those States, in accordance with international law. In distinguishing the new Syria Mechanism's functions from the existing Commission of Inquiry for Syria, the UN Secretary-General said:

> The Mechanism has an explicit nexus to criminal investigations, prosecutions, proceedings and trials that is not within the mandate of the Commission. Specifically, the Mechanism is required to prepare files to assist in the investigation and prosecution of the persons responsible and to establish the connection between crime-based evidence and the persons responsible, directly or indirectly, for such alleged crimes, focusing in particular on linkage evidence and evidence pertaining to *mens rea* and to specific modes of criminal liability. In essence, the Mechanism has a *quasi-prosecutorial function* that is beyond the scope of the Commission's mandate.[30]

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27 In doing so, the General Assembly noted "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", International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/RES/71/248, 21 December 2016, p. 2 ('UNGA Resolution 248') (http://www.legal-tools.org/doc/fecaf0/).

28 Situation of human rights of Rohingya Muslims and other minorities in Myanmar, UN Doc. A/HRC/RES/39/2, 3 October 2018 ('UNHRC Resolution 39/2') (http://www.legal-tools.org/doc/0917d7/).

29 UN General Assembly Resolution 248, see above note 27 and Human Rights Council Resolution 39/2, see above note 28.

30 Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/71/755, 19 January 2017, para. 32 (emphasis added) (http://www.legal-tools.org/doc/a0cd85/).

Both mechanisms were established by comfortable majorities. The General Assembly approved the establishment of the Syria Mechanism by 105 votes to 15 (with 52 abstentions) ,[31] and welcomed the establishment of the Myanmar Mechanism by a vote of 136 to eight (with 22 abstentions).[32] Russia has argued that the Syria Mechanism should have been established either with the consent of Syria or by the Security Council acting under Chapter VII.[33] Its positions on the issue have attracted little support. It appears to be now widely accepted that the General Assembly has the authority to investigate human rights abuses in a non-consenting State, by and against its nationals, and to determine who is responsible.

But none of these initiatives would have been necessary if the General Assembly had referred the situations in question – Syria and Myanmar – to the ICC. I now address whether the General Assembly has an implied power under the Charter to do so.

9.4. The General Assembly's Power to Refer a Situation to the ICC

The General Assembly has a well-recognized power to take non-military action in respect of peace and security over non-consenting States, as evidenced by its establishment of numerous commissions of inquiry and fact-finding missions relating to such States, including the mechanisms for Syria and Myanmar. Plainly, it is widely accepted that the General Assembly has power under the Charter to grant jurisdiction to subsidiary bodies to investigate nationals of a non-consenting State for participation in crimes against humanity, war crimes and genocide. Nevertheless, it is also generally assumed that only the Security Council can empower an international tribunal, or the ICC, to *prosecute* nationals of a non-consenting state.[34] This

[31] Two weeks previously, in a Resolution adopted by a vote of 122 in favour, 13 against, and 36 abstentions, the Assembly expressed grave concern at the continued deterioration of the devastating humanitarian situation in Syria and demanded "rapid, safe, sustained, unhindered and unconditional humanitarian access throughout the country for UN […] and all humanitarian actors". This came days after China and Russia vetoed a similar Resolution at the UN Security Council demanding a ceasefire in Aleppo. UN News, "'Outraged' UN Member States demand immediate halt to attacks against civilians in Syria", 9 December 2016.

[32] UN News, "General Assembly Adopts 16 Texts Recommended by Fifth Committee, Concluding Main Part of Seventy-Third Session", 22 December 2018.

[33] *Note verbale* dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. A/71/793, 14 February 2017(http://www.legal-tools.org/doc/uu92l0/).

[34] Alex Whiting, for example, writes:

understanding – that the General Assembly may delegate the power to investigate, but it is only the Security Council that may delegate the power to prosecute, nationals of a non-consenting State – is not articulated in any decision of the ICJ or ICC. Nor does it necessarily follow from a literal or a purposive interpretation of the Charter. An alternative view, to the effect that the Charter neither contemplates nor precludes referral by the General Assembly has been articulated by commentators[35] and by the Commission of Inquiry for the Democratic People's Republic of Korea ('DPRK').

Proponents of this view argue that if the Security Council fails to refer a situation to the ICC or set up an *ad hoc* tribunal, the General Assembly can 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.[36]

The General Assembly generally does not identify the precise basis for its actions in its resolutions concerning matters of international peace and security. What is clear, from law and practice, is that it has extensive powers to take action. The leading case on the implied powers of the General Assembly on matters of peace and security is *Certain Expenses*.[37] There, the ICJ conducted "an examination of the respective functions of the General Assembly and of the Security Council under the Charter, particularly with respect to the maintenance of international peace and security".[38]

Only the Security Council has the authority under the UN Charter to establish tribunals with compulsory legal authority over individuals or states. The General Assembly cannot itself create a body that can prosecute and so it went as far as it could within its mandate.

Alex Whiting, "An Investigation Mechanism for Syria: The General Assembly Steps into the Breach", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 231–237.

35 Michael Ramsden and Tomas Hamilton, "Uniting against impunity: the UN General Assembly as a catalyst for action at the ICC", in *International and Comparative Law Quarterly*, 2017, vol. 66, no. 4, pp. 893–921.

36 Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, UN Doc. A/HRC/25/CRP.1, 7 February 2014, para. 1201 (http://www.legal-tools.org/doc/1177a4/). The Commission cited as examples of the General Assembly pooling the powers of its members the establishment of the ECCC and the SCSL. Both, however, were created with the consent of the state concerned.

37 ICJ, Certain Expenses, see above note 6.

38 *Ibid.*, p. 167.

From the ICJ's examination, certain conclusions emerge. First, the Security Council's authority in respect of international peace and security is primary and not exclusive: the General Assembly has significant secondary authority. The authority granted by the UN Member States to the Security Council has the express aim of securing "prompt and effective action". The ICJ held:

> The responsibility conferred [on the Security Council by Article 24] is "primary", not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action". To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor. The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security.[39]

A logical corollary is that, when the Security Council does not carry out prompt and effective action on matters of peace and security, it is failing to fulfil its duty under the Charter; the General Assembly's residual powers permit it to act. This is reinforced by the fact that every member of the General Assembly is required to act in accordance with the purposes of the UN as a whole. These purposes include "to take effective collective measures for the prevention and removal of threats to the peace" and "to achieve international co-operation in […] promoting and encouraging respect for human rights and for fundamental freedoms for all for all without distinction as to race, sex, language, or religion".[40] The General Assembly in 2006 reaffirmed its authority on questions of international peace and security, and its ability to take "swift and urgent action".[41]

Much of what the General Assembly does is justified by the doctrine of implied powers: the United Nations "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

[39] *Ibid.*, p. 195.

[40] Charter of the United Nations, 24 October 1945, Article 1 ('UN Charter') (http://www.legal-tools.org/doc/6b3cd5/).

[41] Revitalization of the General Assembly, UN Doc. A/RES/60/286, 9 October 2006, Annex, para. 1 (http://www.legal-tools.org/doc/16z69h/).

its duties".[42] In *Certain Expenses*, the ICJ confirmed that peacekeeping is a proper exercise of those implied powers.[43]

A key question is whether referral to the ICC is also a proper exercise of the General Assembly's implied powers. The ICJ relied upon Articles 11 and 14 in *Certain Expenses* as a legitimate basis for extensive action by the General Assembly. The ICJ interpreted Charter Article 11(2) – which on its face is limited to discussion and recommendation[44] – as permitting the General Assembly to take "*action*" on matters of international peace and security, including peacekeeping. The ICJ's interpretation is worth considering in full, as it is directly relevant to considering whether referral to the ICC constitutes coercive or enforcement 'action' which is solely within the province of the Security Council, or is organizational activity 'action' in connection with the maintenance of international peace and security which the General Assembly may undertake:

> The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of

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42 ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, 11 April 1949, p. 184 (http://www.legal-tools.org/doc/f263d7/).

43 Peacekeeping lacks explicit authorization in the Charter. Its legal basis is an example of a progressive, purposive interpretation of the Charter.

> The starting point for any discussion of the legal framework of UN peace operations is that the power to undertake or create such operations is not written anywhere in the UN Charter. Instead, the legal basis for peacekeeping is most commonly considered to be located in the implied powers of the organisation. One scholar argues that it can be construed as a provisional measure under Article 40, whereas Christine Gray argues that "the debate seems to be without practical significance". Nonetheless, it does mean that the specific rules on peace operations are not set down in the Charter; rather, they have evolved through peacekeeping doctrine over the past six decades.

Lindsey Cameron, "The Legal Basis for Peacekeeping/Peace Operations", in *The Privatization of Peacekeeping: Exploring Limits and Responsibility under International Law*, Cambridge University Press, 2017, pp. 51–52 (internal citations omitted).

44 Article 11(2) of the UN Charter, see above note 40, reads:

> The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council […] and […] may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

recommendations to States or to the Security Council, or to both, to organize peacekeeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10 or Article 14, except as limited by the last sentence of Article 11, paragraph 2. This last sentence says that when "action" is necessary the General Assembly shall refer the question to the Security Council. The word "action" must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". If the word "action" in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.

The practice of the Organization throughout its history bears out the foregoing elucidation of the term 'action' in the last sentence of Article 11, paragraph 2. Whether the General Assembly proceeds under Article 11 or under Article 14, the implementation of its recommendations for setting up commissions or other bodies involves organizational activity 'action' in connection with the maintenance of international peace and security. Such implementation is a normal feature of the functioning of the United Nations. Such committees, commissions or other bodies or individuals, constitute, in some cases, subsidiary organs established under the authority of Article 22 of the Charter. The functions of the General Assembly for which it may establish such subsidiary organs include, for example, investigation, observation and supervision,

> but the way in which such subsidiary organs are utilized depends on the consent of the State or States concerned.[45]

The Charter Article 12 requirement that the General Assembly refrain from making any recommendation "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter" has narrowed considerably in practice; that practice was upheld as lawful by the ICJ in the *Wall* Advisory Opinion.[46] Both entities may lawfully deal in parallel with the same situation.[47] This means that the General Assembly could refer a situation to the ICC while the Security Council is seized of the same matter.

Charter Article 14 is another source for the extensive implied powers which the General Assembly enjoys. It reads:

> The General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

The ICJ in *Certain Expenses* clarified that the 'measures' that the General Assembly can lawfully take under Article 14 include *actions* falling short of coercive action:

> The word 'measures' implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which,

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45 ICJ, Certain Expenses, see above note 6, pp. 164–165.

46 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 9 July 2004, paras. 27–28 ('Wall Advisory Opinion') (http://www.legal-tools.org/doc/e5231b/).

47 The ICJ said, *ibid*.:

> [T]here has been 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. […] It is often the case 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. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.

> exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory.[48]

The kind of 'action' taken by the General Assembly and its subsidiary organs has widened considerably since *Certain Expenses.* The General Assembly now routinely takes, with overwhelming support from its members, action to investigate mass atrocities in non-consenting states by nationals of those states. These include the establishment of entities with explicit mandates to identify those responsible, and to build criminal cases against them, such as the Syria Mechanism and Myanmar Mechanism.

Critically, the target state is not *obliged* to co-operate with such investigations. They are non-coercive actions. Referral of a non-consenting State by the ICC is similarly non-coercive: the target state would have no legal obligation to comply. The only States required to comply with warrants of arrest and request for access to evidence issued by the ICC in such a situation would be the ICC's 123 States Parties. 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.

The "Uniting for Peace" Resolution,[49] in which the General Assembly authorized military force against a non-consenting State, is of limited relevance to the question of whether the General Assembly can refer a situation to the ICC. The Resolution now occupies an uncertain position, arguably in the backwaters of international law, and is viewed by many as an unlawful encroachment on the Security Council's exclusive competence to authorize the use of military force.[50] But this should not blind us to its value in interpreting the General Assembly's duties and powers under the

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48 ICJ, Certain Expenses, see above note 6, p. 163.

49 Uniting for peace, UN Doc. A/RES/377(V)A-C, 3 November 1950 ('UNGA Resolution 377 A(V)') (http://www.legal-tools.org/doc/1a21a9/).

50 See Cóman Kenny, "Responsibility to recommend: the role of the UN General Assembly in the maintenance of international peace and security", in *Journal on the Use of Force and International Law*, 2016, vol. 3, no. 1, pp. 7–16; Andrew J. Carswell, "Unblocking the Security Council: The Uniting for Peace Resolution", in *Journal of Conflict and Security Law*, 2013, vol. 18, pp. 455–456. Michael Ramsden, ""Uniting for Peace" and Humanitarian Intervention: The Authorising Function of the UN General Assembly", in *Washington International Law Journal*, 2016, vol. 25, no. 2, p. 267.

Charter on measures *not* including armed force.[51] In particular, the preamble to the "Uniting for Peace" Resolution remains relevant:

> [F]ailure 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 [...] in particular […] such failure does not 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.[52]

9.5. The Presumption of Legality of Action by the General Assembly

A General Assembly resolution passed by a two-thirds majority, referring a situation to the ICC, would benefit from the ICJ's doctrine of presumption of legality of decisions by UN bodies. If it were asked to provide an advisory opinion on the matter, the ICJ would no doubt consider the evolving practice of the General Assembly regarding the granting of investigative jurisdiction to subordinate bodies over crimes by nationals of non-consenting States on the territories of those States. The ICJ would also consider Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which permits "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". The ICJ in the *Namibia* Advisory Opinion upheld the lawfulness of a Security Council practice that was not in the Charter but that "has been generally accepted by Members of the United Nations and evidences a general practice of that Organization".[53] In the *Wall* Advisory Opinion, the ICJ upheld the lawfulness of "the accepted practice of the General Assembly, as it has evolved".[54] In brief, the ICJ could well hold that referral to the ICC by the General Assembly benefits from the presumption of legality. Michael Ramsden writes:

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[51] See also Graham Melling and Anne Dennett, "The Security Council veto and Syria: responding to mass atrocities through the 'Uniting for Peace' resolution", in *Indian Journal of International Law*, 2017, vol. 57, no. 3–4, pp. 285–307.

[52] Preamble to UNGA Resolution 377 A(V), see above note 49.

[53] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, 21 June 1971, para. 22 ('*Namibia* Advisory Opinion') (http://www.legal-tools.org/doc/d0effa/).

[54] Wall Advisory Opinion, paras. 27–28, see above note 46.

> [I]t is very unlikely that the ICJ would cast doubt on the legality of an Assembly Resolution given the broad approach it has taken to implied powers. Such unlikelihood is further reinforced by the deferential standard of review adopted by the ICJ. A Resolution would have to be "manifestly *ultra vires*" to be invalidated by the ICJ. As Judge Fitzmaurice noted when reviewing the validity of [Uniting for Peace] expenditure, "only if the invalidity of the expenditure was apparent on the face of the matter, or *too manifest* to be open to reasonable doubt, would such a *prima facie* presumption [of validity] not arise". A Resolution that violated the *jus cogens* is indicative of a fundamental defect.[55]

A General Assembly referral of a situation to the ICC, approved by two-thirds majority of States present and voting, would also enjoy widespread legitimacy. A hundred and ninety-three sovereign States can vote at the General Assembly. While it is not perfectly representative (India's 1.39 billion people have one General Assembly vote, as do Tuvalu's 12,000 people), it remains the world's most representative body. The will of humanity is surely more accurately reflected in a General Assembly resolution approved by over a hundred sovereign States from all continents than in a veto by a single State at the Security Council.

In summary, the arguments in favour of a General Assembly power to refer a situation to the ICC are as follows: the General Assembly has secondary authority under the Charter in respect of peace and security, which becomes particularly relevant when the Security Council fails to act. It may lawfully take non-coercive action to ensure that the UN can take effective collective measures to prevent and remove threats to the peace, and to secure respect for human rights and fundamental freedoms. It may act in parallel with the Security Council. The Charter, which is a growing, living document, nowhere distinguishes between the power to investigate and the power to prosecute. It does not state, nor suggest, that the General Assembly can grant jurisdiction to a subordinate body to investigate but not to prosecute, while the Security Council can both investigate and prosecute. The General Assembly's power to grant jurisdiction to subordinate entities to investigate crimes by citizens of a nonconsenting state on the territory of that State, and to attribute responsibility to those most responsible, is widely accepted. A General Assembly resolution passed by two-thirds majority is a powerful and legitimate basis for the grant of criminal jurisdiction both

[55] Ramsden, 2016, see above note 50.

to investigate *and prosecute* any person responsible for participation in mass atrocities. Such a resolution benefits from a presumption of legality. The fairest way to confirm such legality would be for the General Assembly to invite the ICJ to issue an advisory opinion on its first resolution referring a situation to the ICC.

9.6. The Purposive Interpretation of the Charter which Underlies the Security Council's Powers in International Criminal Justice

Since its inception, the Charter has been interpreted by the ICJ and by the organs of the UN itself in a purposive manner. Broadly speaking, the doctrine of purposive interpretation requires that, where a treaty is capable of alternative interpretations, the interpretation that best achieves its intended purpose should be preferred, and any interpretation that frustrates the intended purpose of the treaty should be rejected. The notion is reflected in the "object and purpose" limb of Article 31 of the Vienna Convention on the Law of Treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[56]

While the "the precise nature, role and application of the concept of 'object and purpose' in the law of treaties present some uncertainty",[57] a purposive interpretation of the Charter is what permits the UN's vast peacekeeping operations to function, and the work of fact-finding missions probing crimes in non-consenting States to continue. A purposive interpretation allowed the Security Council to establish international criminal tribunals, and to refer situations to the ICC, as we now examine.

The Charter is silent on international criminal justice. There is no provision to the effect that the Security Council, and only the Security Council, can compel nationals of a non-consenting State to be subject to criminal jurisdiction. Nor does the Charter suggest that the permanent members of the Security Council have exclusive authority over the decision to vest criminal jurisdiction over serving heads of state and government of a non-consenting state. Nowhere does the Charter provide that the Security Council can investigate and prosecute international crimes, but the General Assembly can only investigate them. All these are now widely ac-

[56] Vienna Convention on the Law of Treaties, 23 May 1969, Article 31 (http://www.legal-tools.org/doc/6bfcd4/).

[57] Richard K. Gardiner, *Treaty Interpretation*, Oxford University Press, New York, 2008, p. 190.

cepted interpretations of the Charter; none would have seemed obvious in 1946.

It is worth recalling what the Charter does say on the matter. Chapter VII sets out the powers of the Security Council to take action in respect of any threat to the peace, breach of the peace, or act of aggression. It permits the Security Council to authorize "measures not involving the use of armed force",[58] failing which it can authorize the use of armed force, to give effect to its decisions. The measures not involving armed force, set out in Article 41, "may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".[59] Under Article 48, it is incumbent on Member States to implement these measures. Article 42 foresees the use of armed force if the Article 41 measures prove ineffective: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security".[60]

In May 1993, the Security Council interpreted these Articles to include the power to establish an international tribunal with the power to arrest, prosecute and imprison any citizen, including the Heads of State and government, of a non-consenting State. This novel and unexpected interpretation permitted establishment of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), and, a year later, the International Criminal Tribunal for Rwanda ('ICTR'). Richard Goldstone, former Prosecutor of the ICTY and ICTR, noted:

> It came as a surprise to the international community when in May [1993] the Security Council of the UN decided to establish the [ICTY]. International lawyers had not contemplated that the powers of the Council under Chapter VII of the UN Charter could be used for such a purpose. […] In a very innovative move, the Security Council decided that those Chapter VII powers confer by implication the capacity to establish a war crimes criminal tribunal.[61]

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58 Article 41 of the UN Charter, see above note 40.

59 *Ibid*.

60 *Ibid.*, Article 42.

61 Richard J. Goldstone, "The role of the United Nations in the prosecution of international war criminals", in *Washington University Journal of Law and Policy*, 2001, vol. 5, no. 1, pp. 119–127, 120.

The *Simma* commentary on the Charter described the Security Council's action in establishing the ICTY as "the most far reaching use of Article 41".[62]

The lawfulness of the establishment of the ICTY by Security Council resolution was upheld by trial and appellate judges in *Tadić*.[63] They rejected the argument that the establishment of an international tribunal is not a measure contemplated by Article 41: "It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve 'the use of force'. It is a negative definition".[64]

The Secretary-General had recommended that the ICTY be established by the Security Council, rather than by the General Assembly, in significant part due to the desire for a speedy establishment. His report stressed urgency but did not state that the General Assembly had no power to establish an international tribunal.[65] But the very fact that Chapter VII envisages a degree of compulsion – Article 48 compels Member States to take action to carry out the Security Council's decisions – no doubt proved attractive, as it did to the members of the International Law Commission ('ILC'), who were drafting what became the ICC Statute. The ILC's 1994 draft statute permitted the Security Council, but not the General Assembly, to refer a situation to the ICC. The ILC explained:

> Some members were of the view that the power to refer cases to the court […] should also be conferred on the General Assembly, particularly in cases in which the Security Council

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62 Bruno Simma *et al*. (eds.), *The Charter of the United Nations: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 626.

63 ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ('*Tadić* Jurisdiction Decision') (http://www.legal-tools.org/doc/866e17/).

64 *Ibid.*, para. 35.

65 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, paras. 20–22 (http://www.legal-tools.org/doc/c2640a/):

> The involvement of the General Assembly in the drafting or the review of the statute of the International Tribunal would not be reconcilable with the urgency expressed by the Security Council in resolution 808 (1993). […] In the light of the disadvantages of the treaty approach in this particular case and of the need indicated in resolution 808 (1993) for an effective and expeditious implementation of the decision to establish an international tribunal, the Secretary-General believes that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII.

> 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.[66]

The lawfulness of the establishment of the ICTY and ICTR by the Security Council is today widely accepted. Few question the use of Chapter VII as a valid basis for the assumption of criminal jurisdiction by the two tribunals. Other measures taken by the Security Council under Chapter VII, and not expressly contemplated in Article 41 of the Charter, include establishing a residual mechanism for both tribunals,[67] and the extension of terms of appointment of judges.[68]

In summary, the Security Council's power to establish an international tribunal with authority to arrest and imprison serving Heads of State of non-consenting States is an example of a purposive interpretation of the Charter. Nothing in the Charter, nor in *Tadić*, nor in the Secretary-General's report on the establishment of the ICTY, suggests that *only* the Security Council, and not the General Assembly, has the power to establish an international criminal tribunal. The Appeals Chamber in *Tadić* characterized the establishment of the tribunal – and, necessarily, the grant of criminal jurisdiction to it – as the exercise of the Security Council's principal function of maintenance of peace and security:

> The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance

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66 Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, UN Doc. A/49/10, 2 September 1994, p. 86 (http://www.legal-tools.org/doc/f73459/).

67 UN Security Council Resolution 1966 (2010), UN Doc. S/RES/1966 (2010), 22 December 2010 (http://www.legal-tools.org/doc/e79460/).

68 UN Security Council Resolution 2329 (2016), UN Doc. S/RES/2329 (2016), 19 December 2016 (http://www.legal-tools.org/doc/b1bc1c/).

> of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

This paragraph applies *mutatis mutandis* to referral of a situation by the General Assembly to the ICC. By referring a situation, the General Assembly would not be delegating to the ICC some of its own functions or the exercise of some of its own powers, nor would it be usurping for itself any judicial function. Rather, it would be using the instrument of referral to the ICC as an exercise of its own function under the Charter, secondary only to that of the Security Council, of maintenance of peace and security in the situation country.

9.7. The Obligation of All States to Deter, Investigate and Prosecute Genocide, War Crimes and Crimes Against Humanity

To interpret the Charter to include a General Assembly referral power is consistent with the growing acceptance of the duty, on all UN Member States, to end impunity for genocide, war crimes and crimes against humanity by effective investigation and prosecution.[69] All three sets of crimes – genocide, war crimes, and crimes against humanity – fall within the small group of crimes that are considered *jus cogens* and attract universal jurisdiction. General Assembly referral would therefore help States to discharge their duties under international law to investigate and prosecute these crimes, and to provide redress to survivors.

All members of the General Assembly are required to fulfil in good faith the obligations assumed by them under the Charter.[70] The Charter's preamble refers to the determination "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". States have duties under treaties to investigate, prosecute and punish gross human rights violations, in particular when they amount to war crimes, crimes against humanity and

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[69] See Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1, 30 November 2012 (http://www.legal-tools.org/doc/d0qwyx/), in which heads of state and government:

> commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms.

[70] Article 2.2 of the UN Charter, see above note 40.

genocide.[71] The obligation to search for and prosecute (or extradite) any individual – regardless of nationality – for grave breaches appears in all four Geneva Conventions.[72] States have the right to vest universal jurisdiction in their national courts over war crimes committed in both international and non-international armed conflicts.[73] Every party to the Convention Against Torture has "an obligation to establish the universal jurisdiction of its courts over the crime of torture".[74] The ILC's draft articles on crimes against humanity, which may form the basis for a future multilateral con-

[71] See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I, Cambridge University Press, New York, 2009, Rules 150, 158 ('Customary Rules') (http://www.legal-tools.org/doc/78a250/); United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, UN Doc. A/RES/2550 (XXIV), 12 December 1969 (http://www.legal-tools.org/doc/8e43b9/); Question of the punishment of war criminals and of persons who have committed crimes against humanity, UN Doc. A/RES/2712 (XXV), 15 December 1970 (http://www.legal-tools.org/doc/1fdd22/); Question of the punishment of war criminals and of persons who have committed crimes against humanity, UN Doc. A/RES/2840 (XXVI), 18 December 1971 (http://www.legal-tools.org/doc/2745f2/) and Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, UN Doc. A/RES/3074 (XXVIII), 3 December 1973 (http://www.legal-tools.org/doc/759822/); Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Article 1 (http://www.legal-tools.org/doc/498c38/); General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 (http://www.legal-tools.org/doc/e7d9a3/); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 21 March 2006, Principles 1–5 (http://www.legal-tools.org/doc/bcf508/).

[72] Geneva Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field, 12 August 1949, Article 49 (http://www.legal-tools.org/doc/baf8e7/); Geneva Convention (II) for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, 12 August 1949, Article 50 (http://www.legal-tools.org/doc/0d0216/); Geneva Convention (III) relative to the treatment of prisoners of war, 12 August 1949, Article 129 (http://www.legal-tools.org/doc/365095/); ICRC, Geneva Convention (IV) relative to the protection of civilian persons in time of war, 12 August 1949, Article 146 (http://www.legal-tools.org/doc/d5e260/); Protocol (I) Additional to the Geneva Conventions of 12 August 1949, 8 June 1977, Article 85(5) (http://www.legal-tools.org/doc/d9328a/).

[73] For a list of domestic provisions vesting universal jurisdiction in domestic courts over war crimes, see ICRC, "Practice Relating to Rule 157. Jurisdiction over War Crimes".

[74] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, Article 7(1) (http://www.legal-tools.org/doc/713f11/). See also ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, 20 July 2012, para. 74 (http://www.legal-tools.org/doc/18972d/).

vention, require States Parties to prosecute crimes against humanity.[75] States must ensure that individuals have accessible and effective remedies to enforce their rights, including through redress for violations.[76] Several States have incorporated the crimes contained in the ICC Statute in their national legislation and vested jurisdiction in their courts to prosecute persons suspected of having committed them on the basis of the principle of universal jurisdiction.[77] The Security Council has emphasized "the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law".[78]

In respect of genocide, specific legal duties arise under the Genocide Convention to prevent genocide and to punish its perpetrators.[79] Any party to it "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide".[80] The obligation to prevent genocide applies to any State with the "capacity to

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75 Crimes against humanity, UN Doc. A/CN.4/L.892, 26 May 2017, draft Articles 8 to 10 (http://www.legal-tools.org/doc/3ce0e9/).

76 The right of victims to an effective and enforceable remedy for violations of their human rights appears in Article 8 of the Universal Declaration of Human Rights, 10 December 1948 (http://www.legal-tools.org/doc/de5d83/); International Covenant on Civil and Political Rights, 16 December 1966, Article 2 (http://www.legal-tools.org/doc/2838f3/); International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, Article 6 (http://www.legal-tools.org/doc/43a925/); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Article 14 (http://www.legal-tools.org/doc/713f11/); Convention on the Rights of the Child, 20 November 1989, Article 39 (http://www.legal-tools.org/doc/f48f9e/); Hague Convention Respecting the Laws and Customs of War on Land, 18 October 1907; Additional Protocol I to the Geneva Conventions, 12 August 1949, Article 91. It is further developed in Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gr oss Violations of International Human Rights Law and Serious Violations of International H umanitarian Law, UN Doc. A/RES/60/147, 21 March 2006 (http://www.legal-tools.org/doc/bcf508/).

77 See ICRC, "Rule 157. Jurisdiction over War Crimes", citing the legislation of Belgium, Canada, Germany, New Zealand and the United Kingdom.

78 UN Security Council Resolution 1674 (2006), UN Doc. S/RES/1674 (2006), 28 April 2006, para. 8 (http://www.legal-tools.org/doc/4bf3cc/).

79 Under Article I of the Convention Against the Prevention and Punishment of the Crime of Genocide, 12 January 1951 (http://www.legal-tools.org/doc/498c38/) the parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they *undertake to prevent and to punish*" (emphasis added).

80 *Ibid.*, Article VIII.

influence effectively the action of persons likely to commit, or already committing, genocide".[81] States are required to do all that they can to prevent the genocide, even if the prospects of success are not good:

> [T]he obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ *all means reasonably available to them, so as to prevent genocide so far as possible*. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.[82]

"All means reasonably available" is open to the interpretation that it includes referring a situation of imminent or actual genocide to the ICC as a means of deterring genocide. Furthermore, the obligation to prevent genocide, and the corresponding duty to act,

> arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.[83]

This also supports the argument that all States, which can avail of a deterrent mechanism that might deter a genocide – such as referral to the ICC – must use that mechanism.

In brief, there exists a general principle of international law that States are obliged to do what they can do investigate and prosecute genocide, war crimes and crimes against humanity, and to provide means for survivors to have effective and accessible remedies against those most responsible. Supporting a General Assembly resolution to refer a situation of

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[81] ICJ, *Bosnia and Herzegovina v. Yugoslavia*, Judgement of 26 February 2007, 26 February 2007, para. 430 (http://www.legal-tools.org/doc/5fcd00/).

[82] *Ibid*.

[83] *Ibid*., para. 431.

such crimes to the ICC is an effective way for States to discharge, at least in part, these obligations.

9.8. The Exercise of Jurisdiction Over Nationals of a Non-Party: Practical Difficulties

A referral of a situation by the General Assembly would require the Court to exercise jurisdiction over nationals of a very likely uncooperative non-party State.[84] This presents obvious practical difficulties: securing access to witnesses, documentary evidence, and fugitives would not be easy.

But the ICC Statute already envisages the conduct of investigations in circumstances of great difficulty. It concerns exclusively crimes against humanity, war crimes, genocide and aggression: crimes that happen in circumstances of great turmoil. It grants the Court jurisdiction *only* where the State in question is unable or unwilling to prosecute: environments unlikely to be conducive to a smooth investigation. Further, the ICC Statute already envisages jurisdiction over nationals of non-parties, absent Security Council consent, for all ICC Statute crimes except aggression.[85] This arises where the crime is committed, at least in part, on the territory of a State Party.[86] The ICC Statute is one of many treaties that envisage jurisdiction over nationals of non-parties, without the consent of the non-party.[87]

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[84] The General Assembly plainly has the power to recommend to all UN member states who are also ICC States Parties to refer a situation in a State Party to the Court. It has never done so. Until recently, States Parties have been reluctant to take the step of referring situations in other States Parties to the Court, even though this was clearly anticipated at Rome. The first such referral was on 27 September 2018. Argentina, Canada, Colombia, Chile, Paraguay, and Peru together referred under Article 14 of the ICC Statute, see above note 2, the situation in Venezuela to the Court (http://www.legal-tools.org/doc/92lp01/).

[85] Article 15*bis*(5) of the ICC Statute, see above note 2, states that the Court "shall not exercise jurisdiction over the crime of aggression when committed by the nationals of, or on the territory of, a State that is not a party to the Statute".

[86] Article 12(2)(a) of the ICC Statute, see above note 2. The deliberate formulation in Article 12 contrasts with Article 15*bis*(5), which expressly excludes ICC jurisdiction with respect to a national of non-party.

[87] ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber III, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, para. 45 (http://www.legal-tools.org/doc/db23eb/) (internal citations omitted):

> Similar bases for the exercise of criminal jurisdiction are provided for in numerous multilateral conventions, including with regard to slavery, piracy, genocide, apartheid, counterfeiting of currency, war crimes (grave breaches of the Geneva Conventions), drug trafficking, hijacking and sabotage of aircraft, sabotage on the High Seas, attacks on dip-

Non-parties are not obliged to co-operate with the ICC in investigations of their citizens. The absence of non-party consent certainly adds to the difficulties of an investigation, but does not deprive it of lawfulness, credibility, or potential deterrent effect. The logistical challenges of investigating a situation in a non-consenting State must never be underestimated. But novel methods of investigation, including the collection of social media, commercially-available high-resolution satellite photography, and other digital evidence, which does not require physical presence in the situation country, are developing at a fast pace. Witnesses often take refuge in other States: large numbers of victims and anti-Regime defectors fled Syria, for example, and support criminal accountability efforts.

9.9. The Existence of Chapter VII Remedies and the Success of a Prosecution

A General Assembly referral to the ICC might not be backed up by Chapter VII enforcement action by the Security Council. This is not necessarily fatal to the success of an investigation. Neither the ICC's judges, nor the ASP, have Chapter VII-type power. This has not affected the Court's legitimacy among the 123 States Parties. Nor has it been decisive in securing the co-operation of States in relation to the delivery of documentary evidence, or the execution of arrest warrants.

The experience of the *ad hoc* Tribunals and the ICC suggests that willingness to assist in arresting fugitives and delivering evidence to an international court is not dependent on the presence or absence of Chapter VII powers.[88] The reality is more nuanced. For example, a significant proportion of ICTR fugitives were located and arrested relatively swiftly by African and other States and transferred to the ICTR.[89] There is nothing to

lomats, the taking of hostages, and torture. Those treaty regimes do not exclude nationals of States that are not parties to the relevant treaty. Indeed, such crimes attract universal opprobrium and thus demand repression by each of the members of the international community on behalf of the whole. Nor is the conferral or delegation of jurisdiction by a party to a treaty to an international jurisdiction in itself novel, this already having been the basis for the establishment of the Nuremburg Tribunal.

The exercise of jurisdiction under the treaties referred to over nationals of nonparties is not restricted to crimes committed on the territory of a party. Crimes such as piracy, slavery, and sabotage on the high seas are prosecutable even when committed on the high seas.

[88] ECCC, Special Court for Sierra Leone, and the Special Tribunal for Lebanon did not have Chapter VII-type power. They were established with the consent of the states in question (Cambodia, Sierra Leone and Lebanon), which undertook to co-operate.

[89] By 21 December 2001, 56 ICTR fugitives had been arrested. The arrests were by Kenya (13), Cameroon (9), Belgium (6), Ivory Coast (2), Togo (2), Mali (2), Benin (2), France (2), Na-

suggest that these States arrested the authors of Rwanda's genocide under threat of Chapter VII action; they did so because it was the right thing to do. On the other hand, the ICTY faced serious difficulty in persuading NATO states to permit their forces to arrest ICTY fugitives in Bosnia. Serbia and Croatia serially failed to arrest fugitives or deliver documentary evidence. The ICTY repeatedly reported non-co-operation to the Security Council. The ICTY was eventually able to secure co-operation from Serbia and Croatia, including the arrest of all fugitives, largely because of the concept of 'conditionality': the progress of negotiations for accession to the EU was linked to co-operation with the ICTY.[90]

Many States – including non-parties such as Rwanda and the United States – have provided valuable assistance to the ICC in situations not backed up by Chapter VII. On the other hand, in the Chapter VII-mandated situations of Darfur and Libya, numerous States Parties have failed to execute arrest warrants. As noted earlier, the ICC's Prosecutor and judges have frequently criticized the Security Council's unwillingness to use its Chapter VII powers to secure the arrest of fugitives relating to Darfur and Libya.

This is not to suggest that Chapter VII authorization has no value. Clearly it carries political and diplomatic weight. The policy of conditionality, which resulted in increased co-operation from Serbia and Croatia, might have been less effective if the threshold question of the ICTY's legal entitlement to co-operation was not already settled by virtue of the Chapter VII resolution creating the ICTY. But the fact remains that States choose to co-operate or not for many reasons, only one of which is whether an investigation enjoys Chapter VII imprimatur.

As noted earlier, a General Assembly referral to the ICC, authorized by a two-thirds vote, would likely lack Chapter VII support from the Security Council, but it would carry considerable moral and diplomatic weight. It would also be the subject of co-operation obligations. All 123 States Parties would be required promptly to execute arrest warrants and facilitate access to relevant witnesses and documentary evidence in relation to any General Assembly-referred situation, in accordance with their obligations

mibia (1), United Kingdom (1), Burkina Faso (1), Denmark (1), Zambia (3), Tanzania (5), Senegal (1), Switzerland (2), USA (1), South Africa (1) and the Netherlands (1). See ICTR, "Nzabirinda arrested in Belgium", 21 December 2001.

90 See Florian Bieber (ed.), *EU Conditionality in the Western Balkans*, Routledge, Abingdon, 2012.

under Part 9 of the ICC Statute.[91] Non-compliance would permit the Court to report the State Party to the ASP. Part 9 provides a detailed basis for encouraging and monitoring co-operation with a General Assembly-referred situation.

In practice, the remedy of reporting non-compliance by ICC States Parties is unsatisfactory, whether a complaint is made to the ASP or (for Security Council-referred situations) to the Security Council. The ASP has elaborate procedures,[92] and the Security Council has a range of options under Chapter VII, to secure co-operation by a recalcitrant State Party. But neither the Security Council nor the ASP have taken effective action in respect of the instances of non-co-operation referred to it.[93]

The problem of securing State co-operation for ongoing international investigations is not on its own a valid reason not to facilitate General Assembly referral. As seen with respect to Darfur, Libya, Serbia, and Croatia, Chapter VII is not necessarily a panacea. The non-availability of Chapter VII-type enforcement action is not a legal or practical barrier to the inclusion of a referral function for the General Assembly in the ICC Statute.

To secure co-operation in a General Assembly-referred situation, the General Assembly and the ASP could lawfully call upon States to take

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91 States Parties and non-States Parties to the ICC Statute would have different duties to co-operate in the event of a General Assembly referral. The former have ratified the ICC Statute and voluntarily assumed the obligations imposed by it; they have a duty to co-operate fully. The latter do not.

92 ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5, 21 December 2011, para. 9 (http://www.legal-tools.org/doc/ec50d0/). The "informal response procedure" includes an emergency Bureau meeting, triggering the good offices of the President of the ASP, a meeting of the New York Working Group, an open letter from the ASP President to the recalcitrant state, and other measures. The ASP's "formal procedure" envisages a range of options: (a) the Bureau of the ASP seeks the views of the requested State; (b) States Parties raise the matter in bilateral contacts with the requested State; (c) the ASP President uses his good offices to resolve the matter; (d) a dedicated facilitator consults on a draft resolution containing concrete recommendations on the matter, see *ibid*., Annex 8.

93 The ASP has adopted no resolution condemning non-compliance by States, and has scarcely referred to judicial findings of their non-compliance. On 24 November 2016, the ASP:

> Recall[ed] the non-cooperation procedures adopted by the Assembly in ICC-ASP/10/Res.5, recognizes with concern the negative impact that the non-execution of Court requests continues to have on the ability of the Court to execute its mandate, takes note of the decisions of the Court on non-cooperation findings in relation to Djibouti, Uganda and Kenya, and of the report of the Bureau on non-cooperation.

ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/15/Res.5, 24 November 2016, p. 39 (http://www.legal-tools.org/doc/991a13/).

measures to secure the arrest and delivery of fugitives and access to critical evidence. Many States have imposed measures in recent years on individuals within Syria, Yemen, South Sudan, Myanmar, and the DPRK, including asset freezes, travel bans, arms embargoes, and restrictions on trade and military training and military co-operation.[94] In the event of General Assembly referral to the ICC, blocs of willing States would be able to modify and leverage these tools to secure co-operation with the investigation and prosecution.

9.10. Guards Against Unmeritorious Referrals by the General Assembly

Both the UN Charter and the ICC Statute contain numerous safeguards to address the concern that the General Assembly might refer unmeritorious situations to the ICC, resulting in unfair prosecutions.

The first is that the General Assembly must act by two-thirds majority of "members present and voting" for "important questions", including matters concerning the maintenance of international peace and security, under Article 18 of the Charter. The two-thirds majority requirement should ensure that only the most egregious situations of human rights abuse, attracting almost universal condemnation, would be referred to the Court.

This is borne out by resolutions passed by majorities exceeding two-thirds of members voting supporting referral of Syria and the DPRK to the ICC.[95] In August 2012, the General Assembly passed Resolution 66/253, *inter alia* encouraging the Security Council to consider accountability measures for those responsible for crimes against humanity in Syria. It came three months after the Security Council referral of Syria to the ICC was vetoed, and was passed by 133 votes to 12 (with 31 abstentions).[96] In

[94] See, for example, those imposed by the EU on individuals in Myanmar and South Sudan, EU, Council Decision (CFSP) 2018/655 of 26 April 2018 amending Decision 2013/184/CFSP concerning restrictive measures against Myanmar/Burma, 26 April 2018, 2018/655/CFSP (http://www.legal-tools.org/doc/ttyzyj/); EU, Council Decision (CFSP) 2018/1125 of 10 August 2018 amending Decision (CFSP) 2015/740 concerning restrictive measures in view of the situation in South Sudan, 10 August 2018, 2018/1125/CFSP (http://www.legal-tools.org/doc/a08n72/); and those by the US on individuals based in Syria, US, Office of Foreign Assets Control, "Syria Sanctions Program", 2 August 2013.

[95] Members "present and voting" means members casting an affirmative or negative vote. Those who abstain are considered not voting. UN General Assembly, Rules of Procedure and Comments, Rule 86 (http://www.legal-tools.org/doc/nb3c1y/).

[96] In May 2014, 13 of the 15 Security Council members, supported by 65 other UN member states, endorsed a French proposal to refer Syria to the ICC. UN Security Council Draft

December 2014, the General Assembly passed Resolution 69/188, co-sponsored by 62 countries, calling for referral of the DPRK to the ICC, by 116 votes to 20 (with 53 abstentions).[97] As noted above, the creation of the Syria and Myanmar mechanisms were carried by resolutions supported by well over two-thirds of members present and voting.

It is unlikely that the General Assembly, acting by two-thirds majority, would refer an unmeritorious situation to the ICC. But if it did, the ICC Statute contains further safeguards. The Security Council can at any time pass a resolution to defer any investigation or prosecution.[98] The State under scrutiny can put an end to it by carrying out genuine investigations and prosecutions.[99] The ICC Prosecutor must be satisfied that the situation meets the gravity threshold.[100] Even if the Prosecutor is so satisfied, he or she can decline to investigate or prosecute if he or she concludes that this is in the interests of justice.[101] An unmeritorious case can be halted by a preliminary ruling on admissibility[102] or other forms of challenge to the jurisdiction of the Court or the admissibility of a case.[103] Appeal proceedings exist with respect to jurisdiction and admissibility.[104] The confirmation process by the Pre-Trial Chamber acts to prevent prosecutions on unfounded charges.[105] All these safeguards apply *before* trial even starts. The concern that facilitating General Assembly referral would open the floodgates to the investigation of minor cases by the ICC has no foundation.

Resolution 348 (2014), UN Doc. S/2014/348 (2014), 22 May 2014 (http://www.legal-tools.org/doc/f8f995/). China and Russia vetoed the draft resolution.

97 UN General Assembly Resolution 69/188, UN Doc. A/RES/69/188, 18 December 2014(http://www.legal-tools.org/doc/xkzc3a/). China and Russia voted against the resolution.

98 Deferral requires an affirmative Resolution by the UNSC under Chapter VII, and therefore requires the support of non-permanent members of the UNSC as well as support or abstention of all five of the permanent members. This is in the spirit of the Charter, which foresees the UNSC *as a whole* taking primary responsibility for international peace and security on behalf of all UN Member States and taking "in order to ensure prompt and effective action", Article 24 of the UN Charter, see above note 40.

99 Article 17(a) of the ICC Statute, see above note 2.

100 *Ibid*., Article 17(1)(d).

101 *Ibid*., Article 53(1)(c) and (2)(c).

102 *Ibid*., Article 18.

103 *Ibid.*, Article 19.

104 *Ibid*., Article 82(1)(a).

105 *Ibid*., Article 61.

9.11. Conclusion

ICC States Parties must reconsider the current interpretation of the UN Charter which requires them, in effect, to delegate their responsibilities to investigate and prosecute atrocity crimes in non-States Parties to a Security Council which is too often prevented from action by actual or threatened veto by one or more of its permanent members.

There are no attractive alternatives to referral of meritorious situations to the ICC. Valuable as the work that national war crimes investigation and prosecution units do, none has the capacity to handle a full investigation and prosecution of a major situation, such as the crimes committed in Syria in 2011–2021. Only a well-resourced international court can handle atrocity on such a scale. The General Assembly-approved investigation mechanisms for Syria and Myanmar are carrying out excellent work but lack the power to prosecute.

Further Security Council vetoes in the face of mass atrocity might well lead to the establishment of more General Assembly-approved investigation mechanisms, which will exist alongside the Syria Mechanism and Myanmar Mechanism, and the OPCW's investigative unit. While co-operation between these mechanisms is desirable and inevitable, each new mechanism will nevertheless require considerable annual funding to establish and operate units dealing with evidence-gathering, storage, analysis, co-operation, witness protection, legal advice, personnel, finance and other support functions. Nobody argues that the establishment of further investigative mechanisms, with similar operational challenges, will be a cheaper or faster alternative to referral to the ICC. Nor is the creation of a single permanent investigative mechanism, without a prosecutorial mandate, a satisfactory alternative. The nature and scale of the crimes under discussion demands not merely investigation, but the swift arrest and fair trial of those most responsible.

A General Assembly referral function in the ICC Statute would enable ICC investigations and prosecutions to get off the ground without delay. Bringing all future investigations into major atrocities under the roof of the ICC would enable the ICC to apply across all these situations its expertise in evidence collection, analysis, witness protection, and international co-operation. It would enable a more efficient use of the limited resources available for investigation and prosecution of atrocity crimes.

At the same time, States Parties must be realistic about the value of enabling more ICC investigations but not providing the political and financial back-up necessary to make them effective. Material and logistical support for the ICC remains critically important.

In the final analysis, we cannot in the third decade of the twenty-first century continue to tolerate impunity in the face of barbaric atrocity. A referral resolution supported by two-thirds of the General Assembly in the face of mass atrocities carries not only a presumption of legality, but also enormous moral weight. The ICC's 123 States Parties should not underestimate their power to end impunity for massive crimes that continue to shock the conscience of humanity.

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