'UNITING AGAINST IMPUNITY: THE UN GENERAL ASSEMBLY AS A CATALYST FOR ACTION AT THE ICC'

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Abstract This article evaluates the role of the UN General Assembly ('UNGA') and its subsidiary organs in acting as a catalyst for action at the International Criminal Court ('ICC'). The power of the UN Security Council ('UNSC') to make a referral to the ICC has been increasingly challenged in recent years, due to the perceived misuse of the veto by permanent members and general failings to enforce international criminal law in the face of documented atrocities. Meanwhile, the UNGA and its subsidiary organs have exerted meaningful pressure on the UNSC through the creation of commissions of inquiry and country-specific resolutions. There is the possibility for the UNGA to engage in dialogue with the ICC through 'quasi-judicial' resolutions, in coordinating collective responses to a recalcitrant State and individual perpetrators and also through the possible assumption of a referral power. This analysis reveals that the UNGA has become increasingly active in international justice and holds the potential for an enhanced role in addressing the failings of the current UNSC-dominated paradigm governing UN–ICC relations, thereby facilitating States in 'uniting against impunity'.

Keywords: international criminal law, impunity gap, powers of UN organs, universal jurisdiction, Uniting for Peace resolution.

I. INTRODUCTION

The role of the United Nations Security Council ('UNSC') in the enforcement of international criminal law has a chequered and controversial record, not least with respect to its power to make a referral to the International Criminal Court ('ICC'). Double standards permeate UNSC decision-making, with permanent members of the UNSC in particular criticized for impeding ICC scrutiny of its own nationals and those of its client States.[1] Given

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[1] Space precludes evaluation of the claim that the UNSC (specifically, its permanent members) has impeded the ICC's mandate. There is important literature in this respect, which underpins the major assumptions of this article on the deficit within the UNSC to address impunity, of which see: DP Forsythe, 'The UN Security Council and Response to Atrocities: The P-5 and International Criminal Law' (2012) 34 HumRtsQ 840; N Jain, 'A Separate Law for Peacekeepers: The Clash

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mounting criticism from States, it could not be more timely to take a fresh look at the viable alternatives to the present UNSC-dominated structure in upholding the UN's growing mandate to address impunity for mass crimes.[2] One option is for the UN General Assembly ('UNGA') to assume a greater role, in light of resurgent calls for it to break UNSC deadlock via the '*Uniting for Peace*' mechanism.[3] Based conceptually in the UNGA's powers to promote human rights and international security, as well as on the pooled universal jurisdiction of its members, it is argued that the UNGA has a latent potential to catalyse action at the ICC.[4] This article offers the first systematic analysis of actual and potential UNGA influence on the ICC, setting out, in turn: (1) the role of the UN plenary in influencing the exercise of the UNSC's power to refer situations to the ICC; (2) the UNGA's 'quasi-judicial' competencies that serve to augment the ICC's jurisdiction; (3) the scope for the UNGA to pressure States to engage with the ICC (be they ICC State-parties or not), along with the legally permissive effect of UNGA 'voluntary sanctions' resolutions; and (4) more radically, the constitutional possibility of the UNGA exercising a power to make referrals to the ICC.

This article focuses on the UNGA as one institution which may facilitate States in 'uniting against impunity', although there are other candidate institutions whose role in addressing the impunity gap also deserve assessment, such as the ICC Assembly of States Parties ('ASP'). Indeed, in many respects, the ASP has assumed the same decision-making functions at the ICC that the UNSC and UNGA performed at the *ad hoc* tribunals.[5] Yet, a key reason to focus on the UNGA's potential to act as a catalyst for action at the ICC is empirical: there is evidence of a functional turn within the UN plenary which includes a greater willingness to confront UNSC inaction, conduct investigations and pass country-specific resolutions on international crimes.[6]

between the Security Council and the International Criminal Court' (2005) 16 EJIL 239; M Weller, 'Undoing the Global Constitution: UN Security Action and the International Criminal Court' (2002) 78(4) International Affairs 693.

[2] eg UNGA Res 70/264 (13 May 2016) at preamble.

[3] UNGA Res 377 A(V) (3 November 1950); UNHRC, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict', UN Doc A/HRC/12/48 (25 September 2009) at para 197; UNHRC, '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) at para 1201.

[4] As to relevant Charter powers, see arts 1, 13(1), 55 and 60. This article focuses on how the UNGA is able to complement the ICC's functions, although it is arguable that the UNGA may also establish its own *ad hoc* international criminal tribunals or investigatory mechanisms under UN auspices, as indeed it recently did with respect to the 'International, Impartial and Independent Mechanism' established to investigate crimes in Syria. This analysis is beyond the scope of this article although it has been considered elsewhere: M Ramsden, 'Uniting for MH17' (2017 forthcoming) AsianJIL; cf JM Lemnitzer, 'International Commissions of Inquiry and the North Sea Incident: A Model for an MH17 Tribunal?' (2016) 27(4) EJIL 923.

[5] See art 112, Rome Statute. For an overview: M Plessis and C Gevers, 'The Role of the Assembly of States Parties for the ICC' in R Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Brill 2016) 159.

[6] On UNGA criticisms, see M Schmidt, 'UN General Assembly' in A Bellamy and T Dunner, *Oxford Handbook on the Responsibility to Protect* (Oxford University Press 2016) 276.

This is evident from the UNGA's decision in December 2016 to establish the 'International, Impartial and Independent Mechanism' to investigate individuals responsible for the 'most serious crimes under international law' in Syria since March 2011.[7] A study that catalogues the emerging trend of UN plenary activism in addressing the impunity gap is therefore valuable in evaluating the future possibilities of UN–ICC engagement. Another reason to focus on the role of the UNGA in relation to action at the ICC is normative: the UNGA constitutes a near universal membership of States, including ICC State-parties and non-parties alike, holding the potential for greater legitimation of collective action in a manner that benefits the Court's exercise of jurisdiction. This article will therefore focus its analysis on the actual and potential impact of the UNGA on action taken at the ICC. However, the article will also locate this discussion in its broader context which is to acknowledge that other institutions may be better placed than the UNGA in certain situations to alleviate the impunity gap.

II. GENERAL ASSEMBLY UNGA MEASURES TO PROMOTE ICC ACTION

The Rome Statute recognizes two aspects of jurisdiction, namely the preconditions dictated by Article 12 and the trigger mechanisms in Article 13. The preconditions require that a crime has been committed on the territory of a relevant State (ICC State-parties or States accepting jurisdiction under Article 12(3)), or by a national of a relevant State. ICC jurisdiction is triggered when the UNSC or a relevant State refers a situation to the Court, or when the Prosecutor acts *proprio motu* and is authorized by the Pre-Trial Chamber.[8] As discussed below, there is potential for the UNGA to influence both the preconditions and trigger mechanisms contained in the Rome Statute.

A. Pressuring the Security Council to Make an ICC Referral

The starting point is to establish the extent to which the UNGA has been able to influence decisions of the UNSC to refer situations to the ICC. The UN Charter bestows a power on the UNGA to make recommendation to the UNSC, which has been modified by decades of practice to allow plenary recommendations even where the UNSC is acting on a given situation.[9] At the very least,

[7] UNGA Res 71/248 (2016), 21 December 2016. The HRC has also passed resolutions calling on States to establish transitional justice mechanisms to 'combat impunity': HRC Res 33/L.10 (2016).

[8] Art 13, Rome Statute.

[9] Art 12(1), UN Charter; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, at 149–50. Indeed, when considering Syrian objections to the establishment of the 'International, Impartial and Independent Mechanism', the UNGA President noted that Article 12 of the UN Charter does not prevent it from considering items on the UNSC agenda. Rather, the words that the UNSC 'is exercising' in Article 12 has been interpreted to mean as 'exercising at this moment'. See further: UNGA, 71st Session, 66th Meeting, 'Resolution Establishing International Mechanism Concerning

therefore, the UNGA possesses the procedural legitimacy within the framework of the UN Charter to exert pressure on the UNSC to refer a given situation to the ICC. Furthermore, the UNGA and UNSC have increasingly formed habits of cooperation and dialogue on human rights and security issues. By way of example, the UNSC routinely cites UNGA resolutions to augment the formation of international norms and to also help justify enforcement action under Chapter VII.[10] In this respect, the UNSC invoked the principle 'established' in the UNGA 'Friendly Relations' Resolution 2625 to impose duties on States not to acquiesce in terrorist activity within its territory following the 9/11 terrorist attacks.[11] Likewise, from what originated as a British proposal in the UNGA to eliminate trade in 'blood diamonds', the UNSC 'welcomed' the UNGA's resolution to support its Chapter VII decisions in drawing a link between the escalation of conflict and the diamonds trade in Sierra Leone and Liberia.[12]

Similarly, the UNGA has used its powers to make recommendations to the UNSC in a variety of areas. For example, the UNGA recommended that the UNSC uphold procedural fairness in its terrorist sanctions regime and in criticizing the disproportionality of enforcement action.[13] In rare instances the UNGA has gone further, to condemn UNSC inaction: 'deploring the failure' of the UNSC to ease the humanitarian crisis in Syria.[14] Similarly, the UNGA has proven willing to recommend that the UNSC act in the field of international criminal justice. During a period of debate over whether the UN should establish an *ad hoc* tribunal for crimes committed in the Balkans, the UNGA urged the UNSC to establish the International Criminal Tribunal for the former Yugoslavia ('ICTY'), given initial reluctance from some UNSC permanent members.[15] Recently, the UNGA encouraged the UNSC to consider a referral of the situations in North Korea ('DPRK') and Syria to the ICC, in the latter case 'regretting' that a draft resolution was not adopted despite 'broad support from Member States'.[16] The broader issue this raises is whether UNSC decision-making has been influenced by UNGA recommendations that call for the UNSC to end impunity, specifically in the exercise of its power to refer situations to the ICC.

Syria Passed in Direct Plenary Action' (21 December 2016) available at <http://www.un.org/press/en/2016/ga11880.doc.htm>.

[10] eg UNSC Res 365 (1974); UNSC Res 1998 (2011); UNSC Res 2282 (2016).

[11] UNSC Res 1373 (2001).

[12] UNSC Res 1343 (2001).

[13] UNGA Res 70/14 (17 December 2015) at para 12; UNGA Res 69/122 (10 December 2014).

[14] UNGA Res 66/253B (3 August 2012).

[15] UNGA Res 47/121 (18 December 1992) at para 10; MC Bassiouni, *Introduction to International Criminal Law* (2nd rev edn, Brill 2013) 570.

[16] UNGA Res 69/189 (18 December 2014) at preamble; UNGA Res 71/202 (2017), 26 January 2017, at para 9; UNGA Res 71/203 (2017), 1 February 2017, at preamble.

1. Sharpening the language of UNGA 'impunity' resolutions through commission fact-finding

In this regard, an important development in UN practice in the past decade has been the creation of *ad hoc* commissions of inquiry to conduct country-specific investigations into alleged abuses of international human rights law and international humanitarian law.[17] Using commissions within the UN as a preliminary step to identifying whether a case should be investigated at the ICC brings distinct advantages, at least politically. The oft-cited criticism of UNSC political bias may be partially alleviated were it to rely on the work of credible, competent and independent fact-finders to support referral decisions.[18] Indeed, it has been noted that the evidence presented in the UNSC's Darfur inquiry had a 'strong impact' on the decision to refer the situation to the ICC.[19] In this respect, UNSC-established commissions such as that established for the Darfur situation are likely to be the most authoritative given their support from the permanent members; but this also explains why their creation within the UNSC are a rarity. Aside from Darfur, the UNSC has only established commissions on two occasions, unrelated to its ICC referral power (Rwanda and Yugoslavia), supporting the necessity for other UN organs to perform an investigatory function instead.[20]

Given the absence of UNSC established-commissions, the UN plenary has assumed ever increasing responsibility for establishing country-specific mechanisms to investigate international crimes and to promulgate their findings. An early example of UN plenary activism in advancing international investigations was the creation by the UNGA in 1997 of the Group of Experts for Cambodia, leading to the establishment of a hybrid tribunal.[21] Yet it was the UNGA's creation of the Human Rights Council ('HRC') in 2006, with its mandate to address 'violations of human rights, including gross and systematic violations', which led to a sustained plenary focus on the investigation of international crimes.[22] The result was that over the next decade HRC sponsored commissions would investigate violations in Palestine (2006), Lebanon (2006), Darfur (2006), Libya (2011), Côte d'Ivoire (2011), Syria (2012), Eritrea (2014) and DPRK (2014).[23] The effect of

[17] In this respect, the UNGA is a competent UN organ in using fact-finding missions: UNGA Res 46/59 (9 December 1991) at annex, para 7.

[18] M Frulli, 'Fact-finding or Paving the Road to Criminal Justice: Some Reflections on United Nations Commissions of Inquiry' (2012) 10(5) JICJ 1323, 1331.

[19] ibid.

[20] The UNSC also requested the UN Secretary-General to establish a commission for the Central African Republic: UNSC Res 2127 (2013) at para 24.

[21] UNGA Res 52/135 (12 December 1997); UNGA Res 55/95 (28 February 2001). However, the role of the UN and UNGA in establishing this tribunal has been criticized, see T Hamilton and M Ramsden, 'The Politicalisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia' (2014) 14(1) International Criminal Law Review 115.

[22] UNGA Res 60/251 (15 March 2006) at para 3.

[23] Some of these situations were addressed concurrently in the UNSC, whereas others lacked effective UNSC scrutiny. For an overview, see M Kearney, 'Humanitarian Action through Legal

establishing these commissions was that the HRC were able to form a judgment on the likelihood of crimes being committed in a given State and to make recommendations accordingly. It followed that the release of commission findings coincided with a strengthening of language in HRC country-specific resolutions. Prior to 2011, with the notable exception of Darfur, the HRC avoided pronouncements on the occurrence of 'crimes', instead using the language of human rights violations.[24] The Libyan uprising, which coincided with greater American engagement with the UN, led the HRC to condemn human rights violations, 'some of which may also amount to crimes'.[25] Since then, the HRC has relied on fact-finding missions to note possible 'crimes' in the Occupied Palestinian Territories, Syria, DPRK, Myanmar, Eritrea and South Sudan.[26]

Of particular importance to the analysis here, UNGA resolutions on country-specific situations have been influenced by the findings of HRC sponsored commissions of inquiry.[27] The UNGA endorsed the methodology of HRC commissions and used their findings to condemn possible crimes in Syria and the DPRK.[28] Notably, the language of UNGA resolutions on DPRK strengthened following the release of the commission report, from denouncing 'grave violations' of human rights to 'crimes against humanity'.[29] The UNGA, drawing on the HRC Special Rapporteur, also noted 'violations of international humanitarian law' in Myanmar.[30] The strengthening of language in UNGA resolutions is also apparent with the release of commission reports on the armed conflict in Gaza, which both plenaries endorsed by majority vote, although the UNGA stopped short of characterizing the violations as 'crimes' in the same way as the HRC.[31] Beyond the text of UNGA resolutions, the recent adoption of Resolution 71/248 to establish the 'International, Impartial and Independent Mechanism' itself is premised on augmenting the functions

Institutions' in R MacGinty and J Peterson, *The Routledge Companion to Humanitarian Action* (Routledge 2015) 349.

[24] eg HRC Res 4/8 (2007) at para 3; HRC Res 1/106 (2006).

[25] HRC Res S-17/17 (2011) at para 1.

[26] HRC Res 29/25 (2015) at preamble; HRC Res S-19/1 (2012) at preamble and para 3; HRC Res 29/13 (2015) at preamble and para 3; HRC Res 29/18 (2015) at preamble; HRC Res 32/24 (2016) at preamble and para 6. Non-HRC commissions have also been relied on by the HRC to note possible crimes, as with the AU report on South Sudan: HRC Res 29/13 (2015) at preamble and para 13; HRC Res 34/L.34 (2017) at para 7.

[27] Indeed, the HRC recognizes the important plenary function of the UNGA in making recommendations to the UNSC in the field of international criminal justice. For example, the HRC implored the UNGA to recommend the UNSC to refer the Gaza situation to the ICC: HRC Res 16/32 (2011) at para 8.

[28] UNGA Res 69/188 (18 December 2014) at para 6; UNGA Res 69/189 (n 16) at preamble; UNGA Res 68/182 (18 December 2013).

[29] See eg UNGA Res 68/183 (18 December 2013) at para 1.

[30] UNGA Res 69/248 (29 December 2014) at paras 5 and 6.

[31] See eg UNGA Res 70/90 (9 December 2015) at para 8; UNGA Res 64/10 (5 November 2009) at para 3; UNGA Res ES-10/9 (20 December 2001) at preamble. See further: Z Yihdego, 'The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding' (2012) 13 Melbourne Journal of International Law 1.

of the HRC-established commission so as to secure future criminal prosecution of individuals responsible for serious crimes.[32] Taken collectively, these facts evince the close cooperation and coordination between the UNGA and HRC in investigating and identifying the occurrence of international crimes.

2. *Evaluating UN plenary influence on UNSC referrals*

The crucial issue is whether there is a causal relationship between this UNGA/HRC practice and UNSC referral decisions. It is too early to say given the limited referral practice so far. Even so, identifying influences on the UNSC will not always be easy to establish, particularly as the UNSC will often be slow to attribute its decision or a change in its position to anything other than its members' considered judgment. That said, the UNSC has recognized the investigatory value of commission findings to support its decisions. Thus the UNSC in Resolution 1970 (2011) acknowledged the deliberations of the HRC when referring the Libya situation to the ICC.[33] Aside from the question of whether, ultimately, a UNSC referral occurs, plenary deliberations are influencing the agenda and outcomes in the UNSC in other ways. The UNSC has 'mirrored' the language of HRC resolutions and commission reports, in characterizing international crimes.[34] Further, although Yemen's human rights situation was on the UNSC's agenda, it did not address the need for an investigation for alleged serious crimes until the HRC had called for this.[35] The growing importance of HRC commissions for the UNSC is further evidenced by the UNSC's provision of operational support, for instance, when renewing the mandate of the UN Operation in Côte d'Ivoire. The UNSC instructed this mission to act in 'close coordination' with the HRC's Independent Experts.[36] The UNSC has also underpinned HRC commissions with Chapter VII authority, calling upon all sides to cooperate with investigations in Côte d'Ivoire and the Central African Republic ('CAR').[37] It also endorsed the credibility of HRC commissions' investigatory standards as a model for adoption by the Yemeni authorities in investigating crimes within its jurisdiction.[38]

Still, the extent of UNGA/HRC influence is inevitably limited in the 'hard case' where the interest of a UNSC permanent member is implicated. Thus, China and Russia vetoed the referral of Syria to the ICC despite multiple UNGA/HRC resolutions (carrying considerable State support) and

[32] UNGA Res 71/248 (2016) (n 7).
[33] UNSC Res1970 (2011) at preamble and para 5. Also, UNSC Res 2040 (2012) at preamble; UNSC Res 2000 (2011) at preamble.
[34] Compare eg HRC Res 24/22 (2013) and UNSC Res 2118 (2013); HRC 19/22 (2012) and UNSC Res 2043 (2012); HRC Res 18/19 (2011) and UNSC Res 2040 (2012).
[35] UNSC Res 2014 (2011) at preamble.
[36] UNSC Res 2226 (2015) at para 17.
[37] UNSC Res 1975 (2011) at para 8; UNSC Res 2134 (2014) at para 19.
[38] UNSC Res 2140 (2014) at para 6.

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commission findings that at least supported the opening of an investigation at the ICC.[39] In this respect, the best that can be hoped of UNGA/HRC impunity resolutions is that they build momentum towards the eventual consideration of the issue by the UNSC. For instance, UNGA Resolution 69/189 drew on commission findings that called for the UNSC to refer the DPRK situation to the ICC. Although no resolution was drafted or vote taken, the UNGA's calls to address DPRK impunity prompted the UNSC to meet in closed session; a necessary first step in broadening UNSC consideration of DPRK issues, from disarmament to human rights.[40]

3. Delimiting General Assembly/Human Rights Council UN plenary influence on the Security Council

That said, it is necessary to acknowledge at this juncture that the UNGA's ability to influence the UNSC exists in the broader context of international pressures exerted by a variety of agents. The UNSC will accord due weight to the views of States and organizations within the region in which the situation has arisen, particularly where there are regional sensitivities, to assuage non-intervention concerns of Russia and China. In the Libya situation, the HRC commission added evidentiary justification and legitimacy to the referral, yet it was Arab League support that was, if not decisive, then a weightier factor.[41] Further, the UNGA's influence may be undermined in instances where plenary dissent or abstentions produces a mere technical majority, leading like-minded States to act collectively outside of the UNGA to preserve a 'united front'. This may have been evident when 57 States petitioned the UNSC to refer Syria to the ICC.[42] UNGA political biases may also affect the extent to which it is able to address the impunity gap and also influence the UNSC, as will be developed in Part IV of this article.

Commissions have been established outside the UN, for example, by non-governmental organizations ('NGOs') and regional organizations such as the European Union ('EU') and African Union ('AU').[43] Although NGOs perform an important investigatory role and have assisted the ICC Prosecutor in initiating investigations, commissions established by States provide a better representation of the shifting *modus operandi* of States towards ending impunity and thus hold greater persuasive power.[44] Nonetheless, non-UN

[39] UNSC, Record of the 7180th Meeting of the Security Council, UN Doc No S/PV.7180 (2 May 2014); UNGA Res 69/189 (n 16).

[40] See eg UNSC Res 2270 (2016); Schmidt (n 6) 27–80.

[41] V Peskin and M Boduszynski, 'The Rise and Fall of the ICC in Libya and the Politics of International Surrogate Enforcership' (2016) 10(2) International Journal of Transitional Justice 272, 276–7.

[42] UNSC, 'Letter from the Chargé d'affaires of the Permanent Mission of Switzerland' UN Doc A/67/694–S/2013/19 (16 January 2013).

[43] For examples, see Frulli (n 18) 1326.

[44] C Henderson, 'Commissions of Inquiry: Flexible Temporariness or Permanent Predictability?' (2014) 45 NYIL 287, 289.

commissions can have persuasive effects on the UNSC, particularly in offering regional legitimacy, as in the UNSC's recent 'welcoming' of AU commission findings on South Sudan.[45] Non-UN commissions often compliment HRC investigations or act as surrogates where the principal UN organs fail to investigate, as in the International Labour Organisation ('ILO') commission established to investigate forced labour in Myanmar, an initiative not taken by the UN plenary, but subsequently endorsed by it.[46] Although they play differing roles, the growth of commissions both in the UN and elsewhere can collectively buttress and legitimize UNGA recommendations for UNSC action.

There are of course specific advantages to establishing commissions through the UN's plenary organ. The UNGA (and HRC) possesses broad constitutional authority under the UN Charter, with the 'promotion of human rights' extending to enforcement of breaches, including international crimes.[47] Other international organs, such as the ILO, do not enjoy such broad competencies, as the narrow ambit of the Myanmar inquiry focusing on forced labour shows.[48] The untapped potential of the International Humanitarian Fact-Finding Commission makes it another candidate organ for fostering ICC action,[49] but its mandate is limited to international humanitarian law and, crucially, it requires the consent of all parties to an armed conflict, unlike UN commissions.[50] UN commissions have also played a central role beyond the referral of situations to the ICC, in providing evidence for the Prosecutor's subsequent investigations.[51] Thus, in initiating a *proprio motu* investigation on the Côte d'Ivoire situation, much of the fact-finding relied on derived from a HRC commission report.[52] In short, the UNGA and HRC are able to embolden inquiries via their broad constitutional powers; in turn, commission findings embolden plenary recommendations on the necessity for ICC action.

[45] UNSC Res 2290 (2016) at preamble. See also HRC Res 29/13 (2015) at para 3.

[46] UNGA Res 66/230 (24 December 2012); HRC Res 31/24 (2016). The HRC may become more active following the UN High Commissioner's report on Myanmar, referencing possible crimes, see: HRC, *Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar*, A/HRC/32/18 (28 June 2016).

[47] C Harwood, 'Human Rights in Fancy Dress? The Use of International Criminal Law by Human Rights Council Commissions of Inquiry in Pursuit of Accountability' (2015) 58 Japanese Yearbook of International Law 7.

[48] See ibid.

[49] First Additional Protocol to the 1949 Geneva Conventions 1977, 1125 UNTS 3; C Harwood, 'Will the "Sleeping Beauty" Awaken? The Kunduz Hospital Attack and the International Humanitarian Fact-Finding Commission' (15 October 2015) *EJIL:Talk!* available at <http://www.ejiltalk.org/will-the-sleeping-beauty-awaken-the-kunduz-hospital-attack-and-the-international-humanitarian-fact-finding-commission/>.

[50] Art 2(7), UN Charter; Henderson (n 44) 302; Yihdego (n 31) 45–6.

[51] eg HRC, 'Report of the International Commission of Inquiry on Libya', UN Doc A/HRC/17/44 (1 June 2011) para 78.

[52] Request for an authorization of an investigation pursuant to Article 15, *Côte d'Ivoire*, ICC-02/11-3-OTP, Pre-Trial Chamber III (23 June 2011) sections 20, 28, 63, 82 and 152.

B. Facilitating the ICC's Jurisdiction through Norm-Forming and 'Quasi-Judicial' Resolutions

The UNGA may facilitate the ICC's jurisdiction in a more indirect way by contributing to the resolution of legal issues which in turn may increase the likelihood of the ICC's exercise of jurisdiction. While UNGA resolutions do not possess legislative effect, they provide evidence on a state of affairs in international law, bolstered by the UNGA s broad plenary status. Indeed, the UNGA's central role in norm formation and crystallization has been recognized by the ICJ in multiple decisions.[53] UNGA resolutions are amongst the instruments most cited by international decision-makers,[54] and the UNGA has performed a critical role in developing international criminal law over the past 70 years.[55] The UNGA, through resolutions crafted in peremptory language and with broad plenary support, has a degree of legitimacy in developing ICC law, by providing authoritative pronouncements on custom, defining terms in applicable treaties, or resolving issues that intersect with the ICC's jurisdiction and general international law.

There are many examples of the UNGA acting to develop both international criminal law and the norms contained within the Rome Statute. In the first place, the UNGA has acknowledged the 'usefulness' of it discussing the 'status of instruments of international humanitarian law relevant to the protection of victims in armed conflict'.[56] In a similar vein, ICC crimes that draw on custom, such as Article 7(1)(k) on the crime against humanity of 'other inhumane acts' can be influenced by State voting in the UNGA. One example is the putative crime of 'forced marriage' as 'other inhumane acts', a proposition which has divided jurisprudence in the *ad hoc* tribunals but of which the UNGA has, in the past five years, taken steps towards securing norm consensus.[57] The UNGA may also take steps to define an international crime which is then used by State-parties to amend the Rome Statute, as evidenced by the ASP's incorporation of the UNGA's definition of aggression in Article 8*bis*.[58] Similarly, UNGA resolutions may assist the development of the Court's procedural and cooperation norms. The ICC judiciary has cited UNGA resolutions on a myriad of legal points, such as victims' right to remedies and States' duties to act in good faith in

[53] MD Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 EJIL 879, at 896 (authorities cited there).

[54] A *World Courts* database search returned 795 international decisions citing UNGA resolutions: <http://www.worldcourts.com/index.htm> (accessed 6 April 2017).

[55] eg UNGA Res 95(I) (11 December 1946); UNGA Res 44/39 (4 December 1989); UNGA Res 96(1) (11 December 1946).

[56] UNGA Res 71/144 (2016), 20 December 2016, at preamble.

[57] UNGA Res 66/140 (19 December 2011); HRC Res 24/23 (2013). Recently, the PTC confirmed charges on forced marriage, citing UNGA Res 217(III)A, (10 December 1948) (Universal Declaration of Human Rights, art 16 (freedom of marriage)): Decision on the confirmation of charges, *Ongwen* (ICC-02/04-01/15) Pre-Trial Chamber II (23 March 2016) section 94.

[58] UNGA Res 3314 (XXVIII) (14 December 1974).

cooperation matters.[59] More ambitiously, the UNGA might encourage State cooperation with the ICC by pronouncing on the scope of legal duties under the Rome Statute or other conventions, such as the Genocide Convention.[60] The UNGA may perform a useful role where customary ambiguity or controversy exists as to the scope of cooperation duties, as with the law of immunities.[61]

Aside from norm-development, the UNGA has a potential role to play in resolving international disputes material to the ICC's exercise of jurisdiction in a given situation, through the pronouncement of 'quasi-judicial' resolutions.[62] This type of resolution is, indeed, recognized in the Rome Statute, albeit in relation to the UNSC, where Article 15*bis* makes a prosecution of aggression contingent on an UNSC determination. Although the UNSC is the only UN political organ with broad powers to bind the UN membership, the ICJ has recognized the UNGA's quasi-judicial competencies to ensure that international breaches do not go without remedy.[63] In this respect, the UNGA has pronounced on the scope and applicability of treaties, noting recently that the Geneva Conventions are applicable to the Occupied Palestinian Territories.[64] The UNGA has also addressed UN Charter violations (pertaining to systematic acts of racism and aggression) and the mandate of colonial territories.[65] It has also noted State failure to comply with UNSC resolutions.[66] It is apparent also that UNGA quasi-judicial resolutions have influenced decision-making in other legal regimes; after World War II the four powers administering African colonies agreed to submit any disagreement to the UNGA for determination, the UNGA subsequently pronouncing on the timing for Libyan, Somali and Eritrean Statehood.[67] UNGA determinations have also been used to find State responsibility for human rights violations, even where the resolution was divisive. Thus in *Chiragov v Armenia*, the European Court of Human Rights

[59] eg Decision on victims' participation, *Lubanga* (ICC-01/04-01/06-1119) Trial Chamber I (18 January 2008) section 35.

[60] See generally G Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the *Al Bashir* Case' (2010) 8(2) JICJ 365.

[61] Indeed, the UNGA has discussed immunity of State officials as part of its agenda on codifying the rules on universal jurisdiction: UNGA Sixth Committee, 67th Session, UN Doc A/C.6/67/SR.24 (28 December 2012) section 14. For an analysis of present ICC law, see further M Ramsden and I Yeung, 'Head of State Immunity and the Rome Statute: A Critique of the PTC's Malawi and DRC Decisions' (2016) 16(4) International Criminal Law Review 703.

[62] O Schachter, 'The Quasi-Judicial Role of the Security Council and General Assembly' (1964) 58(4) AJIL 960, 961.

[63] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep (1971) 102.

[64] UNGA Res 70/88 (9 December 2015).

[65] eg UNGA Res 1761(XVII) (6 November 1962); UNGA Res 1103(XI) (18 December 1956); UNGA Res ES-8/2 (14 September 1981); UNGA Res 2145(XXI) (27 October 1966).

[66] eg UNGA Res 67/25 (30 November 2012).

[67] Treaty of Peace with Italy 1947, UNTS 747, Annex XI; UNGA Res 289 (IV) (21 November 1949).

used UNGA Resolution 62/243 (2008) to establish that the population expelled from their homes in Azerbaijan during the Nagorno-Karabakh conflict had a right to return, thereby supporting the finding of an interference with the right to peaceful enjoyment of possessions.[68]

This analysis reveals the UNGA's quasi-judicial potential, which may assist the ICC in resolving jurisdictional questions where these implicate general international law. Such questions may arise, for example, in the interpretation of the phrases 'State' and 'territory' within the meaning of Article 12 of the Rome Statute.[69] It is also easy to envisage a problem, during or in the aftermath of a civil war, in identifying which entity is competent to represent a State in accepting the court's jurisdiction and exercising a referral power. Could, for instance, an ICC-friendly 'government-in-exile' make a referral to the ICC despite lacking effective control? While the ICC is competent to decide jurisdictional questions, its function as a criminal court does not sit easily with it resolving such questions of international law or State responsibility.[70] Indeed, this controversy-avoidance tendency was implicit in the Prosecutor's initial decision not to investigate the Israel/Palestine situation because Palestinian Statehood was uncertain.[71] It is here where the UNGA can resolve international disputes at the ICC via quasi-judicial resolutions.

Three examples show this. The first is the UNGA's pronouncements on Palestinian Statehood. Accountability for crimes in Israel and Palestine is certainly a divisive issue: the US would veto any referral resolution proposed in the UNSC. Yet, if Palestine was a 'State' that would obviate the need for a referral from the UNSC, Palestine then being able to accept the jurisdiction of the ICC of its own accord. The UNGA adopted Resolution 67/19 recognizing Palestine's 'right' to Statehood, according it non-member observer 'State' status in the UN.[72] Remarkably, the Prosecutor treated Resolution 67/19 as '… determinative of Palestine's ability to accede to the [ICC] Statute'.[73] The second example shows the impact of UNGA resolutions on judicial decision-making on questions of 'territory'. The Prosecutor undertook a preliminary examination into alleged crimes committed in South Ossetia, the issue being whether this territory was part of Georgia, a State-party. In authorizing an investigation, the PCT I drew upon multiple UNGA resolutions affirming this fact.[74] Finally, the UNGA has also pronounced on the validity of acts by

[68] Appl No 13216/05, Judgment of 16 June 2015, section 195.

[69] Art 12, Rome Statute.

[70] Bassiouni (n 15) 718.

[71] ICC OTP, 'Situation in Palestine' (3 April 2012) available at <https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>.

[72] UNGA Res 67/19 (29 November 2012).

[73] ICC, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine', Press Release (16 January 2015).

[74] Request for authorization of an investigation pursuant to Article 15, *Situation in Georgia* (ICC-01/15-4-Corr2), Pre-Trial Chamber I (17 November 2015) section 54; UNGA Res 63(307) (9 September 2009) at para 1.

putative State organs, which can serve to guide future decisions of the ICC. In the Crimea, secessionists entered an annexation agreement with Russia. The Ukrainian government lodged an Article 12(3) declaration, thus requiring the ICC to resolve the territorial and governmental issues in the Crimea as a precondition to jurisdiction.[75] In this respect, pending preliminary investigation, the ICC will be assisted by UNGA Resolution 68/262 (2014) which declared the Crimea annexation by Russia to be of 'no validity'.[76]

The ICC's plenary organ, the ASP, could also perform a quasi-judicial role to resolve questions of general international law, given that it comprises a large number of States and has a broad plenary power to make recommendations. The quasi-judicial potential of the ASP was recognized by the Prosecutor when inviting the ASP to form a view on whether Palestine had yet attained Statehood, but it did not pronounce on this issue.[77] It may be that the State-parties do not ultimately perceive this to be the role of the ASP, it better to focus on operational questions and defining the ambit of future crimes. Indeed, many ASP resolutions address operational or technical questions of the ICC as an international organization.[78] These limitations therefore support the UNGA continuing to play a quasi-judicial function in the area of international justice. In this respect, the UNGA is in a better position than the ASP to pronounce on issues in international law because of its broader membership, which also include ICC non-parties, thereby providing a firmer democratic basis for determinations that impact such States.

C. General Assembly Recommendations for State Engagement with the ICC

UNGA resolutions, aside from influencing UNSC and ICC decision-making at the institutional level, may also have extrinsic effects in securing cooperation of States in arresting fugitives and imposing sanctions. It is necessary to first delimit the UNGA's potential role from the existing mechanisms in Article 87(7) of the Rome Statute, which assigns competence on the ASP and UNSC to address instances where States fail to cooperate with the ICC.

1. Effectiveness of ICC mechanisms for securing compliance

Under Article 112 of the Rome Statute, the ASP shall consider 'any question relating to non-cooperation', with any response being 'non-judicial' and aimed at 'deploying political and diplomatic efforts to promote cooperation and to respond to

[75] ICC, 'Ukraine accepts ICC jurisdiction over alleged crimes committed between 21 November 2013 and 22 February 2014', Press Release (17 April 2015).
[76] UNGA Res 68/262 (27 March 2014) at para 6.
[77] Situation in Palestine (n 71).
[78] See ICC ASP, Resolutions, available at <https://asp.icc-cpi.int/en_menus/asp/resolutions/Pages/resolutions.aspx>.

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non-cooperation'.[79] Specific action includes the ASP President's 'good offices' engaging with the non-compliant State, holding public meetings to allow open dialogue and making 'concrete' recommendations.[80] The ASP potentially offers a more direct route than the UNGA for censuring non-cooperation, although the record of them doing so has been mixed so far. While the ASP President and Bureau have called on specific States to cooperate and recommended ASP action, there have been no country-specific recommendations noting failures to cooperate.[81] That said, some States while engaged in dialogue with the ASP Bureau have acknowledged their obligations and gave assurances that their breaches of the Rome Statute cooperation regime will not be repeated. Of particular note here, following dialogue with the ASP Bureau, Malawi refused to host the Sudanese President at an AU summit.[82] In general, however, the ASP has not been able to force cooperation in 'hard cases'. The Kenya government's refusal to deliver evidence to the ICC, bringing the *Kenyatta* trial to a halt, met with little ASP pressure.[83] It has thus been argued that the ASP has been something of a soft touch on non-cooperation, showing a lack of institutional commitment towards monitoring and addressing violations, evidenced by the lack of a permanent subsidiary body under Article 112.[84]

The UNSC, by contrast, may impose cooperation duties and sanction recalcitrant States. It has, of late, taken steps to enforce cooperation with ICC investigations in the Democratic Republic of Congo ('DRC'), CAR and Mali, in authorizing UN peacekeeping operations to cooperate in arrests.[85] However, UNSC referral decisions so far have yet to place obligations on ICC non-parties to cooperate with the Court.[86] Despite the ICC referring multiple instances of non-cooperation to the UNSC, no subsequent enforcement action has been taken against the recalcitrant States. With Libya, the UNSC's 'ending impunity' rhetoric vanished once the new transitional government took office.[87] Similarly, over a decade after the Darfur referral, despite ICC orders being openly flouted and the investigation being suspended, the UNSC took no action; this reflects the reality that China in particular would veto any resolution forcing Sudanese cooperation.[88] In terms of the type of enforcement action, it is within the power of the UNSC to impose sanctions against recalcitrant States or against fugitives the subject of

[79] ASP, ICC-ASP/10/Res5 (2011) at para 6. For a comprehensive analysis on the law and practice of ICC cooperation, see O Bekou and D Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill 2016). [80] ibid, para 15.
[81] ASP, 'Report of the Bureau on Non-cooperation', ICC-ASP/11/29 (1 November 2012) at para 20. [82] ibid, para 10.
[83] L Moffett, 'Elaborating Justice for Victims at the International Criminal Court Beyond Rhetoric and The Hague' (2015) 13(2) JICJ 281, 306. [84] ibid.
[85] UNSC Res 2211(2015) at para 9; UNSC Res 2149 (2014) at para 28; UNSC Res 2164 (2014) at para 13. [86] UNSC Res 1592 (2005) at para 2; UNSC Res 1970 (2011) at para 5.
[87] Peskin and Boduszynski (n 41) 272–91.
[88] G Cafiero, 'China's Sudan Challenge', Foreign Policy in Focus (7 February 2013) available at <http://fpif.org/chinas_sudan_challenge/>.

investigation at the ICC.[89] UN members have called on the UNSC to impose targeted sanctions on suspects 'as a matter of course'.[90] However, the UNSC has failed to adopt a consistent approach to targeted sanctions, nor have they imposed sanctions on States that have failed to cooperate with the ICC.[91] Experience from the former Yugoslavia indicates that the UNSC only took trade sanctions seriously when pursuing 'peace'; once some modicum of peace was obtained, securing post-conflict 'justice' was a dispensable consideration in suspending the sanctions regime.[92]

2. *Diplomatic effect of General Assembly recommendations*

The UNGA can direct recommendations to States to support the ICC's work, calling on non-members to ratify the Rome Statute and for current members to cooperate.[93] Thus, in the context of the Palestinian situation the HRC called upon the 'parties concerned to cooperate fully with the preliminary examination of the International Criminal Court and with any subsequent investigation that may be opened'.[94] The opening of a preliminary examination by the ICC Prosecutor into the situation in Burundi also led the HRC to recall Burundi's 'obligations to fight impunity for crimes falling within the jurisdiction of the Court'.[95] Plenary recommendations might also call on ICC State-parties to make a referral and also encourage UN members unwilling to ratify the ICC Statute to accept the court's jurisdiction on an *ad hoc* basis by way of a declaration under Article 12 (3).[96] More generally, the UNGA and HRC have also invited States to meet their obligations under a number of relevant conventions and also to take such steps to 'combat impunity' within their territory.[97] Notably, the UNGA called on Russia to address the impunity for crimes that have arisen from its occupation of the Crimea.[98] A final example to show how the UN plenary organs can exert pressure on States to respect the Rome Statute is the HRC's Universal Periodic Review ('UPR'). Over the past decade

[89] UNSC Res 1591 (2005) (Sudan); UNSC Res 748 (1992) (Libya).

[90] UNSC, Record of the 6849th Meeting, UN Doc No S/PV.6849 (17 October 2012) at 23. As to their use, see: M Mancini, 'UN Sanctions Targeting Individuals and ICC Proceedings: How to Achieve a Mutually Reinforcing Interaction' in N Ronzitti, *Coercive Diplomacy, Sanctions and International Law* (Brill 2016).

[91] In the Central African Republic, the UNSC imposed targeted sanctions against designated individuals in the Central African Republic who were involved in acts including violations of international human rights law and international humanitarian law, although not specifically ICC suspects as of yet: UNSC Res 2339 (2017), at paras 16–17.

[92] M Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal' (2000) 49 DePaulLRev 925, 943.

[93] eg UNGA Res 70/264 (27 May 2016) at paras 2, 10.

[94] HRC Res 34/L.38 (2017) at para 6.

[95] HRC Res 33/L.31 (2016) para 13.

[96] See UNGA Res 71/253 (2017), 26 January 2017, para 17.

[97] UNGA Res 60/1 (24 October 2005) at para 117; UNGA Res 53/162 (25 February 1999) at paras 13 and 14; HRC Res 34/L.8 (2017), 22 March 2017, at para 17; HRC Res 34/L.23 (2017), 20 March 2017, at preamble.

[98] UNGA Res 71/205 (2017), 1 February 2017, para 2

States have used this mechanism to make in excess of 500 recommendations to individual States pertaining to international justice, including to ratify the Rome Statute, align national legislation and cooperate with the ICC.[99]

Aside from the power to suspend a State's plenary membership, exercised by the UNGA recently with Libya, UNGA exhortations in this area reflect the usual ways that international organizations attempt to influence State action; resolutions encouraging State compliance with ICC law have also been passed by the Organisation of American States, AU, EU and Council of Europe.[100] In many respects these entities exert greater influence than the UNGA, particularly those with geopolitical proximity to the relevant State and where compliance can be encouraged with economic incentives, as with Serbia's accession to the EU following their cooperation with the ICTY.[101] Where the UNSC fails to act, though, UNGA recommendations to recalcitrant States allows the UN to take an official position on a situation, promoting State engagement and accountability within the organization. This could, for instance, lead parties to a conflict to investigate allegations of war crimes and explain their failure to do so, as arose with Israel and Palestine upon the recommendation of the HRC 2009 Gaza report.[102] The UNGA has also pressured States into institutional engagement, apparent from UNGA Resolution 69/188 which noted the possible occurrence of crimes against humanity in the DPRK, prompting the regime to engage with the UN human rights rapporteur and participate in the UPR.[103]

3. *Authorizing effect of General Assembly resolutions*

An interesting question is whether a UNGA resolution may provide a legal basis for the imposition of sanctions in response to State failure to cooperate with the ICC. This is not a mere hypothetical question. UNGA practice recommending 'voluntary sanctions' during the Cold War prompted scholarly reflection on whether such recommendations are able to preclude what might otherwise be internationally wrongful conduct on the part of sanctioning States.[104] The utility of sanctions remains the subject of much debate, including the effectiveness of UNGA supported sanctions in addressing human rights violations.[105] It is beyond the scope of this article to revisit this debate. Rather it proceeds on the assumption that sanctions can serve a valuable function, a view that is supported in multiple UNGA resolutions. In

[99] Universal Periodic Review, Database, available at <http://www.upr-info.org/database/>.
[100] UNGA Res 65/265 (1 March 2011) (suspending Libya's HRC membership); Moffett (n 83) 307.
[101] Forsythe (n 1) 859; Moffett (n 83) 307.
[102] Yihdego (n 31) 20.
[103] Schmidt (n 6) 278–80.
[104] DW Bowett, 'Economic Coercion and Reprisals by States' (1972) 18(1) VaJIntlL 1, 6; JW Halderman, 'Some Legal Aspects of Sanctions in the Rhodesian Case' 17(3) ICLQ (1968) 672.
[105] JM Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press 2007) 262; cf N White, *The United Nations and the Maintenance of International Peace and Security* (Manchester University Press 1990) 151.

particular, the UNGA has already identified the utility of sanctions in supporting ICC action, recommending the UNSC to authorize 'effective targeted sanctions' against perpetrators of international crimes.[106] In the event that the UNSC fails to act, could the UNGA initiate a sanctions regime, and if so, what would be its legal effect?

Some delimitation between different forms of State action and collective measures is first necessary. Many acts that States take against a recalcitrant State will simply amount to retorsions and thus not give rise to State responsibility. But it is certainly apparent that many acts relating to the enforcement of ICC law would constitute an interference in the internal affairs of another State, including asset freezes, travel bans and suspension of diplomatic relations.[107] Aside from possible treaty contraventions, it is arguable that these measures are unlawful without the relevant State's consent, a position supported by UNGA resolutions.[108] Chapter VII provides the obvious basis to preclude such otherwise wrongful conduct, but given the assumption here of UNSC inaction, it is necessary to look at other collective sanctioning regimes. These may arise, for instance, under regional arrangements, as with the AU, which may impose sanctions against one of its members in response to 'war crimes, genocide, and crimes against humanity'.[109] Moreover, the ICC could develop its legal powers to order certain targeted sanctions against indictees that State-parties would then be obliged to follow.[110] Certainly, the UNGA could endorse these measures and thus add weight to their legitimacy. But problems arise in imposing sanctions against a State that has not consented to the sanctioning regime or where these mechanisms have not been activated; it is here where the UNGA may perform a distinct function in precluding otherwise wrongful conduct in line with the Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA').

The first possibility is to treat the implementation of UNGA-recommended sanctions as UN action and thus outside the rules of State responsibility, as Talmon noted.[111] The ARSIWA are 'without prejudice to the Charter of the United Nations'.[112] However, the commentary to the ARSIWA only references Article 103 of the Charter, which gives primacy to the obligations of member-States 'under the present Charter' over those of any 'other international agreement' to which such States are party. The difficulty here is

[106] UNGA Res 69/188 (n 28) at para 8.
[107] EJ Criddle, 'Humanitarian Financial Intervention' (2014) 24(2) EJIL 584, 591.
[108] UNGA Res 2131 (XX) (21 December 1965) at paras 1–2; UNGA Res 2625 (XXV) (24 October 1970).
[109] Constitutive Act of the African Union, arts 4(h), 4(j) (11 July 2000) 2158 UNTS 3.
[110] See arts 57(3) and 93(1)(k), Rome Statute. In the context of the ICTY sanctions regime, see Scharf (n 92) at 945 (and citations there).
[111] S Talmon, 'The Legalizing and Legitimizing Function of UN General Assembly Resolutions' ASIL Unbound (18 July 2014) available at <https://www.asil.org/blogs/legalizing-and-legitimizing-function-un-general-assembly-resolutions>.
[112] Art 59.

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that UNGA resolutions are generally not regarded to be a source of obligation given that they are recommendatory in character.[113] But the commentary also noted a distinction between individual measures and reactions within the framework of international organizations.[114] Indeed, it is firmly established that UNSC-'authorized' enforcement action, including sanctions, precludes the wrongfulness of such coercive acts.[115] The UNSC sanctions regime is predicated on a determination that it is necessary to restore or maintain international peace and security under Article 39 of the UN Charter. Whether UNGA resolutions can also have 'authorizing' effects, especially in light of practice under the *Uniting for Peace* mechanism, remains an open question.[116] Notably, Judge Lauterpacht opined that UNGA recommendations may 'on proper occasions' provide a 'legal authorisation' for members to act, but offered no further insight.[117] Indeed, scholarship on *Uniting for Peace* is divided. A 'weak' reading of *Uniting for Peace* mechanism is that plenary recommendations are merely declaratory of States' pre-existing rights of action under international law, these States acting on the basis of their own responsibilities. A 'strong' construction of *Uniting for Peace*, on the other hand, imputes to the UNGA the power to authorize (non-mandatory) UN enforcement action to uphold international peace and security.[118]

Still, the better view is that the *Uniting for Peace* mechanism embraces both weak and strong powers, as UN practice shows. UNGA recommendations on 'voluntary sanctions' against abusive regimes in South Africa, Southern Rhodesia and the Portuguese Territories support the existence of weak powers.[119] In these instances, the UNGA invited the UNSC to apply necessary enforcement measures, which suggests it did not intend to assume analogous powers; but nor did it have to, given the UNSC's parallel action in these situations.[120] On the other hand, a strong interpretation provides the most natural explanation for the UN mandate in Korea (1950) after UNSC deadlock, both in reflecting views of the major powers at the time and in light of the specific military conduct that went beyond States' right to self-defence.[121]

[113] International Law Commission (ILC), 'Report of the International Law Commission, Fifty-third Session', UN Doc A/56/10(2001), 10 August 2001, at 365. [114] ibid at 350.

[115] D Sarooshi, *The United Nations and the Development of Collective Security* (Oxford University Press 1999) 149.

[116] For further analysis on *Uniting for Peace* in relation to the powers of the UNGA to investigate human rights abuses and international crimes, see M Ramsden, '"Uniting for Peace" in the Age of International Justice' 42 YaleJIntlL Online (2016) 1.

[117] *Voting Procedure,* Advisory Opinion, 7 June 1955, ICJ Rep (1955) 67, at 115.

[118] M Ramsden, 'Uniting for Peace and Humanitarian Intervention: The Authorising Function of the UN General Assembly' (2016) 267 25(2) Washington International Law Journal (and citations there).

[119] UNGA Res 1761(XVII) (n 65) at para 8; UNGA Res 1807 (XVII) (14 December 1962) at para 8; UNGA Res 2151 (XXI) (17 November 1966) at para 6.

[120] UNSC Res 180 (1963); UNSC Res 181 (1963); UNSC Res 221 (1966).

[121] UNGA Res 376(V) (7 October 1950) (seeking 'a unified, independent and democratic government of Korea').

This action included the imposition of an arms embargo against China, which was regarded as collective 'action'.[122] This strong reading is also apparent from reports of the Collective Measures Committee, established to implement *Uniting for Peace*. The UNGA overwhelmingly affirmed this committee's work on the possible 'application of a selective embargo' instituted by the UNGA.[123] A final material point to the definition of UN powers, as the ICJ confirmed, is that the question of which principal organ exercises valid Charter powers is an internal issue which does not affect the external legality of UN enforcement action.[124] The UNGA is able to act on behalf of the entire organization and its exercise of powers enjoy a strong, possibly irrefutable, presumption of validity, at least insofar as the ICJ is concerned.[125] This analysis, then, shows the UNGA's latent potential to authorize targeted or trade sanctions in the context of supporting ICC functions, where such sanctions regime is related to the UN collective security function of restoring or maintaining international peace and security.

A further issue is whether UN members that are not party to the Rome Statute would also owe a duty to cooperate with the ICC. In this respect, it is possible to construct a limited duty to cooperate with the ICC from the UN Charter, although there is no general cooperation duty, according to the principle that a treaty does not create obligations for non-parties.[126] Furthermore, the UNGA has only called for member-States to cooperate with the court; it has only employed stronger language when noting State failures to cooperate with UN investigations or where recommendations have been made to States that they undertake a domestic investigation into international crimes.[127] Nonetheless, a State's failure to cooperate with the ICC would contravene the UN Charter where cooperation is required pursuant to a decision of the UNSC taken in exercise of its Chapter VII powers. If the UNSC obliges States to cooperate with the ICC, then any subsequent failure to do so could be declared by the UNGA to be justifying of countermeasures. In this spirit, several States during an UNSC debate on institutional failings in the Darfur

[122] N White, 'Relationship between the Security Council and General Assembly' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 308–11; UNGA Res 500(V) (18 May 1951).

[123] UNGA Res 703(VII) (17 March 1953) at para 1. See also UNGA Resolution 70/185 (22 December 2015) (urging States 'to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant *organs* of the United Nations' (emphasis added)).

[124] *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)*, Advisory Opinion, 20 July 1962, ICJ Rep (1962) 151, at 168; White (n 122) 311.

[125] S von Schorlemer, 'The United Nations' in J Klabbers and A Wallendahl (eds), Research Handbook on the Law of International Organizations (Edward Elgar 2011) 467; *Expenses* (n 124) at 168.

[126] Art 34, Vienna Convention on the Law of Treaties (VCLT).

[127] In reaffirming the UN Charter's 'principles and purposes', the UNGA noted that 'the Syrian authorities have failed to prosecute such serious violations' and 'demanded' that Syria give 'unfettered access' to the HRC established commission: UNGA Res 67/262 (15 May 2013) at preamble and para 7.

situation noted that Sudan had violated its duties to cooperate with the ICC under UNSC Resolution 1593.[128] The role of the UNGA to act upon violations of UNSC resolutions will thus most obviously arise where the UNSC is deadlocked on further action to enforce its resolutions and in this respect would be a recommendation within the spirit of *Uniting for Peace*: indeed, the UNGA's voluntary sanctions recommendations against South Africa drew upon this State's 'failure' to observe repeated UNSC 'requests and demands'.[129] The notion that UNSC resolutions are open to interpretation by other bodies, while contentious in application, occurs regularly in numerous regimes including in the implementation of sanctions.[130] The UNGA, as the UN's plenary organ, is particularly well placed to pronounce on the meaning of obligations flowing from UN resolutions. The obvious limitation of this approach, though, is that the scope of countermeasures is necessarily tied to how the UNSC formulated the duty to cooperate, which may perpetuate accountability gaps, as with the Sudan and Libya referrals, which did not impose cooperation duties on ICC non-parties.

Finally, subject to overcoming a number of conceptual uncertainties arising from the limited purpose of countermeasures to induce State compliance with international obligations, the UNGA may also recommend targeted sanctions, such as freezing an ICC suspect's assets.[131] Here, the most obvious legal basis would be *erga omnes* obligations; the commission of 'international crimes', as the first draft of the ARISWA indicated, would certainly constitute such breaches.[132] The perceived risks of abuse attendant with unilateral assessments of *erga omnes* breaches adds weight behind the UNGA performing such a coordinating function given its plenary status, as indeed the ILC Special Rapporteur originally envisaged, although other international or regional entities may also do this.[133]

III. THE LEGAL EFFECT OF GENERAL ASSEMBLY REFERRAL TO THE ICC

A more radical solution to resolve UNSC deadlock is to confer a referral power on the UN plenary, as suggested by the UN High Commissioner for Human

[128] UNSC, Record of the 7337th Meeting, UN Doc No S/PV.7337 (12 December 2014) 12 (United States), 13 (Lithuania), 15 (France). The UNGA has also called on States to implement UNSC decisions: UNGA Res 65/105 (10 December 2010) at preamble.

[129] UNGA Res 1761 (XVII) (n 65) at para 1.

[130] A Orakhelashvili, 'Unilateral Interpretation of Security Council Resolutions: UK Practice' (2010) 2 Goettingen Journal of International Law 823, at 842 (and citations therein).

[131] For problems: Criddle (n 107) 595. For UNGA practice recommending third-party countermeasures: EK Proukaki, *Countermeasures, the Non-injured State and the idea of international community* (Routledge 2010) 168.

[132] M Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council' (2007) 77(1) BYBIL 333, 347 (and citations therein).

[133] ibid 345 (and citations there).

Rights.[134] The Rome Statute only lists the UNSC as the competent UN organ to make a referral, necessarily excluding other UN organs.[135] The following section explores possible reform proposals, alongside analysis on the legal significance of a UNGA referral both within the UN and ICC.

A. Legal Basis for General Assembly Referral Powers

The UNGA's legal powers under two treaty regimes are at issue; the UN Charter and the Rome Statute. The UN Charter does not provide a positive basis for the UNGA to assume a referral power, but it does not preclude it, and leaves a certain degree of textual latitude for the UNGA to direct its recommendations at a range of actors, including the ICC.[136] Still, for a UNGA resolution to be an effective trigger of ICC jurisdiction, it must have legal relevance within the ICC order. It might be argued that the Rome Statute should be interpreted in light of 'subsequent practice' under Article 31(2)(b) of the VCLT. A UNGA 'referral' might constitute subsequent practice 'in the application of' the Rome Statute, on the basis that those ICC State-parties that voted for the UNGA resolution would be asserting a legal claim as to the permissibility of such referral. However, unlike the UN Charter, a living instrument, the Rome Statute structurally limits interpretive creativity. Although the ICC judiciary are entitled to take into account subsequent practice of State-parties, the guiding principles of legality and strict construction necessarily constrain expansive interpretations of the Court's jurisdiction.[137]

A formal amendment to the Rome Statute by the ASP is therefore required. A radical approach would be to confer on the UNGA a referral power that is independent of the UNSC's power. This would break from *Uniting for Peace*, which predicates UNGA action on UNSC 'failure'.[138] However, given that the UNGA now routinely pronounces on issues where the UNSC is seized of the matter and it has manifestly not 'failed', this amendment may not be as radical as it first appears. It also depends what the desired legal effect of the referral is within the UN order; if it is underpinned with coercive powers, in being able to impose outcomes on States against their will, then the constitutional question as to which organ ought to have priority in making a referral decision is more pertinent. But if the assumption is that *Uniting for Peace* only reflects 'weak' UNGA powers, as discussed above, then the distillation of an independent referral power is not, in UN constitutional

[134] N Pillay, 'The ICC in the International System', Remarks at the Retreat on the Future of the International Criminal Court, Liechtenstein (16–18 October 2011) available at <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11562&LangID=E>.

[135] Art 13(b), Rome Statute.

[136] Compare arts 10–14, 18, UN Charter. ICC–GA dialogue is also recognized in: 'Relationship Agreement', Doc ICC-ASP/3/Res1 (7 September 2004) arts 4(2), 7; approved by UNGA Res 58/318 (13 September 2004).

[137] L Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press 2014) 406.

[138] UNGA Res 377 A(V) (n 3) para 1.

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terms, of particular controversy. Indeed, a referral from the UN's plenary organ would reflect a broader set of interests in ending impunity than those of the UNSC membership, serving a valuable role in ensuring appropriate investigatory emphasis is given to situations that have been ignored or overlooked, or where the Prosecutor is reluctant to act *proprio motu* due to political sensitivities. A UNGA referral would thus provide political legitimacy for investigations and prosecutions that are not underpinned by Chapter VII powers.

If, though, a UNGA referral lacks the backing of UN collective security powers it may be questioned whether there are other more suitable bodies to trigger the court's jurisdiction. The ASP is one obvious contender, but its proximity to the court poses a concern: it cannot appoint judges and prosecutors then specify which situations ought to be investigated, not without creating appearances that the legal processes lack institutional independence from the political forces underpinning a referral.[139] An alternative is a reputable international fact-finder, such as the International Commission of the Red Cross. This would notionally achieve independence from the politics associated with UNSC referrals, but it also ignores the reality that politics is an unavoidable feature in international case selection. The issue, rather, is about improving the quality of politics that underpins UN-based referral decisions, to secure broader international legitimacy and support, as addressed in Part IV below.[140]

B. Pooling Sovereignty for Universal Jurisdiction

There is an important issue as to whether a UNGA referral would confer jurisdiction on the Court over conduct taking place in an ICC non-party State. In this respect, it is apparent that the UNSC's coercive powers are what underpin Chapter VII referrals to the ICC. This is recognized in commentary to the draft Rome Statute, with the UNSC's constitutional powers ultimately supporting it having a referral power over the UNGA.[141] An important function of an UNSC referral, then, is to dispense with the requirement that a non-party State must consent to the jurisdiction of the Court. Assuming, though, that the UNGA does not possess analogous coercive powers to dispense with State consent, a UNGA referral to the ICC of a situation within a non-party State would have to be justified on a different legal basis to a UNSC referral.

[139] See (n 5).

[140] SMH Nouwen and WW Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21(4) EJIL 941, 964.

[141] ILC, 'Draft Statute for and International Criminal Court with commentaries' (22 July 1994) UN Doc A/49/10, at 44. Indeed, pursuant to art 25 of the UN Charter, all UN members are obliged to abide by UNSC decisions, unlike the UNGA, which does not exercise mandatory powers: CJR Dugard, 'The Legal Effect of United Nations Resolutions on Apartheid' (1966) 83 SALJ 44, 46–8 (and citations there).

One justification is to challenge the theory that a non-party must consent to the ICC exercising jurisdiction over conduct within its territory on the basis of the principle of universal jurisdiction. Given the assumption that the UNGA is unable to make a decision that binds the UN member State on whose territory the conduct in question occurred, the principle of universal jurisdiction would provide a sound legal underpinning for UNGA resolutions that call for the prosecution of alleged international crimes. This is because the principle of universal jurisdiction is not premised on establishing consent of the relevant territorial State.[142] Manifestly, States can delegate their criminal jurisdiction and are entitled to do collectively what they may do individually.[143] Individually, States possess universal jurisdiction over the majority of crimes in the Rome Statute.[144] Therefore, State-parties could amend the Rome Statute to recognize a UNGA referral as a source of jurisdiction over non-parties and base this on the principle of universal jurisdiction.[145] A UNGA resolution would thus have legal significance in ICC law in certifying collective State authority for the ICC to exercise universal jurisdiction on their behalf.

Still, there are legal and political complications with the ICC exercising universal jurisdiction. Not least, it proved controversial in Rome. Many parties supported the use of universal jurisdiction in the Rome Statute, but compromise was reached on the current text of Article 12 in order to maximize ratifications.[146] Therefore, in the future, any such amendment proposal in the ASP would have to revisit this debate, which raised two major legal impediments. First, that universal jurisdiction is non-delegable to international organizations. Second, that the so-called *Monetary Gold* principle precludes an international tribunal from pronouncing on the interests of a State without their consent (ie non-party States).[147] Akande persuasively rebutted these arguments, outlining the numerous instances in which international tribunals have exercised jurisdiction over conduct within a State that did not consent, including the ICTY.[148] There is also no principled basis to single out the exercise of universal jurisdiction as a power that States cannot delegate to international organizations. In fact, the contrary is true; the rationale for universal jurisdiction is to ensure redress for conduct detrimental to all States, with any State exercising jurisdiction doing so on behalf of all others.[149] The vesting of universal jurisdiction in the ICC, consequent upon a referral from the ostensibly most representative international body, the UNGA, would thus ensure a coherent application of

[142] D Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1(3) JICJ 618, 626. [143] ibid. [144] ibid.
[145] The constitutional possibility of pooling universal jurisdiction was recognized in the DPRK Report (n 3) at 362.
[146] See generally O Bekou and R Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) 56(1) ICLQ 49.
[147] M Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' (2001) 64(1) LCP 13, 20, 29. [148] Akande (n 142) 624.
[149] A Cassese, *International Criminal Law* (Oxford University Press 2003) 284–5.

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the principle having regard to its underlying rationale. Furthermore, using the *Monetary Gold* principle to limit the application of the universal jurisdiction principle within the ICC misfires: the principle would only apply where a necessary prerequisite to making a judicial finding is to pronounce on the rights and responsibilities of an absent State.[150] Although a possible implication of a finding of individual criminal responsibility is that this may in certain instances lead to suggestions that the relevant State bears responsibility for the criminal conduct of its officials, this is not a prerequisite to the ICC's ultimate findings.[151]

C. *Binding Effect of UNGA Resolutions*

Grounding a UNGA referral in the principle of universal jurisdiction would only contribute so much to effective ICC action; State cooperation is still necessary. This is legally unproblematic insofar as State-parties are concerned.[152] However, mandatory cooperation of non-parties has to be founded on some other legal basis, principally a binding UN decision. That the UNGA cannot bind members outside internal organizational matters has been challenged by some scholars, referring to equivocation in the drafting history as to the scope of UNGA powers.[153] Furthermore, UN practice demonstrates that the concept of a 'recommendation' is not static, but evolving; it has been used by the UNSC to 'authorize' enforcement action.[154] On this basis, there is some support for UNGA resolutions assuming binding effect where this reflects the will of the UN membership to confer on the body authoritative competencies, as with the UNGA's regulation of trustee and mandated territories.[155] Even so, an amendment to the UN Charter to recognize the binding effect of a UNGA resolution making a referral to the ICC is improbable given the need for the unanimity of UNSC permanent members on any proposal challenging its exclusive referral power.[156] An alternative is to accept that the UNGA possesses binding powers by implication or from broad interpretive agreement of UN members. Although the drafting history did not vest authoritative interpretation of the UN Charter in the UNGA, the UN's decentralized structure necessarily grounds the

[150] B Ajibola, 'The International Court of Justice and Absent Third States' (1996) 4 African Yearbook of International Law 85.

[151] See also art 25(4), Rome Statute. The crime of aggression is probably an exception: D Akande, 'Prosecuting Aggression: The Consent Problem and the Security Council Issue' (28 May 2010) EJIL:*Talk!* available at <http://www.ejiltalk.org/the-icc-and-the-crime-of-aggression-the-consent-problem-and-the-security-council-issue/>.

[152] Art 86, Rome Statute.

[153] B Sloan, 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations' (1948) 25 BYBIL 1, 7, 16.

[154] R Wedgewood, 'Unilateral Action in the UN System' (2000) 11(2) EJIL 349, 349.

[155] B Conforti, *The Law and Practice of the United Nations* (Brill 2010) 365; *Namibia* (n 63) 50.

[156] Art 109(2), UN Charter.

permissible limits of institutional powers in the membership. This is reinforced by the absence of hierarchically superior judicial review and the general approach of the ICJ to give a teleological reading of the principal organs' powers, the exercise of which are presumed valid.[157]

However, the scope to fashion for the UNGA an implied binding power is extremely unlikely. The crystallization of new institutional powers invariably derives from long-standing practice, and thus, persistent recitation of resolutions to evince members' irrevocable intent.[158] It is possible for institutional powers to crystallize more rapidly during transformative times, Sloan noting that the UNGA could evince this intent through the use of peremptory and mandatory language.[159] The use of *Uniting for Peace* to redraw ICC referral powers may constitute one such transformative moment, as the original resolution in 1950 arguably did as an urgent response to UNSC deadlock over the possibility for continued action in Korea. The problem though, as a customary institutional power, it is subject to the shifting tides of State interest and thus is vulnerable especially in the context of imposing duties on States that may mobilize to reject the UNGA's putative power, as indeed happened to an extent with the UNSC's analogous power.[160] In short, while a UNGA referral may vest jurisdiction in the ICC over conduct taking place in the territory of non-parties, it is unlikely to generate corresponding cooperation duties due to norm indeterminacy. This need not undermine the utility of a UNGA referral, though, in legitimizing the use of universal jurisdiction and in bolstering the persuasive effect of UNGA recommendations for State cooperation with the ICC.

IV. THE LEGITIMACY OF UNGA ACTION

The notion that the UNGA should perform a greater role in securing justice at the ICC, particularly where it involves the exercise of 'strong' powers under *Uniting for Peace*, is contentious.

The first objection is that the powers of the UNSC under the Rome Statute reflect the desirability of close management of international situations by the major powers, and with this, selectivity in invoking UN collective security. The consequence of widening enforcement is that the ICC might take jurisdiction over situations that are politically controversial, as with the Court's opening of an investigation in Ukraine and also following Palestine's accession to the Rome Statute, prompted by the UNGA. While there is no denying the challenges faced by the Court in investigating certain situations that affect 'permanent five' interests, or require a delicate evaluation of peace

[157] *Expenses* (n 124).
[158] See generally SA Bleicher, 'The Legal Significance of Re-citation of General Assembly Resolutions' (1969) 63 AJIL 444, 457.
[159] Sloan (n 153) at 24 (and citations there).
[160] S Solomon, 'Judicial Regionalism's Thwarting of UN Security Council Chapter VII Punitive Cosmopolitanism: Measuring the Effects on International Jurisdictional Constitutionalism' (2015) 16(2) German Law Journal 261, 268–71.

and justice paradigms, plurality of State enforcement is built into the Rome Statute. The 'great power' monopoly in enforcing international criminal law was the dominant narrative from Nuremberg until the UN's *ad hoc* tribunals, but a proposal to carry this role through to the ICC was significantly weakened.[161] Instead, for the first time, a large number of States (124 to date), be they large or small, could act independently to trigger the jurisdiction of an international criminal tribunal.

That the Rome Statute did not grant the UNSC exclusivity in triggering jurisdiction addressed one problem, but created another; there was now no authoritative political entity able to define and prioritize situations for international criminalization. Instead, issues of great political contestation and complexity were to be offloaded to the ICC Prosecutor and Judges to determine. It might be said that the ICC is able to resolve these issues according to neutral legal criteria and thus act independently of the political forces that lead to situations being referred to the Court. The reality, however, is that policy choices inevitably factor into whether an ICC investigation eventually materializes, even where it is said that the opening of the investigation is based solely on considerations of 'gravity'.[162] In replacing what was once a clear political determination for a legal one, in a sense there is now less transparency in situation selection than when this fell to the UNSC, this organ at least operating somewhat openly and being accountable to national political constituencies.[163] This is not to defend continued UNSC involvement at the ICC, but rather to highlight the need for political coordination and guidance outside of the ICC to facilitate effective prosecutorial and judicial decision-making. Within a system that emphasizes and depends on plurality of State enforcement, the UNGA as a political body thus has potential to harness State support and translate this into ICC action that has various legitimizing and legalizing effects.

However, an obvious criticism is that an enhanced plenary role may produce effects that are counterproductive: States may 'unite for impunity'. Critics point to the historical political biases in the UNGA, it being soft on human rights in the global south, how the non-binding character of resolutions enables autocratic regimes to push false rhetoric at little political cost and its disproportionate emphasis on Israel as a decoy for abusive States.[164] The very characteristic supporting the UNGA's legitimacy, its near universal membership, is thus used to undermine it. This is evidenced by South Africa's attempt in the ASP to amend the Rome Statute to vest the power to suspend an investigation in the UNGA, ironically, supported by *Uniting for*

[161] WA Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43 JMarshallLRevJ 535, 539.
[162] Nouwen and Werner (n 140) 951.
[163] Schabas (n 161) 550.
[164] MJ Peterson, *The UN General Assembly* (Psychology Press 2006) 103–31.

Peace.[165] Although gaining no traction, this illustrates structural weaknesses in pluralizing State involvement within a plenary made up of uncertain and potentially unsympathetic coalitions.

This poses challenges, but is overstated and must be assessed in light of the realistic alternatives. It is true that UNGA action on ending impunity has been selective so far and there have been noticeable omissions from the plenary agenda of country situations that do warrant criminal investigation. Still, the ICC enjoys broad support based on UNGA debates and votes, which is not limited to Western democracies: in fact, UN plenary voting records of ICC State-parties on matters relating to the Court have been remarkably cohesive.[166] This voting pattern is not a random occurrence but often reflects a common position reached by ICC State-parties prior to voting.[167] The AU's hardening position on the ICC might dampen optimism for greater plenary involvement in addressing impunity, but this position should also not be overstated, especially as this opposition arises partly due to the perceived illegitimacy of the UNSC in exercising referral powers. As Jordaan argues, African States have broadly supported country-specific resolutions in the HRC, even where pertaining to events on its continent, in Côte d'Ivoire, Libya and Eritrea.[168] Furthermore, in recent (2014–2016) UN plenary resolutions on impunity, there is no 'one African voice' resisting calls for ICC action, insofar as resolutions that went to a vote are concerned. Significant UNGA recommendations that the UNSC refer Syria and the DPRK to the ICC received support of up to half of the 54 African States.[169] The imperative to end impunity therefore cuts across regional and political lines.

Related to this, the substantive legitimacy of enhanced UNGA involvement will depend on whether it is able to address criticisms of the UNSC referral mechanism, particularly, in terms of selective enforcement according to the interests of UNSC permanent members. In this respect, the UNGA has not been free from criticism; it too has perpetuated 'friend-enemy' distinctions in country situations, seen from its singling out pro-Gaddafi forces for prosecution in its resolutions, despite credible evidence produced by the HRC commission to show that crimes were committed by all sides of the

[165] ICC, 'Proposed amendment to the Rome Statute of the International Criminal Court, Report of the Working Group on the Review Conference', Appendix VI, Official Records of the Assembly of States Parties, Doc ICC-ASP/8/20 Annex II (November 2009).

[166] See generally S Ford, 'The ICC and the Security Council: How Much Support Is There for Ending Impunity?' (2016) 26 Indiana International and Comparative Law Review 33.

[167] LR Atkinson, 'Knights of the Court' (2011) 7(1) JILIR 66, 78.

[168] E Jordaan, 'The African Group on the United Nations Human Rights Council: Shifting Geopolitics and the Liberal International Order' (2016) 115(460) AfrAff 490.

[169] UNGA Res 69/189 (n 16) (127 in favour, 13 against, with 48 abstentions: of those, 27 African States voted yes, 21 abstained, and only one voted against (Zimbabwe); UNGA Res 70/172, 17 December 2015 (DPRK) (119 yes, 19 no, 48 abstentions: of those, 22 African States voted yes, 7 no, 21 abstentions).

conflict.[170] By contrast, both the UNGA and HRC called on Israeli and Palestinian armed groups alike to conduct investigations into alleged crimes arising from 2008–2009 Gaza conflict.[171] The difference in approaches here are primarily justified by political considerations, with the UN plenary keen to support the new regime in Libya and thus avoid any destabilizing influences, which would include allegations that its leaders failed to prevent or suppress war crimes. Such political calculations are inherent in 'victor's justice'; whether such form of justice is legitimated where the 'victors' make up a voting majority in the UNGA is another matter. But the perception of even-handedness in investigations is central to the procedural legitimacy of the ICC. The potential for the UNGA to justifiably complement the Court's judicial functions will turn on its ability to obviate or minimize such biases.

Another criticism directed at the UNSC is its failure to refer situations to the ICC in circumstances that justified it, thereby exacerbating the democratic deficit inherent in the current referral system.[172] Linked to this, a key AU criticism against the UNSC referral in Darfur was that it confirmed an 'African bias'; why have Asian States, like Myanmar, not received the same level of scrutiny inside the UNSC and the ICC?[173] The universal composition of the UNGA and absence of a veto for any State should in the long term ensure a broader investigatory reach into international crimes so as to alleviate the accountability blind-spots created by UNSC politics. This supposition has some basis in practice, as noted above, the recent DPKK, Israel and Syria inquiries asserting the need for perpetrators in these States to be held to account, recommendations that were made despite the shielding from scrutiny of these situations by different UNSC permanent members. Similarly, inroads into addressing crimes in Myanmar have occurred in the UNGA, unlike the UNSC.[174] Admittedly, it is still necessary for there to be political momentum for the initiation of an inquiry and there will remain double standards in country selection. This is inevitable in a political body, but the functional turn in the UNGA and HRC towards the creation of commissions of inquiry will at least prompt greater reflection on assuring consistency in approach, with the possibility of developing a set of norms to trigger investigations by the UN plenary bodies.[175]

V. CONCLUSIONS

The UNGA (and its subsidiary, the HRC) provides an important forum for enhanced State participation in international justice, in the context of increasing dissatisfaction with the exercise of UNSC powers in relation to the

[170] UNGA Res 66(11) (18 November 2011). But see some criticisms of commission impartiality: JG Stewart, 'The UN Commission of Inquiry on Lebanon: A Legal Appraisal' (2007) 5(5) JICJ 1039. [171] Yihdego (n 31) 20. [172] See (n 1).
[173] O Imoedemhe, 'Unpacking the Tension between the African Union and the International Criminal Court: The Way Forward' (2015) 23(1) African Journal of International and Comparative Law 74. [174] UNGA Res 69/248 (n 30). [175] Henderson (n 44) 307.

ICC. The UNGA could engage more actively with the ICC through a range of means: from simply exerting greater pressure to secure a UNSC referral through to the fundamental legal reform of the UNSC's referral powers in the Rome Statute. This article has revealed movement towards using the UNGA and HRC to build State consensus on the necessity for action at the ICC. However, there is a need to be circumspect about the future direction of UN plenary action to avoid the criticisms directed at the UNSC pertaining to political bias and selective justice. Equally, there is also a need to see the UNGA's role in the context of other international action, including by the ASP. In some instances, such as non-cooperation, the ASP would be the appropriate organ to act, although this role is not yet fully realized. In other instances, the UNGA has the potential to assume an important role concomitant with its status as the global plenary organ; a role that presents a resurgent UNGA with many opportunities to act as a catalyst for action at the ICC and to unite against impunity.