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Uniting for MH17

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Abstract
Russia's veto in the Security Council of a proposed ad hoc tribunal for the Malaysia Airlines Flight MH17 disaster prompts consideration of alternative mechanisms to bring the offenders to justice. It is arguable that the General Assembly, drawing upon the text of the UN Charter and the Uniting for Peace mechanism, possesses the constitutional powers to establish the tribunal. The unique features of the General Assembly, comprising the international community, also mean that it is able to act in a way that would facilitate the functioning of an ad hoc tribunal, even in the absence of mandatory powers. Although many practical obstacles lie ahead, an ad hoc tribunal established by a broad coalition in the General Assembly may offer the best hope in securing accountability for the MH17 disaster.

On 17 July 2014, the downing of Malaysia Airlines Flight MH17, allegedly at the hands of Russian-backed separatists in eastern Ukraine, immediately led to calls for accountability. The UN Security Council [the Council], then united in their condemnation, demanded in Resolution 2166 that those "responsible for this incident be held to account and that all States cooperate fully with efforts to establish accountability".[1] Despite such support, an attempt to secure accountability was impeded a year on due to the negative vote of Russia in the Council. A proposed Chapter VII resolution for the creation of an international ad hoc tribunal was vetoed by Russia on 29 July 2015, despite this proposal receiving general support from Council members.[2] In voting down the creation of the tribunal, the Russian representative characterized such a move as politicized, premature, and inconsistent with the Council's remit in maintaining "international peace and security".[3]

Russia's obstruction of accountability for the MH17 disaster did not weaken the resolve of those members who sponsored the draft resolution to search for alternative mechanisms to hold the perpetrators to account.[4] Different options are currently being

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1. *UN Security Council Resolution 2166 (2014)*, UNSC Res. 2166, UN Doc. S/Res/2166 (2014).
2. Eleven members supported the resolution, three abstained, with only Russia in opposition. As to the draft resolution, see *UN Security Council Draft Resolution (S/2015/562)*, UN Doc. S/2015/562 (2015).
3. *UN Security Council 7498th Meeting (29 July 2015)*, UN Doc. S/PV.7498 (2015), at 4–5.
4. See the statements of the investigating states after the resolution was vetoed: *ibid*.

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explored by the five investigating states (Malaysia, Australia, the Netherlands, Belgium, and Ukraine), outside the UN framework, including the initiation of an investigation at the national level, the creation of an international court by treaty, and a state referral to the International Criminal Court [ICC].[5] Although there is merit in exploring these accountability mechanisms, there are also possible drawbacks in establishing a tribunal that lacks co-ordinated UN support: history has proven it difficult to obtain the arrest and surrender of state officials to be tried for international crimes at the domestic level, even more so where high-ranking officials are sought for trial.[6] A UN-endorsed ad hoc tribunal ostensibly adds "collective legitimization" to the investigations and prosecutions, and will serve to exert pressure on states to co-operate with it.[7] Furthermore, the appeal of a tribunal established under Chapter VII is that it binds the UN membership, making co-operation with investigations and the issuance of arrest warrants mandatory. Thus, from a legal perspective, a difficulty in establishing a tribunal outside the UN framework is the need for states to respect the rights of other states that may inhibit co-operation with the tribunal. Similarly, while Ukraine may confer jurisdiction on the ICC for the MH17 situation, this would not place legal obligations on Russia and other non-State Parties to co-operate with the court.[8]

Ukraine has lodged a declaration pursuant to Article 12(3) of the Rome Statute[9] accepting the jurisdiction of the ICC, first with respect to incidents occurring on its territory during the period 21 November 2013 to 22 February 2014, and then later extending this to events since 20 February 2014.[10] This would also include the MH17 crash, which occurred on 17 July 2014.[11] Indeed, the Office of the Prosecutor [OTP] is apparently investigating the MH17 crash as part of its preliminary assessment into alleged crimes committed during the wider conflict in Ukraine.[12] Still, a prosecution at the ICC is likely to encounter difficulties given the limitations imposed by the Rome Statute.[13] In particular, some scholars point out that the requirement of intention in the

5. For an analysis of the alternative prosecutorial options, see Aaron MATTA and Anca IORDACHE, "Malaysia Airlines Flight MH17—Possible Legal Avenues for Redress" *Opinio Juris* (28 August 2015), online: Opinio Juris <http://opiniojuris.org/2015/08/28/guest-post-malaysia-airlines-flight-mh17-possible-legal-avenues-for-redress-part-2/>.

6. See generally Luc REYDAMS, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2004); A. SAMMONS, "The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts" (2003) 21 Berkeley Journal of International Law 111.

7. Sammons, *ibid.*, at 6.

8. Russia has signed but has not ratified the Rome Statute.

9. *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002) [*Rome Statute*].

10. See International Criminal Court, "Ukraine Accepts ICC Jurisdiction over Alleged Crimes Committed since 20 February 2014" (8 September 2015), online: ICC <https://www.icc-cpi.int/Pages/item.aspx?name=pr1146&ln=en>.

11. For a critique of Ukraine's first declaration, see Rebecca HAMILTON, "Justice for MH17" *Foreign Policy* (25 July 2015), online: <http://foreignpolicy.com/2014/07/25/justice-for-mh17/>.

12. Niklas JAKOBSSON, "ICC Prosecution 'Likely' to Look at MH17 Downing" *Justice Hub* (10 September 2015), online: Justice Hub <https://justicehub.org/article/icc-prosecution-likely-look-mh17-downing>.

13. Although see UN News Centre, "Eastern Ukraine: UN Rights Chief says Downing of Plane may be 'War Crime', Urges Probe" *UN News Centre* (28 July 2014), online: UN <http://www.un.org/apps/news/story.asp?NewsID=48360-.Vu5Hrbzwwoo>.

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Rome Statute requires that the perpetrators knew that they were targeting a civilian aircraft; merely being reckless to that effect is insufficient.[14] By some accounts, the rebels did not intend to target a civilian aircraft, having mistaken it for a military object.[15] In short, even though the MH17 situation may actively be under consideration by the OTP, the chance of a successful prosecution at the ICC is questionable. It is perhaps because of the limitations in the Rome Statute that the investigating states sought to create an international ad hoc tribunal instead, where different legal standards could be applied to try the suspects. This is indeed reflected in the draft statute for the MH17 tribunal, where crimes within the jurisdiction of this tribunal included Malaysian and Ukrainian criminal law. This included Section 9 of the Aviation Offences Act 1984 of Malaysia,[16] which prohibits acts endangering the safety of an aircraft. The Ukrainian offences included murder and "negligent homicide", an offence that would offer greater latitude for a prosecution than the more stringent *dolus directus* requirement in the Rome Statute.[17]

One legal strategy that has yet to be considered is the potential for the UN General Assembly [the Assembly] to establish an ad hoc tribunal, particularly through the invocation of its Uniting for Peace [UfP] mechanism put in place by Resolution 377 (1950).[18] This resolution contemplates Assembly action where, due to an absence of unanimity, the Council failed in its primary responsibility to maintain international peace and security.[19] The Assembly first invoked this mechanism to recommend the continuation of UN action in Korea (1950), following the Soviet Union's veto of this mandate. The UfP procedure has since been used to condemn acts of aggression and alien occupation, to support peacekeeping operations, and to augment claims of a people to self-determination, as with Palestine.[20] In providing a basis for the Assembly to assume an enhanced role in regulating international security, it may therefore provide a solution for the five investigating states seeking to establish an ad hoc tribunal under UN auspices, which would otherwise be frustrated due to a Council veto.

Although some question the continued application of UfP in a post-Cold War world, there has been increasing support for the use of this mechanism as a response to

14. See in particular Kevin Jon HELLER, "MH17 Should be Framed as Murder, Not as a War Crime" *Opinio Juris* (11 August 2014), online: Opinio Juris <http://www.opiniojuris.org/2014/08/11/mh-17-framed-murder-war-crime> ; Alex WHITTING, "How to Prosecute the Perpetrators of the Malaysian Jet Downing" *Just Security* (25 July 2014), online: Just Security <http://www.justsecurity.org/13269/prosecute-perpetrators-malaysian-jet-downing/> .

15. Heller, *ibid*. Whitting, *ibid*.

16. *Aviation Offences Act 1984*, Act 307 of Malaysia [*Aviation Offences Act*], at s. 9.

17. See *UN Security Council Draft Resolution (S/2015/562)*, *supra* note 2.

18. *Uniting for Peace*, GA Res. 377, UN Doc. A/RES/377(V) (1950).

19. *Ibid*., at para. 1.

20. For analysis of its uses, see generally Christina BINDER, "Uniting for Peace Resolution (1950)" *Max Planck Encyclopaedia of Public International Law* (June 2013), online: Max Planck Encyclopaedia of Public International Law <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e568?prd=EPIL> ; Keith S. PETERSEN, "The Uses of the Uniting for Peace Resolution since 1950" (1959) 13 International Organization 219; Michael RAMSDEN, "'Uniting for Peace' and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly" (2016) 26 Washington International Law Journal 267.

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a number of high-profile failings of the Council due to deadlock. Recent tensions amongst the Permanent Members over Russia's intervention in the Crimea have provoked casual references to a "new Cold War", a view shared by Russian Prime Minister Dmitry Medvedev.[21] Levgold noted that such tensions "will affect nearly every important dimension of the international system".[22] This is also set in a context where the Assembly has been more willing to confront the Council where it has failed to take action. Thus, the failure of the Council to agree on a resolution to ease the humanitarian crisis in Syria has provoked widespread condemnation, prompting the Assembly to pass a strongly worded resolution, by a large majority, "deploring the *failure* of the Security Council".[23] The Council was also criticized for condoning impunity, its Permanent Members being deadlocked on a referral to the ICC to investigate the Syrian situation.[24] Most relevant here, UN agencies have suggested that UfP may be invoked to break a Council deadlock on securing accountability for mass crimes. The UN Mission in Gaza noted that the Assembly "may consider whether additional action within its powers is required in the interests of justice, including under its resolution 377(V) on uniting for peace".[25] One solution posited by UN monitors was for the Assembly to establish an ad hoc tribunal to redress the accountability deficit owing to Council deadlock on an ICC referral, with respect to the situations in North Korea and Syria.[26] These opinions show that the use of UfP in this way commands attention as a viable option for the Assembly in the event that the Council has failed to act due to a lack of Permanent Members unanimity.

Previous ad hoc tribunals have been established by way of a Chapter VII decision, by treaty, or by domestic law.[27] Indeed, evidence shows that the Assembly, while not previously injecting the legal basis for such tribunals' creation, has provided institutional support to assist domestic authorities to establish "hybrid" tribunals. When reviewing legal options for the creation of the International Criminal Tribunal for the former Yugoslavia [ICTY], the UN Secretary-General noted that the Assembly's "authority and prestige" would justify it establishing this ad hoc tribunal, even though

21. See James STAVRIDIS, "Are We Entering a New Cold War?" *Foreign Policy* (17 February 2016), online: Foreign Policy <http://foreignpolicy.com/2016/02/17/are-we-entering-a-new-cold-war-russia-europe/>.

22. R. LEGVOLD, "Managing the New Cold War" (2014) 93 Foreign Affairs 74.

23. *Resolution Adopted by the General Assembly on 3 August 2012*, GA Res. 66/253B, UN Doc. A/RES/66/253B (2012): 133 votes to 12, with 31 abstentions (emphasis added).

24. UN, "Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution" *UN* (22 May 2014), online: UN <http://www.un.org/press/en/2014/sc11407.doc.htm>.

25. *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (2009), at para. 197; Independent Fact-Finding Committee on Gaza to the League of Arab States, "Report of the Independent Fact Finding on Gaza: No Safe Place" *ICAHD-USA* (30 April 2009), online: ICAHD-USA <http://icahdusa.org/multimedia/no-safe-place.pdf> at para. 610.

26. *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 (2014), at 362; *UNHRC Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/28/69 (2015), at para. 139.

27. Sarah WILLIAMS, *Hybrid and Internationalized Tribunals: Selected Jurisdictional Issues* (Oxford: Hart Publishing, 2012) at 7.

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the Council was ultimately favoured to do this.[28] It was the Assembly rather than the Council that played the crucial role in facilitating the creation of the Extraordinary Chambers in the Courts of Cambodia [ECCC]. The absence of Council involvement is explicable for different reasons, but there was a threat of a China veto in the event that a resolution endorsing the tribunal was placed before the Council.[29] Instead, it was the Assembly who requested the Secretary-General to lend assistance to the Cambodian authorities to investigate serious violations of international law during the Democratic Kampuchea period, leading to the creation of a Group of Experts and the Assembly's endorsement of the draft agreement between the UN and Cambodia.[30] It is therefore conceivable that the Assembly may play some role in the creation of an ad hoc tribunal for the MH17 disaster, either by directly establishing a tribunal as a subsidiary organ or through the endorsement of such a tribunal established by the five investigating states and/or other states.

The purpose of this paper will be to explore the legal basis for a possible ad hoc tribunal established by the Assembly. As the five investigating states look for alternative mechanisms outside Chapter VII to hold the perpetrators to account, this analysis bears specific relevance to the MH17 disaster, but it also has broader significance to the questions related to the constitutional scope of the Assembly's powers and whether it is able to assume functions analogous to the Council. Space does not permit a broader analysis concerning the prospects of a successful investigation or prosecution of those responsible for downing MH17, which inevitably prompts difficult questions of international politics and the willingness of states to co-operate with any such tribunal, even where there are legal obligations to do so. These questions are likely to become more acute with the tentative findings of Dutch investigators that fragments of Russian missiles were found at the crash site.[31] Similarly, this paper does not explore the nature of the alleged crimes, or the question of the applicability of individual or superior criminal responsibility to the conduct in question. These interesting questions have already been the subject of some analysis in their own right, but are largely academic in the absence of an appropriate international criminal tribunal to try the perpetrators.[32]

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28. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704 (3 May 1993), at para. 21. The Council took responsibility for establishing the ICTY because this was perceived as the more expeditious route given the executive character of the Council. The assumption here is that the Assembly could not act fast enough, which could be countenanced in practice provided that the will for a rapid response exists amongst states. One proposal by the Cambodian Group of Experts in this respect was an Assembly subsidiary organ comprising a small number of states that could prepare the constituent instruments of the proposed tribunal expeditiously, see *Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, UN Doc. A/53/850 (1999), at para. 144 [*Cambodia Report*].

29. Steven D. ROPER and Lilian A. BARRIA, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (London: Ashgate Publishing, 2006) at 39.

30. *Situation of Human Rights in Cambodia*, GA Res. 52/135, UN Doc. A/RES/52/135 (1997); *Situation of Human Rights in Cambodia*, GA Res. 55/95, UN Doc. A/RES/55/95 (2000).

31. Haroon SIDDIQUE, "Flight MH17: Possible Parts of Missile System Found at Ukraine Crash Site" *The Guardian* (11 August 2015), online: The Guardian <http://www.theguardian.com/world/2015/aug/11/mh17-possible-parts-missile-system-found-ukraine-crash-site> .

32. Heller, *supra* note 14.

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An important assumption of this paper is that an ad hoc tribunal is an appropriate mechanism to ensure accountability for the MH17 disaster. This is not to deny the possibility of other mechanisms open to the aggrieved states or victims' families to establish the responsibility of implicated states, including the European Court of Human Rights [ECtHR] and International Court of Justice [ICJ] (be it contentious interstate litigation or an advisory opinion).[33] A negotiated diplomatic settlement is another option.[34] While these options may be pursued, they do not diminish the need for parallel criminal investigations, especially given the strong international consensus in favour of prosecuting the perpetrators of the MH17 disaster.[35] Pursuing individual criminal responsibility and state responsibility are not mutually exclusive, but can and should be pursued concurrently in order to increase the prospects of holding those responsible to account for the disaster. Moreover, to some extent the success of these mechanisms in determining state responsibility will be contingent on the cogency and effectiveness of such criminal investigation to establish the state affiliation of those forces responsible for targeting MH17.[36] This investigation would only be enhanced if it took place within the institutional framework of an ad hoc tribunal observing international standards of fact-finding, together with a permanent investigatory staff.[37]

Still, others may criticize the appropriateness of an ad hoc tribunal on the basis that its creation is a complex and time-consuming process, and serves to unnecessarily exacerbate diplomatic tensions between Permanent Members of the Council. To be sure, the creation of ad hoc tribunals today would take place in a landscape of international justice that has evolved substantially from the days of the creation of such tribunals for the former Yugoslavia, Rwanda, Cambodia, and Sierra Leone. This is especially so given the questionable success of some of the hybrid tribunals in providing

33. Both Russia and Ukraine are parties to the European Convention on Human Rights [ECHR]. While Ukraine is keen to pursue a variety of claims before the ICJ, Russia does not accept the Court's compulsory jurisdiction, nor has it entered into any special agreement with Ukraine to resolve these issues. Indeed, Ukraine has lodged various applications before international tribunals pertaining to Russia's conduct on its territory, for a summary of which see Gaiane NURIDZHANYAN, "Ukraine vs. Russia in International Courts and Tribunals" *EJIL: Talk!* (9 March 2016), online: EJIL: Talk! <http://www.ejiltalk.org/category/international-tribunals/european-court-of-human-rights> .

34. Indeed, when the US Air Force shot down an Iranian airliner in international airspace in 1988, the US did not acknowledge any blame but did pay compensation to the government of Iran, for which see D.K. LINNAN, "Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility" (1991) 16 Yale Journal of International Law 245.

35. Thus the earlier Council Resolution on the MH17 disaster, Resolution 2166 (2014), was passed unanimously, "emphasizing the importance of holding those responsible for violations of these rules to account" and "[d]emands that those responsible for this incident be held to account and that all States cooperate fully with efforts to establish accountability".

36. Thus art. 2 of the ECHR protects the right to life, which encompasses both negative and positive duties. It is possible that a claim is brought to the ECtHR against Ukraine that it failed in its positive duties (such as to close the air space), or against Russia pertaining to its negative duty (in that Russia ordered the strike or provided Ukrainian rebels with weaponry to carry out the strike). Indeed, the ECtHR in *Ioppa v. Ukraine*, Case No. 73776/14, is currently examining a complaint from the mother of one of the victims of the MH17 crash, on the basis that Ukraine failed in its positive duty to safeguard life.

37. For example, one of the criticisms of investigations conducted by UN mandated commissions of inquiry is the variable standards that are applied in gathering and interpreting evidence, in contrast to ad hoc tribunals, see generally Catherine 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 71.

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cost-effective impartial justice.[38] Nonetheless, there are situations where ad hoc tribunals remain desirable; the recent establishment of the Extraordinary Chambers in the African Court, as well as discussion of a new tribunal in the Democratic Republic of Congo, indicating that variety and creativity of accountability mechanisms will continue to be the norm.[39] The limitations of the ICC's jurisdiction and the desirability for any tribunal to be internationally constituted supports the creation of an ad hoc tribunal for MH17. Furthermore, that the situation in Ukraine remains the source of tensions between the Permanent Members should not, at least as a matter of principle, impede the creation of an ad hoc tribunal, which is broadly supported by states via an Assembly resolution. Indeed, from a consequentialist perspective, the creation of an ad hoc tribunal may even provide the impetus for political resolution, where sufficient pressure is exerted by states acting collectively.[40] These points are worthy of consideration in their own right, but the purpose of what follows is to examine the more fundamental constitutional question about the Assembly's powers to establish such a tribunal in the first place.

I. POWERS AND PURPOSES UNDER THE UN CHARTER

For the Assembly to establish a tribunal it must possess the power to do so under the UN Charter, which also requires an enquiry into whether a tribunal is consistent with the purposes of the UN. Powers and purposes are distinct concepts: a UN organ may be furthering a purpose of the organization but not have the power to do so. Thus, while the Assembly has subsidiary responsibility for maintaining international peace and security, an identifiable purpose of the UN, on a traditional understanding of the powers it may assume in furthering this purpose, these are limited to those expressed in the UN Charter. Textually, the Assembly's function is essentially deliberative: it may "discuss", "promote", and "recommend".[41] Unlike Council decisions, an Assembly recommendation does not bind the membership, unless pertaining to internal operational matters, such as admission of UN members, or budget apportionment.[42]

While a distinction is drawn between purposes and powers, it is apparent from important jurisprudence of the International Court of Justice that there is considerable latitude for a principal organ of the UN to act based on the doctrine of implied powers. Although the ICJ once applied a principle of "specialty" to narrowly define the powers

38. Tomas HAMILTON and Michael RAMSDEN, "Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia" (2014) 14 International Criminal Law Review 115 at 117.

39. For an overview, see Sarah M.H. NOUWEN, "'Hybrid Courts': The Hybrid Category of a New Type of International Crimes Courts" (2006) 2 Utrecht Law Review 190.

40. See David P. FORSYTHE, "The UN Security Council and Response to Atrocities: The P-5 and International Criminal Law" (2012) 34 Human Rights Quarterly 840 at 859, noting how the European Union and other key international economic actors were instrumental in ensuring Serbia's eventual co-operation with the International Criminal Tribunal for the former Yugoslavia.

41. *Charter of the United Nations*, 26 June 1945, 59 Stat. 1031 (entered into force 24 October 1945) [*UN Charter*], at arts. 11–17, 55.

42. *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (Second Phase), [1966] I.C.J. Rep. 6 at 50–1.

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of the World Health Organization, it has shied away from declaring *ultra vires* any teleological assertions of power by the Council and Assembly, being principal organs.[43] In *Reparations*, the ICJ found that "[u]nder international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by *necessary implication*, as being essential to the performance of its duties".[44] Thus, in considering whether the creation of peacekeeping forces outside a Council mandate were valid expenses of the Organization, the ICJ in *Certain Expenses* articulated a broad approach to the implied powers doctrine, noting that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization".[45] The ICJ disavowed a literal interpretation of the UN Charter where doing so leaves the UN "impotent in the face of an emergency situation".[46] Here, an asserted power by a principal UN organ that is rationally connected to a purpose of the UN will be lawful. The creation of a peacekeeping force, furthering international security, even without any textual support in the UN Charter, was thus *intra vires*.[47] Therefore, based on the reasoning in *Certain Expenses*, it is arguable that the Assembly may establish a tribunal for MH17 where to do so is in furtherance of a purpose underpinning the UN Charter. To arrive at this conclusion, however, it is necessary to address a number of likely objections.

A. *The Connection Between Ad Hoc Tribunals and International Peace and Security*

The first concerns the issue of whether a UN mandated ad hoc tribunal is a proper purpose under the UN Charter. In justifying its veto of the MH17 tribunal resolution in the Council, the Russian delegate argued that the creation of such a tribunal did not further international peace and security. This was because Resolution 2166 (2014), passed in the aftermath of the MH17 disaster, failed to characterize the situation as a threat to international peace and security. According to the Russian delegate, if it did not constitute a threat one year ago, it was difficult to see what had materially changed in the intervening period to qualify it as such.[48] Despite the Council having established ad hoc tribunals for the former Yugoslavia and Rwanda, the Russian delegate further asserted that organizing a criminal investigation does not fall under the remit of this organ. Rather, no precedent in principle exists for the establishment by the Council of

43. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (World Health Organization Request)*, Advisory Opinion, [1996] I.C.J. Rep. 66 at 78.

44. *Reparations for Injuries Suffered in the Service of the Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174, 182–4 (emphasis added) [*Reparations*].

45. *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)*, Advisory Opinion, [1962] I.C.J. Rep. 151 at 168 [*Certain Expenses*].

46. *Ibid*., at 167.

47. See also Nigel D. WHITE, "The UN Charter and Peacekeeping Forces: Constitutional Issues" (1996) 3 International Peacekeeping 43 at 45.

48. *UN Security Council 7498th Meeting (29 July 2015)*, *supra* note 3 at 4–5.

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international tribunals to bring to justice those responsible for transportation disasters.[49]

The view put forward by Russia is misconceived and ignores a long line of UN practice that recognizes truth-seeking and international accountability as an aspect of international peace and security. For example, the Council has established commissions of inquiry and fact-finding missions as precursors to the taking of appropriate action up to establishing or endorsing ad hoc tribunals.[50] Russia's narrow focus on transportation disasters as lacking precedential support for a Chapter VII decision also ignores the measures that the Council took in the aftermath of the Lockerbie bombing. Acting under Chapter VII, the Council gave support to the creation of a Scottish court in the Netherlands to try two suspects, which included a decision that all states "shall cooperate" with the court and that the "Libyan Government shall ensure the appearance in the Netherlands of the two accused for the purpose of trial".[51]

Moreover, the ICTY has also addressed the constitutionality of its own creation.[52] Acting under Chapter VII, in Resolution 827 the Council established the ICTY, noting that its creation "would contribute to the restoration and maintenance of peace".[53] In *Tadić*, the Defence argued, in a similar vein to the Russian delegate, that the ICTY did not address any "international emergency", a prerequisite for exercising Chapter VII powers.[54] Curiously, the Defence argued that for an ad hoc tribunal to be lawful, it requires a "consensual act of nations" such as an Assembly resolution, "whose participation would at least have guaranteed full representation of the international community".[55] The ICTY Appeals Chamber rejected the Defence's motion, noting the Council's "very wide discretion" in making a determination whether there existed a "threat to the peace, breach of the peace, or act of aggression" under Article 39 of the UN Charter. However, the Article 39 determination is not unfettered, as it has to remain, "at the very least, within the limits of the Purposes and Principles of the Charter".[56] The existence of an internal or international armed conflict satisfied the requirement of a threat to the peace or breach of the peace which, given the situation in Yugoslavia, properly engaged Chapter VII.[57] The Appeals Chamber then relied on the *specific* power of Article 41 to find that the ICTY was lawfully established, which confers discretion on the Council to "decide what measures not involving the use of

49. *Ibid*.

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

51. *UN Security Council Resolution 1192*, UN Doc. S/RES/1192 (1998).

52. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, 2 October 1995 [*Tadić*]; *Prosecutor v. Milošević*, Decision on Preliminary Motions, Case No. IT-99-37-PT, 8 November 2001 [*Milošević*].

53. *UN Security Council Resolution 827 (1993)*, UN Doc. S/RES/827 (1993).

54. *Tadić, supra* note 52 at para. 27.

55. *Ibid*.

56. *Ibid*., at para. 29.

57. *Ibid*. Equally, a threat to the peace could be manifested outside the context of an armed conflict, of which see such a characterization that led to the creation of the ICTR: *UN Security Council Resolution 955 (1994)*, UN Doc. S/RES/955 (1994).

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armed force are to be employed to give effect to its decisions".[58] It was immaterial whether an evidentiary link could be established between peace restoration and the creation of such an ad hoc tribunal: that Council Resolution 827 claimed that the ICTY "*would* contribute towards the restoration of peace" was not amenable to review. [59]

Those in favour of the Assembly establishing an ad hoc tribunal for MH17 could do no better than cite the ICTY Appeal Chamber's decision. Although the reasoning in this case pertained to the wide discretion of the Council in qualifying a situation as a threat to international peace and security, there is no principled reason why the Assembly does not enjoy the same margin of discretion in determining whether a situation constitutes such a threat. As the ICJ in *Certain Expenses* observed, the UN Charter makes it "abundantly clear" that the Assembly shares responsibility for the maintenance of international peace and security with the Council.[60] Just as the Appeals Chamber in *Tadić* established that there was a threat to international peace and security given the armed conflict in the former Yugoslavia, the same would also be said for the ongoing hostilities in eastern Ukraine that caused the downing of MH17. But, more broadly, it is arguable that MH17 qualifies as a threat to international peace and security given the need for safe civil aviation.[61] The creation of the MH17 tribunal would not only serve to secure justice for the victims, but also act as a deterrent to the growing number of non-state actors with the ability to target civilian aircraft. In turn, those who travel by air are more at risk generally if perpetrators are not held to account for aviation disasters.[62]

B. *The Scope of the General Assembly's Implied Powers to Establish an Ad Hoc Tribunal*

Although finding the creation of the ICTY as within the purposes of the UN, the Appeals Chamber in *Tadić* appeared to adopt a narrower approach to implied powers than the ICJ in *Certain Expenses*. The Appeals Chamber noted that the UN Charter only "speaks the language of specific powers, not absolute fiat".[63] The ICTY's constitutional basis was founded on Article 41, not a teleological reading of the general purposes of the UN Charter as per the peacekeeping force in *Certain Expenses*. Based on this reasoning, it is necessary for an ad hoc tribunal established by the Assembly to derive from a specific Charter provision. Article 22 of the UN Charter provides that the Assembly "may establish such subsidiary organs as it deems necessary for the

58. *Tadić, supra* note 52 at para. 34.

59. *Ibid*., at para. 39 (emphasis added).

60. *Certain Expenses*, *supra* note 45 at 151, 163.

61. This itself is recognized in the draft MH17 resolution, see *supra* note 2: "Believing that the establishment of an international tribunal and the prosecution of persons responsible for the incident *will contribute to the safety of civil aviation* and to the maintenance of international peace and security" (emphasis added).

62. *UN Security Council 7498th Meeting (29 July 2015)*, *supra* note 3 at 3 (statement of Malaysia).

63. *Tadić*, *supra* note 52 at para. 28. It is arguable that the Appeals Chamber erred in this interpretation of the Council's powers, especially as the ICJ had previously held that the Council possesses "general powers" to discharge the responsibilities conferred by the UN members on it: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep. 16 at 112 [*Namibia*].

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performance of its functions". It may be argued that this provision is broad enough to include the creation of an ad hoc tribunal. However, critics of this view would undoubtedly focus on the word "functions" in Article 22: there are limits on the Assembly's power to create subsidiary organs due to the division of responsibilities with the other main UN organs.[64] The ICJ in *Effect of Awards* confirmed this, where the creation of the United Nations Appeal Tribunal [UNAT] could not be derived from Article 22, as the rendering of judicial decisions via a subsidiary organ was not a function of the Assembly.[65] The Appeals Chamber's reasoning casts further doubt on the Assembly's ability to establish a tribunal, noting that a limitation on powers derives from the "internal division of power" within the UN.[66] On this view, the creation of a judicial organ with the capacity to make findings of criminal responsibility would exceed the essentially deliberative powers granted to the Assembly under the UN Charter.

This view may be countered in three ways. The first is to challenge the underlying reason for the narrow approach taken by the ICTY Appeals Chamber, which may have been driven by the "exceptional" nature of powers under Chapter VII, being both coercive (here, to the individual perpetrator subject to the tribunal's jurisdiction) and mandatory (requiring states to co-operate with the tribunal).[67] However, the exceptionality of the power at issue has not prevented the Assembly in the past from authorizing coercive action. Acting under UfP, the Assembly mandated the continuation of enforcement action in Korea.[68] The exceptionality of the power does not therefore justify a change of constitutional method from that in *Certain Expenses* in discerning implied powers, but it does separately require legal safeguards to ensure that such coercive power is not abused. In this respect, human rights bodies have pronounced on the legitimacy of ad hoc tribunals, upholding their legality provided that they guarantee the accused a fair trial.[69] The constituent instruments of all ad hoc tribunals, including that of the ECCC (as endorsed by the Assembly), contain references to international human rights law and rules of evidence and procedure. It is thus submitted that the consequences of a power is only relevant to determining the extent of attendant legal safeguards, but not the internal constitutional question of which principal UN organ may assume these powers in the first place.

Second, that Article 22 refers to the Assembly's functions would not preclude a consideration of how such functions have constitutionally developed to discern what types of subsidiary organs may be established. As Article 31(1)(b) of the Vienna

64. Bruno SIMMA, ed., *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002) at 731–4.

65. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, [1954] I.C.J. Rep. 47 at 56 [*Effect of Awards*].

66. *Tadić*, *supra* note 52 at para. 28.

67. *Ibid*., at para. 31.

68. For a recent restatement of this proposition, see Nigel D. WHITE, "The Relationship Between the UN Security Council and General Assembly in Matters of International Peace and Security" in Marc WELLER, ed., *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), at 311.

69. *General Comment of the Human Rights Committee on Article 14 of the ICCPR*, UN Doc. A/43/40 (1988), at para. 4; *Milošević*, *supra* note 52 at para. 8.

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Convention on the Law of Treaties stipulates, a treaty may be interpreted in its context, taking into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[70] This is also reflective of the general proposition that the UN Charter is a "living" instrument, providing justification for procedural latitude in giving effect to subsequent practice.[71] For instance, the Council practice of interpreting "concurring" votes in Article 27 of the UN Charter as not including abstentions was considered by the ICJ in *Namibia*, the court noting that it was established practice within the Council and "has been generally accepted by Members of the United Nations".[72]

In this respect, the practice developed under UfP serves as an aid to construing the scope of the Assembly's functions under Article 22. This proposition was even recognized by the ICTY Appeals Chamber in *Tadić*, where it noted that the Assembly did not need "military and police functions" in order to establish a peacekeeping force in 1956.[73] Rather, UfP broadly enables the Assembly to assume analogous functions to that of the Council where two conditions are satisfied: where there is an absence of Permanent Member unanimity, and where the Council has failed to exercise its primary responsibility. The text of Resolution 377 makes clear that the Assembly has a broad spectrum of powers at its disposal where the Council fails to act: the discharge of the Assembly's responsibilities "calls for possibilities of observation which would ascertain the facts and expose aggressors". Acting under UfP, the Assembly thus initially investigated interstate acts of aggression.[74] It has since used its powers to directly establish fact-finding subsidiary organs to investigate large-scale violations of human rights, doing so for situations in South Vietnam (1963), Mozambique (1973), Cambodia (1998), and Afghanistan (1998).[75] It is true that the creation of an ad hoc tribunal with the power to impose criminal responsibility goes beyond these fact-finding missions. The issue then is not whether a subsidiary organ may be established to investigate international crimes, but rather whether such a body is clothed with the competence to act coercively. The extent of the tribunal's power will be addressed in more detail below, but it suffices to note at this stage that the Assembly did exercise coercive powers under UfP in authorizing continued enforcement action in Korea (1950).[76] If the Assembly is able to recommend coercive measures of a military nature, then there is no reason why it would not be able to also enforce its will against an individual accused of committing international crimes. Indeed, this same reasoning

70. See further *Namibia*, *supra* note 63 at 22.

71. *Reparations*, *supra* note 44.

72. *Namibia*, *supra* note 63 at 22 (emphasis added).

73. *Tadić*, *supra* note 52 at para. 38.

74. See generally Michael G. KEARNEY, "Humanitarian Action Through Legal Institutions" in Roger M. GINTY and Jenny H. PETERSON, eds., *The Routledge Companion to Humanitarian Action* (London: Routledge Press, 2015) 349.

75. For example *UN General Assembly Report of the Commission of Inquiry on the Reported Massacres in Mozambique*, UN Doc. A/9621(SUPP) (1974); *UN General Assembly Resolution 52/135*, UN Doc. A/RES/52/135 (1997); *UN General Assembly Resolution 55/95*, UN Doc. A/RES/55/95 (2000).

76. Nigel WHITE, "From Korea to Kuwait: The Legal Basis of United Nations' Military Action" (1998) 20 International History Review 597 at 613.

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underpinned the expansion of the Council's Chapter VII authority to include the creation of ad hoc tribunals as a form of enforcement action.[77]

Third, a closer reading of the ICJ's *Effect of Awards* advisory opinion, cited at length in *Tadić*, reveals that a UN organ has fairly broad latitude in establishing subsidiaries provided there is some textual basis to do so. In *Effect of Awards*, while Article 22 was itself insufficient to create a subsidiary judicial organ under Assembly auspices, the ICJ referred to Article 7(2), which enables the creation of "[s]uch subsidiary organs as may be found necessary", and read this provision alongside Article 101 concerning the appointment of staff. Accordingly, the power of the Assembly arose "by necessary intendment" in order to further the purpose of promoting "freedom and justice" for staff members and the "efficient working of the Secretariat".[78] This illustrates that a UN organ may go beyond the delegation of their own competencies if a substantive provision of the UN Charter allows them to do so.[79] In this respect, *Effect of Awards* represents a mix between a textual and teleological approach, using the broad purposes of the UN to define the scope of power, and text to ascertain whether it may be established.[80] Based on Article 7(2), the Assembly's responsibility to promote human rights, and the now undoubted UN purpose of ending impunity where mass human rights abuses have occurred, the Assembly has a specific basis in which to establish an ad hoc tribunal.

C. *Article 2(7) and General Assembly Power*

Still, states objecting to the formation of the ad hoc tribunal would point to Article 2(7) of the UN Charter that prohibits the UN from intervening "in matters which are essentially within the domestic jurisdiction of any state".[81] Although Article 2(7) only expressly exempts Chapter VII decisions, and while some states have sought to resist Assembly inquiry into human rights abuses within their territory on the basis of this provision, it has not impeded subsequent Assembly practice. The Assembly thus rejected attempts by states to apply Article 2(7) to resolutions addressing racism, apartheid, and decolonization.[82] This reflects the long-held position that what falls within a state's internal affairs is "essentially relative", developing with international relations generally.[83] Moreover, it is for the Assembly to interpret the scope of Article 2(7) as a necessary jurisdictional predicate so as to determine whether it is able to exercise its powers.[84]

77. See further *UN Security Council Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704 (1993), at para. 28

78. *Effect of Awards*, *supra* note 65 at 57.

79. Sabine VON SCHORLEMER, "The United Nations" in Jan KLABBERS and Åsa WALLENDAHL, eds., *Research Handbook on the Law of International Organizations* (Cheltenham: Elgar, 2011), at 469.

80. Catherine BRÖLMANN, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties:* (London: Bloomsbury, 2007), at 119.

81. For an early pronouncement, see Hans KELSEN, "Limitations on the Functions of the United Nations" (1946) 55 Yale Law Journal 997.

82. *UN General Assembly Resolution 820 (IX)*, UN Doc. A/RES/820(IX) (1954); *UN General Assembly Resolution 917 (X)*, UN Doc. A/RES/917(X) (1955).

83. *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, Advisory Opinion, [1923] P.C.I.J. Rep. Series B No 4.

84. John DUGARD, "The Legal Effect of United Nations Resolutions on Apartheid" (1966) 83 South Africa Law Journal 44 at 54.

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On this basis, Article 2(7) does not place any real impediment on the Assembly to discuss and pronounce on internal matters within a state where international human rights law is engaged, including the commission of core international crimes. Indeed, the Assembly has a long history of actively investigating international crimes, and of condemning states for failing to prevent and punish them.[85] For example, the Assembly condemned the Syrian authorities for failing to "prosecute such serious violations" of international criminal law.[86] The Assembly and its subsidiary, the Human Rights Council [HRC], have established multiple commissions of inquiry to conduct investigations into country situations. The Assembly has directly established fact-finding subsidiary organs to investigate large-scale violations of human rights, doing so for situations in South Vietnam (1963), Mozambique (1973), Cambodia (1998), and Afghanistan (1998).[87] So far, the HRC has established commissions for Palestine (2006), Lebanon (2006), Darfur (2006), Libya (2011), Côte d'Ivoire (2011), Syria (2012), Eritrea (2014), and North Korea (2014).[88] It is therefore plain that the Assembly and the HRC (which is also necessarily bound to observe Article 2(7)) do not view the investigation of international crimes as failing uniquely within a state's internal affairs. Furthermore, it is also apparent that a state's jurisdiction to investigate such crimes is conditioned on it being able and willing to undertake an effective investigation.[89] The complementarity principle, underpinning the Rome Statute, has been iterated in Assembly resolutions and monitoring agencies as supplying a justification for the Council to make an ICC referral.[90] While the UN organ at issue differs, the point still remains: the failure of a state to effectively investigate international crimes justifies a response within the UN, such action being not precluded by Article 2(7).

It may also be queried whether the Assembly's creation of the MH17 tribunal would inadvertently set a precedent such that the UN is expected to act and establish ad hoc tribunals whenever aviation disasters arise in the future. As argued above, it is clear that the failure to investigate and prosecute aviation terrorism constitutes a threat to international peace and security, but this does not necessarily require UN action in establishing an ad hoc tribunal in all such instances. The justification for doing so with respect to the MH17 disaster arises because of the ICC's limited jurisdictional scope and the regional instability in the part of the world where the disaster occurred, making

85. See e.g. *UN General Assembly Resolution 67/262*, UN Doc. A/Res/67/252 (2013).

86. *UN General Assembly Resolution 67/262*, UN Doc. A/RES/67/262; *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, *supra* note 25.

87. *UN General Assembly 18th Session Official Records (11 October 1963)*, UN Doc. A/PV.1239 (1963); *UN General Assembly Report*, GA Rep. A/9621 (1974); *UN General Assembly Resolution*, GA Res. 52/135 (1998); *UN General Assembly Resolution*, GA Res. 54/185 (1999); *UN General Assembly Resolution*, GA Res. 55/95 (2001).

88. See further M. SILVA, "The United Nations Human Rights Council: Six Years On" (2013) 10 SUR International Journal on Human Rights 99; Stewart M. PATRICK, "Gaining Ground at the UN Human Rights Council" *The Internationalist* (3 October 2014), online: The Internationalist <http://blogs.cfr.org/patrick/2014/10/03/gaining-ground-at-the-un-human-rights-council/>.

89. *Rome Statute*, *supra* note 9 at art. 17.

90. See e.g. *UN General Assembly Resolution*, GA Res. 67/262 (2013), noting that "the Syrian authorities have failed to prosecute such serious violations"; *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, *supra* note 25.

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any domestic prosecutions improbable. In other instances, it is possible that the state in whose territory the disaster occurred will investigate and seek to prosecute those responsible, as was the case with Scotland's assertion of jurisdiction over the Lockerbie bombing incident.[91]

II. LEGAL EFFECT OF A GENERAL ASSEMBLY RESOLUTION

The issue that remains is whether an MH17 tribunal established by the Assembly would enjoy the same legal powers as one that originates from a Chapter VII decision of the Council. Assembly resolutions generally lack binding effects. Thus the issue arising is whether the Assembly may render a decision that compels the UN membership to co-operate with the proposed tribunal. This is of material importance in the realm of international justice, as states owe international obligations to other states that may serve to hinder co-operation with the court. A binding resolution, while not guaranteeing co-operation from states, does at least express an obligatory rule that may justify further measures to ensure its compliance.[92] Indeed, it has been suggested that the lack of a Chapter VII underpinning undermined the effectiveness of the Special Panel for Serious Crimes [SPSC] in East Timor.[93] The failure of the SPSC to deliver justice stemmed from its lack of powers to compel Indonesia to transfer indictees, which may have been averted had the Council injected the tribunal with the legal force of Chapter VII.[94] Furthermore, a binding UN decision would not only make it mandatory for states to co-operate with the tribunal, but this duty would also take precedence over any conflicting obligations such states have pursuant to Article 103 of the UN Charter. The effect is that a state cannot claim that it is under a duty, for instance, to respect another state's immunities from arrest, as the UN decision takes hierarchical precedence by virtue of Article 103. In the case of the MH17 disaster, if Russia or its allies harbour the suspects from prosecution, this would engage with the issue as to the binding force of Assembly resolutions. In this respect, there are three ways to conceive of the power to secure the co-operation of states in furtherance of investigations and prosecutions at the MH17 tribunal.

The first argument in support of binding powers may come from a reading of Resolution 2166 (2014), passed by the Council by a unanimous vote and which demanded states to "cooperate fully with efforts to establish accountability" with respect to the MH17 incident. It might be argued that this resolution provides the necessary underpinning for a UN tribunal possessing binding powers to compel state co-operation, be it under the auspices of the Council or Assembly. The interrelationship between Council and Assembly powers was even recognized by the Cambodian Group of Experts as a possible solution to the absence of binding powers in the ECCC, where it was noted that the Council could make a Chapter VII decision so as to impose

91. For an overview, see Michael PLACHTA, "The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare" (2001) 12 European Journal of International Law 125.

92. Still, there have been notable instances where states have failed to co-operate with the ICC notwithstanding a Council decision, which have become a central theme running through ICC debates within the UN; see *UN General Assembly Report of the International Criminal Court*, UN Doc. A/69/321 (2014).

93. Y. BEIGEDER, *International Criminal Tribunals: Justice and Politics* (London: Palgrave, 2011) at 109.

94. *Ibid*.

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a duty of co-operation with this tribunal.[95] The issue therefore is identifying the scope and effect of Resolution 2166: whether it is recommendatory or mandatory, and, if the latter, the extent to which it may serve to underpin the powers of a proposed MH17 tribunal established by the Assembly.

Interpreting Council Resolutions is by no means a straightforward exercise, and will require consideration of a variety of interpretive factors.[96] In *Namibia*, the ICJ provided some guidance, noting that "the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect".[97] This involves an analysis of the terms of the resolution, the discussions leading to it, the Charter provisions invoked, and, in general, all the circumstances that may assist in determining the legal consequences of the resolution.[98] Although Resolution 2166 does contain language that is mandatory in its terms, for the resolution to bind the UN membership it is necessary for it to be taken under Chapter VII, after a determination under Article 39 that a threat to the peace or breach of the peace, or an act of aggression, has occurred.[99] Indeed, it is now a general practice for the Council to expressly make an Article 39 determination in a resolution which is intended to be mandatory, which will include the words "acting under Chapter VII" as well as "decides".[100] As Resolution 2166 did not expressly invoke Chapter VII, reference any threat to peace, or make any decision, it therefore lacks binding characteristics.[101]

Second, the Assembly resolution that establishes the MH17 tribunal may be conceived as having an authorizing function in that it enables states to act in a manner that would otherwise contravene international law. Judge Lauterpacht once expressed the view that Assembly recommendations may "on proper occasions" provide a "legal authorization" for members to act on them.[102] Although Lauterpacht did not elaborate further on this point, it is consistent with the view that the UfP mechanism shielded those states that contributed to UN enforcement action from responsibility. One apparent example of such enforcement action was the continuation of the UN mandate in Korea in 1950 by the Assembly, pursuant to Resolution 376, even though Russia had subsequently vetoed such continuation in the Council. Although some may assert Resolution 376 to declare the right to collective self-defence, as White noted, the better view is that such resolution constituted UN enforcement action.[103] The implication of

95. *Cambodia Report*, *supra* note 28 at para. 145.

96. See generally Michael C. WOOD, "The Interpretation of Security Council Resolutions" (1998) 2 Max Planck Yearbook of United Nations Law 73.

97. *Namibia*, *supra* note 63 at 53.

98. *Ibid*.

99. *UN Charter*, *supra* note 41 at art. 39; Antonios TZANAKOPOULOS, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (Oxford: Oxford University Press, 2011) at 60.

100. Wood, *supra* note 96 at 82.

101. This view is supportive of Russia's position, in that the creation of an ad hoc tribunal for MH17 was not a necessary intendment from Resolution 2166, as it had not considered the downing of the aircraft as a threat to international peace and security: *UN Security Council 7498th Meeting (29 July 2015)*, *supra* note 3 at 5.

102. *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Advisory Opinion, [1955] I.C.J. Rep. 67 at 115.

103. White, *supra* note 76 at 614.

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this conclusion is that Resolution 376 served to preclude any wrongful act in the use of force. This view is reinforced by the Collective Measures Committee, a subsidiary organ established under UfP, which noted that "in the event of a decision or recommendation of the United Nations to undertake collective measures … (d) States should not be subjected to legal liabilities under treaties or other international agreements as a consequence of carrying out United Nations collective measures".[104] Indeed, some jurists have even argued that Assembly resolutions, in embracing a quasi-judicial role, may clear states of wrongful acts, as was argued with respect to an Assembly resolution condemning US intervention in Libya after the Lockerbie bombing.[105] Based on this reasoning, it is possible that a state co-operating with an ad hoc tribunal pursuant to an Assembly resolution would also be shielded from responsibility in the event that such co-operation infringed the rights of another state.

Third, the scope for Assembly resolutions to possess binding effects also warrants consideration. Conceiving of Assembly resolutions as authorizing otherwise wrongful acts may aid voluntary state co-operation, but the lack of obligatory force may hinder the scope for reluctant states to co-operate with the tribunal. This is important if the terms of the proposed MH17 tribunal resolution are to be upheld. In the proposed resolution, the Council was to impose a duty on all states to "cooperate fully" and to "take any measures necessary under their domestic law to implement the provisions of the present resolution and Statute [establishing the MH17 tribunal]", including "the obligation to comply with requests for assistance or orders" from the tribunal.[106] One possibility is for the Statute of the MH17 tribunal, where established by the Assembly, to incorporate the conventional and customary obligations owed by those states requested to co-operate (notably, in this instance, Russia). The limitations of this argument, however, are that there are no customary law duties imposed on a state to extradite its own nationals to face charges in a foreign jurisdiction.[107] The situation, at least pertaining to Russia's legal commitments, remains the same under treaty law. Russia is a party to the 1971 Montreal Convention,[108] an instrument that is highly relevant to the MH17 disaster given that it regulates the prosecution of those who committed unlawful acts against the safety of civilian aviation. Article 7 in particular requires that a Contracting State "in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged … to submit the case to its competent authorities for the purpose of prosecution".[109] While it is tempting to argue that Article

104. *UN General Assembly Official Records (VI)*, UN G.A.O.R Supp. 13 at para. 265.

105. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. US)*, Provisional Measures, [1992] I.C.J. Rep. 114 (dissenting opinion of Judge Bedjaoui). Although see *UN General Assembly Resolution*, GA Res. 41/38 (1988), which did not address Libya's culpability for the Lockerbie bombing, but only condemned the military campaign against it.

106. *Supra* note 2.

107. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, [1992] I.C.J. Order of 14 April 1992 (Joint Declaration of Judges Evensen, Tarassov, Guillaume, and Aguilar) at 25.

108. *1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 177 (entered into force 27 January 1973) [*Montreal Convention*].

109. *Ibid*., at art. 7.

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7 imposes a duty to extradite, the plain language makes it difficult to sustain this interpretation. As concurring opinions in the ICJ *Lockerbie Provisional Measures* decision made clear, Article 7 "did not prohibit Libya from refusing to extradite the accused to the United Kingdom or the United States. It implied merely that, in the absence of extradition, Libya had to submit the case to its competent authorities for the purpose of prosecution."[110] In short, Article 7 establishes extradition as an option, but prosecution as an obligation: a failure to prosecute would not trigger an obligation to extradite.

It is therefore necessary to consider the extent to which Assembly resolutions may intrinsically possess binding effect. This notion is inconsistent with the text and drafting history of the UN Charter, in addition to contemporary state practice.[111] Textually, the UN Charter only expressly provides that members are under a duty to abide by decisions of the Council and the ICJ, with no equivalent provision for the Assembly.[112] Further, even with recourse to the drafting history, such powers were rejected, most notably being the Philippine delegation's proposal to endow legislative powers on the Assembly.[113] It is true that Assembly resolutions possess binding force with respect to internal organizational matters, such as budget apportionment and membership approval.[114] However, these limited powers are unable to justify Assembly resolutions imposing legal obligations on states. Assembly resolutions are thus simply recommendatory and may be ignored.[115] As Fitzmaurice argued, a recommendation is incapable of amounting to an "obligation" under Article 103, and thus would not conflict with other legal obligations owed by states.[116]

Despite these objections, some scholars have sought to recast the Assembly's constitutional powers, arguing that while there is a presumption against resolutions having binding force, this is rebuttable.[117] This argument is based on the nature of the UN Charter as a living instrument to which there is latitude for the membership to broadly interpret the powers of the various UN organs.[118] Based on this argument, it falls upon the Assembly to interpret the scope of its own powers, being reflective of the principle that an interpretation of the treaty is as binding on the parties as the treaty itself.[119]

110. *Ibid.*
111. Dugard, *supra* note 84 at 46–8 (and authorities cited there).
112. See *UN Charter*, supra note 41 at arts. 25, 94.
113. *UNCIO Documents, Volume 2* (1945), at 70.
114. *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, *supra* note 42. Also, Dugard, *supra* note 84 at 46–8 (authorities cited there).
115. *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), ibid.*; Dugard, *ibid.*
116. Gerald FITZMAURICE, "Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure" (1958) 34 British Yearbook of International Law 1 at 5.
117. F. Blain SLOAN, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations" (1948) 25 British Yearbook of International Law 1 at 16.
118. *Vienna Convention on the Law of Treaties*. 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) [*Vienna Convention*], at art. 31; *Reparations*, *supra* note 44 at 174.
119. Oscar SCHACHTER, "Law and the Process of Decision in the Political Organs of the United Nations (Volume 109)" in Hague Academy, *Collected Courses of the Hague Academy of International Law* (The Hague: Hague Academy of International Law, 1963), at 180; Hans KELSEN, *The Law of the United Nations* (New York: Frederick A. Praeger, 1950) at xiii.

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Indeed, during the Charter's drafting, the point was made that if an interpretation of the treaty "is not generally acceptable it will be without binding force", thus recognizing that interpretations receiving general approval will be authoritative.[120] The notion that UN members may vest authoritative powers in the Assembly is not unprecedented. Thus, the primary role UN members entrusted in the Assembly, derived from a customary norm in favour of the rights of colonial peoples, imbued its resolutions within this competence as having an extrinsic binding effect.[121] Indeed, the ICJ in *Namibia* appeared to endorse the proposition that the Assembly may enjoy authoritative competencies, noting that "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from *adopting*, in specific cases within the framework of its competence, resolutions which make determinations or have operative design".[122]

Still, a fundamental problem remains. Although some recognize the theoretical possibility of Assembly resolutions being authoritative, the lack of UN practice would make any assertion of power with respect to the MH17 tribunal highly contentious. There is a need to establish general acceptance amongst the membership for a given treaty interpretation or practice. This does not require membership unanimity, but it does typically require a long gestation period in order to establish general acceptance.[123] As Bleicher noted, generally there is a need for significant persistent recitation of a resolution to evince members' intent.[124] Thus, the Universal Declaration of Human Rights attained the status of customary international law not because of its affirmation in a single resolution, but because of its recitation in subsequent resolutions.[125] Evincing members' intent is all the more complicated with respect to action in the Assembly, where most resolutions are hortatory in character. The nature of the forum therefore means that members should not be held to their vote on resolutions: there should be no obstacle to a "change of heart".[126] Although there is scope for UN organs to develop customary powers at different rates of rapidity, the highly contentious notion of the Assembly exercising binding powers would provoke strong disagreement amongst states, thus undermining the "general acceptance" of the practice by the membership. In short, while the Assembly has the power to establish the MH17 tribunal, which may render coercive decisions against accused persons, it is unlikely that such entity possesses binding powers to compel state co-operation, absent specific legal underpinning by a Council decision.

120. *Report of the Rapporteur of Committee IV/2*, 13 UNCIO Doc. 933, IV/2/42(2) (1945), at 710; Schachter, *supra* note 119 at 187.

121. *UN Repertory of Practice Vol. IV Study on Article 73*, UN Repertory of Practice (1955), at para. 226; M.K. NAWAZ, "Colonies, Self-Government and the United Nations" (1962) Indian Yearbook of International Affairs 3; Schachter, *supra* note 119 at 187; Benedetto CONFORTI and Carlo FOCARELLI, *The Law and Practice of the United Nations* (Leiden: Brill, 2010) at 365.

122. *Namibia*, *supra* note 63 at 50 (emphasis added).

123. *Ibid*., at 22 (noting that the practice at issue "has been generally accepted").

124. See generally Samuel A. BLEICHER, "The Legal Significance of Re-citation of General Assembly Resolutions" (1969) 63 American Journal of International Law 444 at 457.

125. *Ibid*., at 457.

126. *Ibid*., at 453, 457.

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III. UTILITY OF ASSEMBLY RESOLUTIONS AS QUASI-JUDICIAL INSTRUMENTS AND IN AUGMENTING CUSTOM TO FACILITATE ITS FUNCTIONS

Despite the presumption that the Assembly is unable to impose extrinsic legal obligations on UN members, it remains instructive to consider how this organ may facilitate the operation of the MH17 tribunal in other ways, by using its unique representative status to create more permissible international law with respect to state action to address impunity. One option, as noted above, was to request that the Council make Chapter VII decisions where necessary so as to instil mandatory powers into the work of the ad hoc tribunal.[127] Even though the tribunal would have been established in response to Council deadlock, it is theoretically possible for the Council to subsequently support the operation of the tribunal once it is established. Yet, given Russia's alleged proximity to the MH17 disaster, there is no prospect of the Council subsequently injecting the tribunal with mandatory powers.

Thus, assuming that Assembly recommendations do not have binding effect, it is instructive to consider whether and to what extent this organ may develop customary international law in a manner that facilitates the operation of its ad hoc tribunal. It is firmly established in the jurisprudence of the ICJ that Assembly resolutions provide a rich source of evidence as to the evolution and existence of custom.[128] Furthermore, the Assembly has and continues to perform a standard-setting role in the field of international criminal law, first spearheading the acceptance of the Nuremberg principles to developing consensus on the nature of the international crimes of genocide, torture, and aggression.[129] In this regard, a neat illustration of the potential for the Assembly to shape international law in the work of the MH17 tribunal comes in analyzing the legal issues arising from the immunities that a serving state official enjoys from criminal investigation or prosecution in a foreign jurisdiction.[130] Although the applicability of immunities to the MH17 disaster remains unknown at this stage, it is not inconceivable to imagine an immunity defence being raised, particularly if it transpires that state officials are implicated in the disaster, be it from the putative Crimean government or its Russian counterpart. While an Assembly resolution would not override any putative immunity, they may have utility in other ways.

127. *Cambodia Report*, *supra* note 28 at para. 145.

128. Rosalyn HIGGINS, *The Development of International Law Through the Political Organs of the United Nations* (Oxford: Oxford University Press, 1963) at 5.

129. *UN General Assembly Resolution*, GA Res. 95 (1946); *UN General Assembly Resolution*, GA Res. 96(1) (1946) (leading to the Genocide Convention 1968); *UN General Assembly Resolution*, GA Res. 3314 (XXVIII) (1974), where the Assembly's definition of aggression was subsequently included in the text of art. 8bis, Rome Statute. Interestingly, in adopting the Genocide Convention, the Contracting Parties considered the Assembly's definition to "confirm" that genocide was an international crime (see *UN General Assembly Resolution*, GA Res. 260 (III) A (1948)). See also M. BASSIOUNI, *Introduction to International Criminal Law*, 2nd ed. (Leiden: Martinus Nijhoff, 2013) at 76, 158.

130. The focus here is not functional immunities (*ratione materiae*), which concern the acts of former state officials, as such immunities arguably do not pertain where the person's conduct in office involved the commission of international crimes, for which see *R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3), [2000] 1 A.C. 147 at 204 (Lord Browne-Wilkinson); *AG of Israel v. Eichmann*, [1968] 36 I.L.R. 277 at 308.

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First, Assembly resolutions may serve a "quasi-judicial" function.[131] The legal significance of an Assembly resolution here stems from the character of the organ rather than the intrinsic value of the resolution itself: given the near universal membership of the Assembly, its resolutions carry weight in resolving contentious or unclear political matters that an ad hoc tribunal, given its primary function as a court tasked with making findings on individual criminal responsibility, would wish to avoid. This point is well illustrated with the situation in Palestine, where Assembly resolutions characterizing it as a "state" paved the way for Palestine's admission to the Rome Statute.[132] In a similar way, an Assembly resolution would serve an adjudicatory function in resolving questions over the sovereign status of Crimea and the applicability of any asserted immunities by criminal suspects who purport to represent the government of this putative state. Indeed, the Assembly has already weighed in on the legality of Russia's annexation of the Crimea, finding that the referendum in Crimea that led to the peninsula's annexation by Russia had "no validity", and that states were urged to "refrain from any action or dealing that might be interpreted as recognizing any such altered status".[133]

Second, even if a serving official of a valid governmental entity is a suspect before the tribunal, it is arguable that the Assembly is able to override such immunities by crystallizing an exception to official immunities. The position under international law remains that a serving official enjoys immunity from prosecution, unless the state has waived such immunities. Up until 2002, the ICJ in *Arrest Warrant* was unable to discern any exception under custom to this rule, even where the serving official was suspected of having committed core international crimes.[134] This was further reinforced in *Germany v. Italy*, where the ICJ held that a state enjoyed immunities from proceedings in the courts of another irrespective of the *jus cogens* character of the alleged violations of international law.[135] In *Arrest Warrant*, the ICJ did note, however, that immunities would not preclude criminal prosecution by a relevant international court with jurisdiction, expressly citing the ICC as an example.[136] The link the ICJ makes between jurisdiction and immunities is important here as it reinforces the "waiver" principle: only if a state has assented to the ICC's jurisdiction will the official

131. Oscar SCHACHTER, "The Quasi-Judicial Role of the Security Council and General Assembly" (1964) 58 American Journal of International Law 960 at 961. On the role of the Assembly generally in international justice, see further Michael RAMSDEN, "Uniting for Peace in the Age of International Justice" (2016 forthcoming) Yale Journal of International Law (online).

132. *UN General Assembly Resolution 67/19*, UN Doc. A/RES/67/19 (2012). See also International Criminal Court, "The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine" *International Criminal Court* (16 January 2005), online: ICC <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx>.

133. *UN General Assembly Resolution 68/262*, UN Doc. A/RES/68/262 (2014).

134. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, [2002] I.C.J. Rep. 3 at 41.

135. *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, [2012] I.C.J. Rep. 99 at para. 95. In *Prosecutor v. Al Bashir (Decision on Cooperation of the DRC)*, [2014] ICC-02/05-01/09 at para. 30 the PTC relied on *Germany v. Italy* in noting that the immunity attached to Al Bashir was a procedural bar from prosecution before the Court, albeit waived by para. 2 of Council Resolution 1593 [*DRC Decision*].

136. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *supra* note 134 at 58, 61.

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capacity of its serving officials be irrelevant in court proceedings.[137] A Council referral under Chapter VII will also constitute an implicit waiver, given that the relevant state's UN membership makes it bound by such a decision.[138]

If a state were to co-operate with the Assembly's tribunal, but by doing so they did not respect the immunities of another state, this would place the co-operating state in violation of international law. Thus, the Council's solution with respect to the ICTY and the ICTR was to make co-operation mandatory, taking precedence under Article 103 over the conflicting obligation a state owes to respect immunities.[139] This is also reflected in the proposed MH17 Statute, which provides that "official capacity as a Head of State or Government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility".[140] However, given the assumption that Assembly resolutions lack binding powers, its tribunal would have to operate within the confines of immunities under international law, rather than the special legal regime under Chapter VII.

The requirement for a state to waive its immunities would likely be detrimental to an Assembly ad hoc tribunal seeking to prosecute serving officials, were it not for some evidence of an "emerging" customary exception. The ICC Pre-Trial Chamber in *Malawi* noted that "customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes".[141] Indeed, it is noteworthy that the ICTY did not base the irrelevance of official capacity on the implicit waiver via a Chapter VII resolution, but rather on the customary exception theory.[142] Still, concerns persist over the validity of this exception to customary law. In April 2014, in an apparent retreat from its earlier broader position, the ICC Pre-Trial Chamber in *DRC* noted that immunities of the serving head of Sudan, Omar al-Bashir, were "implicitly waived" by virtue of the Chapter VII referral that was binding on Sudan.[143] Further, it may be argued that all of the sources cited as supporting a customary exception to immunities could easily be used to support the waiver theory: that the states concerned had waived such immunities by virtue of their membership of the UN. Unfortunately, all decisions have glossed over the legal underpinnings of these statutes when declaring there to be an exception to customary law. This may be because the circumstances have not called for more intense scrutiny due to the firm footing the ICC (by way of a treaty) and Council ad hoc tribunals (Chapter VII) have had.

In this regard, the Assembly can perform a valuable role in participating in the creation of customary international law. The ICJ in *Nicaragua* noted that *opinio juris*

137. *Rome Statute*, *supra* note 9 at art. 27.

138. *DRC Decision*, *supra* note 135 at para. 29.

139. *UNSC Res 827*, *supra* note 53 at para. 4; *UNSC Res 955*, *supra* note 57 at para. 2.

140. *Supra* note 2.

141. *Prosecutor v. Al Bashir (Corrigendum)*, [2011] ICC-02/05-01/09 at para. 43. For a recent critique, see Michael RAMSDEN and Isaac YEUNG, "Head of State Immunity and the Rome Statute: A Critique of the PTC's Malawi and DRC Decisions" (2016 forthcoming) International Criminal Law Review.

142. *Milošević*, supra note 52 at para 32.

143. *DRC Decision*, *supra* note 135 at para. 29.

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may be discerned from the "attitudes of States to certain General Assembly resolutions", noting that the "effect of consent to the text of such resolutions cannot be understood as *merely* that of 'recitation or elucidation' … On the contrary, it may be understood as an *acceptance* of the validity of the rule or set of rules declared by the resolution by themselves."[144] What this dictum reveals is that an Assembly resolution may go beyond merely declaring custom that already exists, but may also extend to participating in the creation of custom through an "acceptance" of the rule contained in the resolution.[145] Finding acceptance will depend on the "content and condition" of the rule's adoption.[146] The vote outcome is thus relevant: greater weight is given to resolutions passed unanimously or by sizeable majorities than resolutions adopted with significant dissent.[147] The type of resolution is also relevant, with greater normative weight given to "affirmations" than to mere "recommendations".[148]

If an Assembly resolution was to establish the MH17 tribunal and included an irrelevance of official capacity clause in its constitutive statute, this would provide a rich source of evidence as to the status of the putative exception to official immunities in customary law. Such a resolution could be viewed as either substantive or pre-substantive in its legal effects. The formation of custom requires state practice and *opinio juris*. If the various previous judicial decisions from ad hoc and treaty-based courts articulating the limits of official immunities constitute "state practice", then a resolution that evinced acceptance of the general rule underpinning such judicial pronouncements would have a substantive effect in crystallizing the customary exception, having successfully married state practice with *opinio juris*.[149] But an alternative interpretation is that Assembly resolutions only have a pre-substantive effect, in expressing *opinio juris*.[150] It is here where an Assembly resolution establishing the MH17 tribunal and affirming the irrelevance of official capacity would have a pre-substantive effect in stating general acceptance for the rule, which would subsequently take form in custom with evidence that state practice in the operation of the tribunal has conformed to the affirmation set out in the resolution.

IV. CONCLUSION

The purpose of this paper has been to consider the scope of the Assembly's legal powers to establish an ad hoc tribunal for the MH17 disaster. While the Assembly possesses

144. *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Judgment on Merits, [1986] I.C.J. Rep. 14 at 100 (emphasis added).

145. M.D. OBERG, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ" (2006) 16 European Journal of International Law 879 at 897.

146. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226 at 254–5.

147. *Ibid*.

148. M. SCHARF, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge: Cambridge University Press, 2013) at 449.

149. In reality, the acts of international organizations with their own personality do not fit neatly into the traditional source of international law, but have come to be regarded as state practice by some commentators: N. ARAJÄRVI, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (London: Routledge, 2014) at 18.

150. Oberg, *supra* note 145 at 904.

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the legal power to establish the tribunal, it is unable to bind UN members to co-operate with it. It is possible, however, that an Assembly resolution and decisions of the MH17 tribunal would serve a permissive function, in enabling states to co-operate with this organ, even though doing so potentially interferes with the rights of other states. Yet, even on the assumption that an Assembly ad hoc tribunal lacks some of the legal underpinnings enjoyed by Council tribunals, the nature of the Assembly means that its resolutions may facilitate the functions of the tribunal, acting in a quasi-judicial capacity or crystallizing more permissive customary law.

The need to consider Assembly involvement in the creation of ad hoc tribunals is indicative of the Council's loss of legitimacy in upholding international criminal justice. The Council's leading role in securing accountability in Yugoslavia and Rwanda led to the subsequent entrenchment of its status in the Rome Statute, where the Council was the only UN organ vested with referral power. Yet the failure to secure accountability, first in Syria and now in Ukraine, justifies a fundamental re-evaluation of the Council's role in international criminal justice. The politicization of international criminal justice is also readily apparent where the prospect of accountability is dependent on the Permanent Members not having an interest in the outcome of criminal proceedings. Provided that the political will exists, there are good reasons to support the Assembly assuming greater functions in triggering accountability mechanisms, including the creation of ad hoc tribunals in the event that the Council fails in its primary responsibility to uphold international peace and security.

Whether the MH17 investigating states pursue the creation of an ad hoc tribunal through the Assembly remains to be seen. There are many practical obstacles to the prosecution of those responsible for the MH17 disaster, which include identifying the perpetrators and obtaining evidence where there is reluctance and aversion to making this available to prosecutors. The creation of an ad hoc tribunal would also be set against a highly politicized environment where the prospects of effective Russian co-operation remain slim. While the route to individual criminal responsibility remains difficult, it is not insurmountable. Admittedly, the Assembly's MH17 tribunal would lack the binding powers necessary to compel state co-operation, which may somewhat undermine its effectiveness in pressuring Russia and its client government in the Crimea to hand over suspects. However, this would also be a problem faced by any other justice option outside the Chapter VII regime. In the final analysis, as Forsyth noted, the effectiveness of an ad hoc tribunal will ultimately turn on the existence of a broad international coalition who support the work of the tribunal and who bring pressure to bear on recalcitrant states.[151] If the Assembly was to establish an ad hoc tribunal following Council deadlock, this would not only signify a constitutional moment in UN history, it would send a strong message from a broad international coalition that accountability must be secured for the victims of the MH17 disaster.

151. Forsythe, *supra* note 40 at 859.

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