

The UN General Assembly as a Security Actor: Appraising the Investigative Mechanism for Syria

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Abstract

This article analyses the role of the United Nations General Assembly (UNGA) as a security actor. With the creation of the 'International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (IIIM), through UNGA Resolution 71/248¹ in 2016, the General Assembly creatively used its powers to strengthen international criminal justice. Although investigative or fact-finding missions itself are nothing new to the UN system, Resolution 71/248 is qualitatively different to any other mission before it. The IIIM was established without Syrian consent, which is a historic first for the General Assembly. It is also the first time that such a body is tasked with investigations that fulfil prosecution standards, that serves as an evidence repository as well as a connecting hub between different justice actors. The UN General Assembly filled a void where the UN Security Council found itself in a stalemate over Syria. The IIIM has since served as a blueprint for a new generation of investigative mechanisms that emerged in the UN system. Looking beyond the appraisal of the IIIM, the article argues that the UN General Assembly practice in maintaining peace and security has significantly evolved over time. The early UN General Assembly practice through Uniting for Peace allowed it to assert its proactive role in parallel to the Security Council, yet it failed in its claim of authority to recommend forceful, collective measures. The practice subsequently evolved towards the diverse use of non-forceful measures, of which the IIIM provides a recent example. Creative boundary pushing in the UNGA through non-forcible measures will hopefully contribute to peace and security beyond war.

1 UNGA Res 71/248 'International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (11 January 2017).

Keywords

UN General Assembly – IIM – Syria – International Security – UN Security Council

1 Introduction

The war in Syria has been one of the most significant crises of the early 21st century. By 2016, the war in Syria had been raging for five years. What started as a peaceful uprising, quickly became one of the most brutally fought contemporary conflicts. By April 2016, the United Nations Special Envoy for Syria warned that the death toll in Syria had probably reached 400,000.² The spread and intensification of fighting had led to a dire humanitarian crisis with millions of Syrians internally displaced, more than four million seeking refuge abroad, and an estimated one million people living in besieged areas and denied life-saving assistance and humanitarian aid.³ Torture and ill-treatment in Syrian detention facilities as well as high levels of disappearances had been reported on a repeat basis.⁴ Against this background and the deadlock in the UN Security Council, Christian Wenaweser, Liechtenstein's Representative to the UN, attested in the UN General Assembly that the 'disagreement between those members of the Security Council that have veto power has led time and again to inaction'.⁵ He called out the collective failure of all UN member states in addressing the Syrian crisis.⁶ This call did not fall on deaf ears. On 21 December 2016, the UN General Assembly established the 'International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (IIM) through UNGA Resolution 71/248 to pave pathways to hold those responsible for crimes in Syria to account for their actions.

Looking back at this development, this article appraises the role that the UN General Assembly can play in the maintenance of peace and security. Drawing out the novel features of this investigative mechanism with its role as

2 UNSC 'Note to Correspondents: Transcript of press stakeout by United Nations Special Envoy for Syria: Mr. Staffan de Mistura' (22 April 2016).

3 Human Rights Watch, 'World Report Syria: Events of 2016', available at <https://www.hrw.org/world-report/2017/country-chapters/syria> (accessed 6 April 2022).

4 Ibid.

5 UNGA Plenary Meeting (21 December 2016) 71st Session 66th Plenary Meeting, at 18.

6 Ibid., at 19.

a criminal investigation body and cooperation hub in Section 2, the creation of the IIIM has been the starting point for a new generation of investigative mechanisms within the UN system. It is argued in more detail in Section 4 that this type of mechanism – in its significance not fully understood in the literature to date – holds the potential for shaping a more robust system of international criminal justice. It provides connection points within networks of disparate justice actors such as Syrian Civil Society Organisations and individuals dispersed across the world, as well as domestic prosecution services. The investigative mechanism also serves as a repository of widely collected evidence, providing a central resource for decentralised prosecution action in domestic courts or, perhaps at some point in the future, in a regional or international court. The Mechanism's standard of operation is set to become a blueprint for future situations beyond the International Criminal Court (ICC).

The UN General Assembly has a clear mandate of taking a proactive role as an international security actor – as an actor in the international legal architecture mandated to prevent or respond to situations that threaten peace and security. Although the creation of the IIIM was met with protest by a small group of states that included the Syrian Arab Republic and Russia, it is argued that the Charter provides the General Assembly with the necessary mandate. The discussion in Section 3 demonstrates that Article 12(1) of the Charter has undergone a normative shift, not least triggered by the early practice of the General Assembly in *Uniting for Peace* and the use of emergency special sessions. This shift allows the General Assembly to assume a proactive role alongside the Security Council, even if the latter is engaged with the situation concerned. In Syria, the Security Council had only taken very limited action and failed entirely in addressing the continued impunity for large scale violations of international human rights and humanitarian law, including the use of chemical weapons. This failure stands in stark contrast to the rise of individual criminal accountability as a tool of international security in the practice of the UN Security Council. The General Assembly has stepped into this breach and creatively used the competency to utilise non-forceful measures to facilitate the work of domestic courts and safeguard evidence for any future court that may have jurisdiction over crimes in Syria.

In Section 5, the article takes a broader look at the role of the UN General Assembly as a security actor. It briefly revisits the early practice of the General Assembly with the push to assert powers to authorise the use of force through the *Uniting for Peace* Resolution addressing the Korea crisis in 1950. Although *Uniting for Peace* left some imprint on the understanding of Article 12 (1) of the Charter, it did not achieve the aim of providing the General Assembly with equivalent powers to those assigned to the Security Council in Chapter 7 of the

Charter. UN General Assembly practice in the area of peace and security has evolved to utilise and broaden non-forceful measures instead. The creation of the IIIM re-enforced the need for accountability for international crimes as a vital element in a legal order that seeks to maintain peace and security in this world.

2 The Mandate and Work of the Investigative Mechanism for Syria

The IIIM's mandate was novel in 2016 at the time of the creation of the IIIM. With a view to crimes committed in the Syrian Arab Republic, its purpose is

... to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.⁷

This mandate is important as it allows investigations of possible crimes committed by all sides in the Syrian conflict to a prosecution standard. This is a step change from previous fact-finding or investigative missions within the UN system making this a significant development in the practice of the UN and international criminal law. Yet, the Mechanism is not equipped with any further prosecutorial powers. Instead, the IIIM aims to build a central repository for the evidentiary materials collected that document the Syrian conflict 'as a "service to prosecutors and courts" for current and future trials as well as a wider repository for survivors'.⁸ Although set up out of the frustration of the UN Security Council's failure to effectively address the Syrian Conflict and the vast gap of impunity, the current achievements of the IIIM are yet very limited. This Section will discuss two important aspects of the IIIM's work in more detail, the facilitation of prosecutions and the acting as a central repository

⁷ UNGA Res 71/248 'International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (11 January 2017).

⁸ M. Burgis-Kasthala, 'Assembling Atrocity Archives for Syria' (2021) 19 *Journal of International Criminal Justice*, at 193 and 1201 (citing the Head of the IIIM, C. Marchi-Uhel).

and bridge between different actors documenting crimes committed in Syria. Lastly, it will also reflect on some of the key challenges the IIIM currently faces.

2.1 *Applying Criminal Law Standards and Facilitating Prosecutions*

The IIIM's mandate requires it to secure evidence and conduct investigations on an impartial and independent basis, which can meet prosecutorial standards and directly contribute to accountability in different prosecutorial fora. In practice, it applies criminal law standards in its investigations; it also cooperates with national prosecution services and courts prosecuting crimes in the Syrian context, for example based on universal jurisdiction.⁹ This is a critical qualitative difference that is a new development within the UN system. Wenaweser highlighted that the IIIM is 'designed to facilitate and expedite criminal proceedings once there is a court or tribunal able and willing' to conduct independent and fair proceedings.¹⁰

The IIIM is not mandated to serve as a court, nor does it serve any prosecutorial functions as such. In many jurisdictions, such as the International Criminal Court (ICC), the Office of the Prosecutor unites investigative functions and the prosecution of individuals in courts of law. This is not the case for the IIIM; it solely fulfils an investigative function through the collection and preservation of evidence for the respective situations that they were created for. These investigations will contribute to any prosecution if prosecution services in domestic courts¹¹ – or perhaps one day in international or hybrid courts¹² – take the initiative to bring specific cases. Against this background, the introduction of the IIIM has been lauded as historic, as it would ensure that justice could be done when the conditions and political will existed to provide accountability for Syria.¹³

One notable contribution in the collection of evidence with the aim of aiding and facilitating criminal prosecutions is the new and innovative technology-based approach taken in the IIIM. This allows the analysis of and

9 C Marchi-Uhel, 'Remarks on The ICC and Beyond: Re-evaluating the Promise of International Criminal Justice' (2020) ASIL Proceedings, at 208.

10 UNGA Plenary Meeting (21 December 2016) 71st Session 66th Plenary Meeting, at 19. Mr. Wenaweser speaking for Liechtenstein.

11 For example, Germany conducts investigations into Syria with various prosecutions resulting so far.

12 Such an option has repeatedly been called for regarding ISIL or Da'esh. See, for example, S. Sayapin, 'A "Hybrid" Tribunal for Daesh?' (2016) Blog of the European Journal of International Law.

13 A. Whiting, 'An Investigation Mechanism for Syria' (2017) 15 Journal of International Criminal Justice, at 231 and 235.

cross-corroboration of large volumes of evidence and documentation.¹⁴ These technology-based review possibilities are new and unprecedented in international criminal law.¹⁵ These data-bases also contribute to developing new archival practices, which may in the long run provide a source of knowledge and truth-finding beyond criminal prosecutions.¹⁶ Yet, to date, the IIIM's mandate to facilitate prosecutions would not easily be reconcilable with opening up to broader publics such as victim groups, as any form of public access could jeopardize criminal investigations.

In practice, the IIIM has only had very limited success in its aim of facilitating and expediting criminal proceedings since its creation. It can currently only support domestic prosecutions, as no competent regional or international tribunal exists (yet) for Syria. According to the IIIM's latest report, it has, to date, assisted 36 distinctive investigations at the domestic level.¹⁷ Although the geographical distribution of the jurisdictions in which these investigations are ongoing has not been reported, it can be safely assumed that the majority of those will be European countries. Countries such as Germany, the Netherlands, Sweden, and France have taken the lead in prosecuting international crimes linked to the Syrian conflict.¹⁸ The factors that contribute to this trend include the presence of large numbers of Syrian refugees and exiled communities in those countries. These communities have had an important impact on pushing for accountability efforts at national levels. Also, most European countries have domestic legislation in place, have identified perpetrators present on their territory, and can draw on distinct European investigative structures, such as the Europol Genocide Network, to better enable effective investigations.

The most notable proceedings to date are the convictions against Eyad Al-Garib and Anwar Raslan addressing state-sponsored torture in Syria before the OLG Koblenz.¹⁹ Although the proceedings in Koblenz are at times in the

14 E. Radeva, 'The Potential for Computer Vision to Advance Accountability in the Syrian Crisis' (2021) 19 *Journal of International Criminal Justice*, at 131 and 134–135.

15 Burgis-Kasthala, 'Assembling Atrocity Archives for Syria', at 1205.

16 *Ibid.*, at 1204.

17 UNGA 'Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (12 February 2021) UN Doc. A/75/743, at para. 30.

18 For an overview over cases based on universal jurisdiction, see the database provided by Trial International, available at <https://trialinternational.org/resources/universal-jurisdiction-database/> (accessed 6 April 2022).

19 *Al-Garib v OLG (Regional High Court) Koblenz (Judgment)* (24 February 2021) Case No. 1 StE 3/21; *Raslan v OLG (Regional High Court) Koblenz (Judgment)* (13 January 2022) Case No. 1 StE 9/19. At the time of writing, both convictions are under appeal.

emerging literature linked to the work of the IIM,²⁰ the Koblenz trial proceedings were predominantly made possible because of evidence collection by NGOs, through the investigative approach within the German Federal Prosecution service with its structural investigations, and critically the agency from within Syrian communities.²¹ To what extent the IIM will succeed in its future work to facilitate criminal prosecutions will critically depend on the political will of states and the international community to take more decisive steps towards establishing a dedicated tribunal.

2.2 *Facilitating Cooperation with Other Justice Actors*

In doing so, the IIM ought to closely cooperate with the Independent International Commission of Inquiry on the Syrian Arab Republic. This Commission was established in 2011 by the Human Rights Council and is mandated to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic.²² Bringing the work of both mechanisms together can streamline efforts and ensure that the work of the Commission of Inquiry can benefit future prosecutions of human rights violations amounting to criminal conduct.

Additionally, the IIM is cooperating with NGOs and civil society actors. These (non-state) justice actors started filling the gap that was left by the international community's inaction.²³ Syrian civil society within Syria and in exile has shown determination and agency in collecting evidence and advocating for accountability through universal jurisdiction cases.²⁴ One significant example for the determination with which non-state actors have worked to collect evidence are the so-called Cesar Files; thousands of photographs of victims of Syrian state torture taken by a Syrian forensic photographer under the

20 Burgis-Kasthala, 'Assembling Atrocity Archives for Syria', at 1201 fn 31.

21 These insights are based on the author's own research in reviewing trial monitoring reports on file with the author, as well as background talks with participants involved in the trial proceedings.

22 UN HR Council Resolution S-17/1 'Situation of Human Rights in the Syrian Arab Republic' (22 August 2011).

23 I. Elliott, 'A Meaningful Step towards Accountability?' (2017) 15 *Journal of International Criminal Justice* 239, at 240; M. Burgis-Kasthala, 'Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice' (2019) 30 *European Journal of International Law* 1165.

24 The author's own interviews within the project 'Universal Jurisdiction in German Courtrooms', sponsored by the *Deutscher Akademischer Austauschdienst*, have revealed the importance of Syrian civil society activities.

codename Cesar, who smuggled the files out of the country.²⁵ These files were provided, *inter alia*, to the German Federal Prosecutor and served as critical evidence in the first conviction for state sponsored torture in Syria as crimes against humanity before the Regional High Court in Koblenz in February 2021.²⁶ Another critical actor investigating crimes committed in Syria is the Commission of International Justice and Accountability (CIJA), which is a non-profit, non-governmental organisation ‘dedicated to furthering criminal justice efforts through investigations, in order to prevent the loss and destruction of vital evidence for the purpose of supporting prosecutorial efforts to end impunity, whether at the domestic or international level’.²⁷ Its work is sponsored by states and NGOs; in the period 2019–2020, for example, its work was funded by the UK, the US, Germany, Canada, the European Union, and the Open Society Foundation. These are some significant examples of how non-state actors created new pathways and networks to work towards justice for the crimes committed in Syria. While Syrian actors and other NGO efforts are crucial drivers in the documentation of crimes, the IIM acts as a repository for such evidence, wherever actors are willing to share this evidence with the IIM. The advantage of centralised data collection within the IIM is that the existing evidence can more easily be reviewed, compared, and contrasted with material from different sources.²⁸ It allows the identification of evidentiary gaps as well as material that can corroborate other evidence, therefore potentially enhancing the probative value. The cooperation with the multitude of different actors holds the promise of creating synergy effects through cooperation and coordination.

The IIM has, in the five years of existence, developed a canvas of cooperation, showcasing how it has assumed a role as a connecting hub between different actors. It has entered into 59 formal cooperation frameworks with a diverse set of actors, State entities, international organizations, and civil society.²⁹ One remarkable agreement among those is the so-called Lausanne Protocol between

25 See the website of the Caesar Files Group, available at <https://caesar-fsg.org/caesar-photos-document-systematic-torture/> (accessed 6 April 2022).

26 Al-Garib v OLG (Regional High Court) Koblenz Judgment (24 February 2021) Case No. 1 StE 3/21.

27 See the Commission’s website, available at <https://cijaonline.org> (accessed 6 April 2022).

28 IIM, ‘Bulletin No. 5’ (February 2021), at 2, available at <https://iim.un.org/wp-content/uploads/2021/08/IIM-Syria-Bulletin-5-ENG-Feb-2021.pdf> (accessed 6 April 2022).

29 UNGA ‘Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011’ (12 February 2021) UN Doc. A/75/743, at para. 25.

Syrian Civil Society Organisations and the IIIM. This Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organisations acknowledges the efforts made by Syrian actors and emphasises continuous dialogue.³⁰ It also contains important provisions on witness and data protection, requirements for consent by the NGO which provided the information before sharing this with actors, on victim and witness support, as well as transparency. This agreement recognises the contribution made by Syrian civil society and safeguards their agency in the process. Such a cooperation agreement highlights that the IIIM – despite the central role it aims to assume – is one actor among many in pursuance of the ‘common goal of ensuring justice, accountability, and redress for victims of crimes committed in Syria’.³¹

2.3 *Key Challenges in the Work of the IIIM*

The IIIM is confronted with key challenges that hamper the effective realisation of its mandate. Although it has an important function in serving as a bridge between actors and a central repository, it is also reliant on non-state efforts on the ground to collect evidence from within Syria. The lack of Syrian state consent and enforcement powers based on Chapter 7 of the UN Charter do not allow it to operate within Syria to investigate independently. Furthermore, the IIIM cannot trigger or catalyse domestic proceedings. This requires political will, domestic legislation, and the ability to apprehend alleged perpetrators in domestic jurisdictions. This will effectively reduce prosecution efforts to those alleged perpetrators, who have left Syria, for example because they have defected from the Syrian regime, as was the case with both accused prosecuted before the OLG Koblenz in Germany. It is therefore unlikely, that those most responsible for the crimes committed in Syria will be held responsible, as long as no dedicated tribunal exists. In addition to those more structural challenges, the IIIM’s work was also hampered by financial and, resulting from that, staffing constraints. Until 2020, it had to rely on raising voluntary donations for its work, while Russia worked towards blocking UN funds for the Mechanism’s work.³² Although Russia did not succeed with its efforts and the funding for

30 Lausanne Protocol of Cooperation with the International, Impartial and Independent Mechanism (IIIM) (signed on 3 April 2018).

31 Statement on the IIIM’s website, available at <https://iiim.un.org/documents-and-reports/syrian-civil-society/civil-society-protocol/> (accessed 6 April 2022).

32 B. Jarrah, ‘Russia’s Bid to Block UN Financing for Syria Probe Defeated’ (16 January 2020) Human Rights Watch.

the IIM was ultimately included in the UN Secretary General's budget in 2020, it does demonstrate the potential volatility of such mechanisms.

Beyond those practical challenges, the IIM's contribution to international justice does not transcend the facilitation of criminal accountability. Justice for victims, however, must go beyond holding perpetrators to account. In the Syrian context, the fate of possibly 100,000 enforcedly disappeared remains unknown. Although the IIM aims to include a victim-centred approach where possible, it is not able to contribute to the realisation of victims' rights beyond supporting prosecution efforts. As shown above, it cannot to date open its archive to individual victims or the broader public who want to better understand what happened. Neither can it contribute to the identification and return of the remains of victims. In comparison, the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) in Iraq, which is discussed in more detail in Section 4.1, is able to build a DNA database and contribute to identifying and returning the remains of victims discovered in mass graves in cooperation with the Kurdish Regional Government and other actors.³³ Such activities complement the purely perpetrator-focussed approach on holding those responsible to account by inserting a more victim-centred perspective that addresses the need for victims to understand what happened. Especially for victims of the crime of enforced disappearances any investigative efforts that fall short of clarifying the fate of their loved ones will not satisfy their need for justice.³⁴

3 Did the UN General Assembly Have the Competency to Establish the IIM?

The creation of the IIM through the UN General Assembly brings into focus some foundational questions on the competencies of the UN General Assembly as a security actor. The creation of the IIM was embedded in the discussion of responses to the armed conflict in Syria.³⁵ Two questions were brought up in the debate in the UN General Assembly, as the creation of the

33 'Iraqi Officials and UNITAD Announce a New Ceremony for the Return of Yazidi Remains, Call on Families to Provide DNA Samples to Increase Victim Identifications' (24 November 2021) UNITAD.

34 See for the rights of victims of enforced disappearances, UNGA Res 47/133 'Declaration on the Protection of All Persons from Enforced Disappearance' (18 December 1992), at Articles 18 ff.

35 UNGA Plenary Meeting (21 December 2016) 71st Session 66th Plenary Meeting, at 18 ff.

IIIM was strongly contested by a small group of states. What is the distribution of competencies between the UN General Assembly and the Security Council in peace and security matters? And, secondly, did the UN General Assembly act *ultra vires* when establishing the Investigative Mechanism supposedly amounting to the creation of a judicial body? The following section will discuss both questions and in doing so revisit the historical ‘Uniting for Peace’ Resolution.³⁶ The debate surrounding that resolution allows valuable insights for the normative developments that the UN Charter, and in particular article 12(1), have undergone. Linking both the historical and the more contemporary debate highlights the proactive role – including the establishment of the IIIM – that the UN General Assembly can play as a security actor.

3.1 *The UN General Assembly as a Security Actor vis-à-vis the Security Council*

The UN Security Council and the UN General Assembly are both responsible for the maintenance of peace and security, as this is a core purpose of the UN system as such.³⁷ Yet, the exact delineation of this responsibility and accordingly the competencies that the Charter assigns to both organs is a site of continuous contestation. Any discussion on this point will necessarily turn its attention to articles 12(1)³⁸ and 24(1) of the UN Charter – the latter assigning primary responsibility to the UN Security Council for the maintenance of peace and security. The Syrian representative had invoked article 12(1) of the Charter in the debate having emphasised that ‘the Security Council remain[ed] seized of its responsibilities’. A valid argument?

The Security Council was indeed engaged with the war in Syria but only managed to agree to some very limited responses on some aspects of the hugely complex conflict situation in Syria.³⁹ Yet, it remained largely in deadlock over

36 L.D. Johnson, ‘Uniting for Peace Does It Still Serve Any Useful Purpose’ (2014–2015) 108 *AJIL Unbound* 106; M. Ramsden, ‘Uniting for Peace and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly’ (2016) 25 *Washington International Law Journal*, at 267.

37 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 *UNTS* 16, at Article 1(1).

38 *Ibid.*, at Article 12(1). While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

39 See, for example, UNSC Res 2235 (2015) ‘Establishment of an OPCW-UN Joint Investigative Mechanism to Identify the Use of Chemical Weapons in the Syrian Arab Republic’ (7 August 2015).

any measures that would respond to the humanitarian law and human rights violations that were reported in the conflict resulting from the Syrian uprising.⁴⁰ The opposing geopolitical interests pursued by the permanent members of the Security Council were starkly visible in their voting behaviour. By the end of December 2016, Russia had vetoed six, and China five draft resolutions addressing the Syrian war.⁴¹ Among those was a draft resolution tabled in May 2014 at the 7180th Security Council meeting that would have referred the situation in Syria to the International Criminal Court aiming to insert a pathway to individual accountability for reported mass atrocities and large-scale humanitarian law violations.⁴² The impasse at the UN Security Council in this area allowed continued impunity for these crimes.

One notable exception to the failure on taking any action at all, that would potentially also address responsibility for alleged international crimes, was the establishment of a Joint Investigative Mechanism between the Organisation

40 Ramsden, 'Uniting for Peace and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly', at 269.

41 Draft Resolutions, UNSC 'France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: draft resolution' (4 October 2011) UN Doc. S/2011/612; UNSC 'Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution' (4 February 2012) UN Doc. S/2012/77; UNSC 'France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution' (19 July 2012) UN Doc. S/2012/538; UNSC 'Albania, Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Canada, Central African Republic, Chile, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Latvia, Libya, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution' (22 May 2014) UN Doc. S/2014/348; UNSC 'Andorra, Australia, Austria, Belgium, Bulgaria, Canada, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco, Morocco, Netherlands, Norway, Poland, Portugal, Qatar, Romania, San Marino, Saudi Arabia, Senegal, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution' (8 October 2016) UN Doc. S/2016/846; UNSC 'Egypt, New Zealand and Spain: draft resolution' (5 December 2016) UN Doc. S/2016/1026.

42 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution' (22 May 2014) UN Meetings Coverage.

for the Prohibition of Chemical Weapons (OPCW) and the UN to follow up on allegations of the use of prohibited chemical weapons in Syria.⁴³ The UN Security Council expressed ‘its determination to identify those responsible ... and reiterates that those individuals, entities, groups, or governments responsible for any use of chemicals as weapons, including chlorine or any other toxic chemical, must be held accountable.’⁴⁴ By October 2016, this mechanism had been able to confirm the allegations that prohibited chemical weapons had been used; in its fourth reports it, for example, confirmed the allegations that Syrian government forces had used chemicals in an attack in Idlib in March 2015.⁴⁵ Although the Joint Mechanism had been able to broadly identify the responsibility of the Syrian government forces, and in some cases ISIS, it could not identify individual perpetrators. The fourth report concluded with a need for alternative information collection efforts and investigative skills; these ‘would be required to understand and establish the link between the actors identified by the Panel and the individual perpetrators and their chain of command, as well as sponsors and organizers.’⁴⁶ Despite these findings, the Security Council neither renewed the mandate of the already restricted mechanism after Russia and Bolivia blocked a draft resolution to that end⁴⁷ nor did it provide any alternative ways of following the work done to establish in more detail who was responsible for the use of prohibited chemical weapons. Hence, Security Council action in Syria can be described as extremely limited and, with a view to providing accountability for alleged crimes, ineffective. Against this background, the Syrian invocation of article 12(1) of the UN Charter rings rather hollow.

The understanding of Article 12(1) of the UN Charter has also evolved from posing a barrier for the UN General Assembly to allowing parallel engagement of the UN Security Council and General Assembly with the same matter. Security Council deadlock in the early years of the UN in 1950 around the Korean War led to the historic ‘Uniting for Peace’ General Assembly Resolution 377A(V) of 3 November 1950. The General Assembly introduced the procedural vehicle of emergency special sessions to allow it to meet beyond the regular

43 UNSC Res 2235 (2015) ‘Establishment of an OPCW-UN Joint Investigative Mechanism to Identify the Use of Chemical Weapons in the Syrian Arab Republic’ (7 August 2015).

44 *Ibid.*, at para. 4.

45 UNSC ‘Letter dated 21 October 2016 from the Secretary-General addressed to the President of the Security Council’ (21 October 2016) UN Doc. S/2016/888, at paras 18 ff.

46 *Ibid.*, at para. 49.

47 ‘Security Council Fails to Renew Mandate of Joint Investigative Mechanism on Chemical Weapons Use in Syria, as Permanent Member Casts Veto’ (24 October 2017) UN Meetings Coverage.

sessions to consider measures necessary to maintain or restore international peace and security, even when the Security Council was formally seized of the matter.⁴⁸ This was a procedural feature of relevance at the time, as the General Assembly did not used to be in session all year round – a critical distinction to current practice.⁴⁹ The interpretation of the Charter in Resolution 377 at the time pushed the boundaries of how the interplay between the General Assembly and Security Council were understood. Looking back after 70 years of practice since, emergency special sessions were used ten times; the tenth session on Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory was called in 1997 and has been ongoing since.⁵⁰ Although the Uniting for Peace Resolution critically aimed at establishing a mandate for the authorization of the use of force, subsequent UN practice indicates that this attempt was to no avail.⁵¹ Yet, it allowed the General Assembly to position itself as a proactive security actor.

The Uniting for Peace Resolution triggered a gradual normative development in asserting its role as an actor in peace and security,⁵² although not as far as equipping the UN General Assembly with the authority to authorise the use of force. The evolution in practice has been acknowledged by the ICJ:

[The Court] notes that, under Article 24 of the Charter, the Security Council has ‘primary responsibility for the maintenance of international peace and security’ and that both the Security Council and the General Assembly initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda, but that this interpretation of Article 12 has evolved subsequently. The Court takes note of ... an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. The Court considers that the accepted practice of the Assembly, as it has evolved, is consistent with Article 12, paragraph 1; it is accordingly of the view that the General Assembly, ...

48 UNGA Res 377 (v) ‘Uniting for Peace’ (3 November 1950), at para. 1.

49 Johnson, ‘Uniting for Peace Does It Still Serve Any Useful Purpose’, at 108.

50 For the full list of Emergency Special Sessions, see <https://www.un.org/en/ga/sessions/emergency.shtml> (accessed 6 April 2022).

51 For further discussion of this point, see Section 5.

52 A role confirmed by the ICJ, in *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (*Advisory Opinion*) [1962] ICJ Rep 151, at 61.

seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.⁵³

A range of non-forcible measures have evolved in the practice of the General Assembly in the areas of peace and security. These include the introduction of fact-finding missions and requests of ICJ Advisory Opinions. The ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory is instructive in this context, as it had been challenged whether the request of an advisory opinion resulting from a special emergency session based on the Uniting for Peace Resolution would exceed the General Assembly's competences, which the Court denied.⁵⁴ As a non-forcible measure, the ICJ deemed the request for an advisory opinion as within the range of measures that the UN General Assembly may recommend. Fast-forwarding to the situation in Syria and the introduction of an investigative mechanism, albeit not introduced in an Emergency Special Session, the IIM neatly fits into the category of measures within the UNGA competence.

3.2 *The Legal Mandate to Establish the IIM*

The establishment of an investigative mechanism was nothing new to the UN system and not as such disputed during the debates leading up to Resolution 71/248. Having overcome the legal bar of Article 12(1) of the Charter, the UN General Assembly is equipped with the power to establish any subsidiary organ necessary to perform its functions⁵⁵ and may recommend measures for the peaceful adjustment of any situation as provided for in Article 14 of the Charter. Fact-finding missions broadly conceived have indeed featured repeatedly in the practice of the UN General Assembly. In 1963, the General Assembly established a fact-finding mission to South Vietnam; in 1973, a commission of inquiry was mandated to investigate massacres in Mozambique; in 1998, a group of experts was appointed for Cambodia to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy, and addressing the issue of

53 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136. at paras 13–42 (on Questions of jurisdiction, emphasize added by author).

54 *Ibid.*

55 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, at Article 22.

individual accountability; and in 1999, an investigative team for Afghanistan was established. Viewing the Charter and UN practice together, the establishment of an investigative body as such is not disputed.

A key issue was the new standard of investigations that would allow the compilation of individual case files and the use of evidence subsequently in domestic or international courts. Russia, as the leading opponent of Resolution 71/248, argued that the GA would not have the power to establish a prosecutorial body, specifically in a situation in which the affected state did not consent. Through the submission of a *note verbal* to the UN Secretary General, Russia demonstrated its disagreement. It argued that the GA could not assign powers to such a mechanism that it did not hold itself:

A number of powers vested in the 'mechanism' under [R]esolution 71/248, including those of 'analys[ing] evidence' and 'prepar[ing] files', are prosecutorial in nature. However, prosecutions, criminal investigations and support of criminal investigations are not among the functions of the General Assembly. It cannot create an organ that has more powers than the General Assembly itself.⁵⁶

Although the new standard of operations and the compilations of individual case files will much more easily facilitate prosecutions, the IIM has not been endowed with prosecutorial powers *stricto sensu*. Indeed, in most international courts investigation and prosecution are within the combined power of the international prosecutors. In the UN mandated ICTY and ICTR, prosecutors investigated and prosecuted (alleged) perpetrators of international crimes. At the ICC, the Prosecutor also holds the power to investigate situations as well as prosecute specific cases arising from the investigated situations. However, not every investigative mechanism therefore automatically equates to a prosecutorial body. The IIM lacks direct access to a forum for prosecution. What the IIM does do is fulfil adherence to prosecutorial standards when collecting and analysing evidence. 'In other words, at bottom the Mechanism is simply a fact-finding body that will adhere to a criminal law standard in performing its functions.'⁵⁷ The IIM will more easily facilitate prosecutions but cannot provide justice as such. The establishment of the IIM is designed to lay the foundations to close the gap of impunity left by Security Council inaction.

56 UNGA 'Note Verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General' (14 February 2017) UN Doc. A/71/793.

57 A. Whiting, 'An Investigation Mechanism for Syria' (2017) 15 JICJ 231, at 234.

Over the past decades, criminal accountability has become an integral part of the security responses in international law. Why should the UN General Assembly only be equipped to establish investigative mechanisms that fall short of adherence to criminal law standards and contributing to establishing individual responsibility? The General Assembly filled a gap left by the ineffective Security Council practice regarding Syria. It continued a path first taken by the UN Security Council with the creation of the *Ad Hoc* Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). The ICTY was established during the ongoing armed conflicts around the dissolution of the Former Yugoslavia through Security Council Resolution 827 (1993), under Chapter 7 of the UN Charter. Accountability in the form of individual criminal prosecutions was aimed at putting an end to such crimes and thus 'contribute to the restoration and maintenance of peace'.⁵⁸ Shortly after the creation of the ICTY, the UN Security Council established the ICTR with Resolution 955 (1994).⁵⁹ At that point, the UN SC during the creation of the ICTR still emphasised the 'particular' nature of the conflict,⁶⁰ suggesting that accountability could be viewed as an exceptional element within the architecture of peace and security.

The Security Council's competency to do so is based on Article 41 of the UN Charter. Reviewing subsequent practice of the Security Council, the need to hold perpetrators to account has become a regular feature as a tool of international security. The Security Council utilized its powers under Chapter 7 twice to refer specific situations to the International Criminal Court – in Darfur/Sudan⁶¹ and in Libya.⁶² Ironically, the Security Council itself emphasised the need for accountability when initially introducing the joint investigative

58 UNSC Res 827 (1993) 'Tribunal (Former Yugoslavia)' (25 May 1993), at Preamble.

59 UNSC Res 955 (1994) 'Establishment of an International Tribunal and Adoption of the Statute of the Tribunal' (8 November 1994), at Preamble. 'Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, [c]onvinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace ...' (Emphasize added by author).

60 *Prosecutor v Tadić, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995)*, at paras 34–35.

61 UNSC Res 1593 (2005) 'Reports of the Secretary-General on the Sudan' (31 March 2005).

62 UNSC Res 1970 (2011) 'Establishment of a Security Council Committee to Monitor Implementation of the Arms Embargo Against the Libyan Arab Jamahiriya' (26 February 2011), at Preamble. 'Stressing the need to hold to account those responsible for attacks'.

mechanism to investigate the use of chemical weapons in Syria.⁶³ Most recently, the Security Council followed the footsteps of the UN General Assembly when it established the Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD).⁶⁴ As the discussion in the subsequent section will demonstrate, UNITAD's design mirrors that of the IIIM and is part of a new generation of investigative mechanisms within the UN system. With the rise of accountability as a non-forceful security tool, the competencies expressed in Articles 14 and 22 of the Charter viewed together with the purposes of the UN as such provide a sound foundation for the establishment of the IIIM.

4 Significance for the Architecture of International Criminal Justice

The creation of the IIIM is of considerable significance for the still evolving architecture of international criminal justice, but what made the qualitative difference of the IIIM such that its creation was so contested and portrayed by Syria⁶⁵ as an interference with its sovereignty? UN investigative mechanisms or fact-finding missions have existed many times before. Fact-finding missions or similar mechanisms usually inform the responses of the international community to specific situations of crisis. As explained in Section 2, the enhanced standard of investigation provides a tangible difference as it is designed to facilitate subsequent prosecutions. As will be shown in the following section, this development has been the first of a new generation of investigative mechanisms. Beyond setting this new trend, the IIIM and other such mechanisms connect a host of different justice actors. In Syria, the IIIM brings state actors – acting through the UN – back into the picture, where non-state

63 UNSC Res 2235 (2015) 'Establishment of an OPCW-UN Joint Investigative Mechanism to Identify the Use of Chemical Weapons in the Syrian Arab Republic' (7 August 2015), at para. 4. See also the discussion above.

64 UNSC Res 2379 (2017) 'Establishment of an Investigative Team to Support Domestic Efforts to Hold the Islamic State in Iraq and the Levant Accountable for Its Actions in Iraq' (21 September 2017), at 2. 'Reiterates its condemnation of all violations of international humanitarian law, violations and abuses of international human rights law, and acts of terrorism, and expresses its determination that, having united to defeat the terrorist group ISIL (Da'esh), those responsible in this group for such acts, including those that may amount to war crimes, crimes against humanity, and genocide, must be held accountable ...'

65 UNGA Plenary Meeting (21 December 2016) 71st Session 66th Plenary Meeting, at 21 (Mr. Ja'afari speaking for the Syrian Arab Republic).

actors have tirelessly worked to fill the void that was left by the inaction of the international community of states. The Mechanism, as emphasised in its name, is designed to provide independence and impartiality within its work. Viewing those developments together, central mechanisms such as the IIIM strengthen – somewhat paradoxically – the decentralised dimension to the architecture of international criminal justice and provide the potential to make the emerging system of accountability more resilient.

4.1 *A New Generation of Investigative Mechanisms*

The establishment of the IIIM has set new standards for a new generation of investigative mechanisms within the UN system. Subsequently to the establishment of the IIIM for Syria in 2016, mechanisms with equivalent mandates have been established within the UN system. In September 2017, the UN Security Council established the UNITAD. A year later, in September 2018, the UN Human Rights Council made a similar move; in addressing the human rights situation of the Rohingya and other minorities in Myanmar, it established the Independent Investigative Mechanism for Myanmar (IIMM).⁶⁶ These are significant developments within the UN system that complement existing structures of international criminal justice.

UNITAD, the team investigating crimes committed by Da'esh/ISIL in the territory of Iraq, was created with Security Council Resolution 2379 (2017). Its establishment followed a call for help by Iraq in holding members of the Islamic State in Iraq and the Levant (ISIL) group, also known as Da'esh, to account.⁶⁷ UNITAD's task – similar to that of the IIIM – is to 'support domestic efforts to hold ISIL (Da'esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide'.⁶⁸ Another parallel to the IIIM mandate is that UNITAD is also designed to cooperate with national courts and promote accountability for crimes committed by ISIL/Da'esh worldwide.⁶⁹ UNITAD is further tasked with complementing investigations being carried out by the Iraqi authorities or those of other authorities in third countries at their request.⁷⁰ The significant similarities in mandate are contrasted by the key difference that UNITAD was

66 Also referred to in this article as the 'Myanmar Mechanism'.

67 UNSC Res 2379 (2017) 'Establishment of an Investigative Team to Support Domestic Efforts to Hold the Islamic State in Iraq and the Levant Accountable for Its Actions in Iraq' (21 September 2017), at Preamble.

68 *Ibid.*, at para. 2.

69 *Ibid.*, at paras 2–3.

70 *Ibid.*, at para. 2.

created at the request of the state in which it operates, which makes its work in practice much easier, as it can operate easily within Iraq, benefits from the support of Iraq governance structures, and has open access to potential crimes sites. It can therefore also contribute to capacity-building efforts within Iraq with a view to bolster the prospect of subsequent prosecutions of identified cases. UNITAD has been able to develop an innovative approach to harnessing technology for its investigations and to support survivors, those who were subjected to slavery, genocide, persecution, and other atrocities. A psycho-social team of experts secures a trauma-informed approach and to train investigators in ensuring best practices in the engagement with vulnerable witnesses.⁷¹ Too often, this is not the case yet in domestic or other investigations and the development of new standards is an important step forward.

Addressing the plight of the Rohingya and other minorities in Myanmar, the third investigative mechanism within the UN system featuring the new standard of operations is the Independent Investigative Mechanism for Myanmar ('IIMM' or also referred to as 'The Myanmar Mechanism'). With Resolution 39/2 the Human Rights Council established an independent mechanism 'to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011'.⁷² This collection of preservation has to adhere to international legal standards in order to enable or support prosecutions 'in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes'.⁷³ The mandate in its scope mirrors that of the IIMM and UNITAD. The differences between all three in the mandates as such link to the specific situation under investigation.

For the Myanmar Mechanism, one outstanding difference to the other two is that the scope of its mandate includes cooperation with the investigation conducted at the International Criminal Court⁷⁴ as well as proceedings linked to state responsibility – the Case of *The Gambia v Myanmar* – under

71 For more detail, see UNITAD's website, available at <https://www.unitad.un.org/content/special-event-delivering-accountability-through-innovation-and-partnership> (accessed 6 April 2022).

72 UN HR Council Resolution 39/2: 'Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar' (3 October 2018) UN Doc.A/HRC/RES/39/2, at para. 22.

73 Ibid.

74 *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (14 November 2019) ICC-01/19.

the Genocide Convention before the ICJ.⁷⁵ The creation of the Myanmar Mechanism was influenced by the creation of the IIIM. The previously established fact-finding mission on Myanmar suggested in its detailed report to the Human Rights Council, that the collection and preservation of evidence in Myanmar was critical in the absence of a dedicated court addressing the situation.⁷⁶ The report explicitly suggests 'explor[ing] the benefits of association with the Syria mechanism to allow for speedy operationalisation and the sharing of administrative and other common facilities'.⁷⁷ This showcases the catalysing effect that the creation of the IIIM had for the subsequent establishment of similar mechanisms.

These UN investigative mechanisms set new standards and strengthen a network of existing justice actors. The IIIM includes a witness and victim support section,⁷⁸ which is a novelty and has before only featured in international and hybrid courts. The mechanism is staffed with specific expertise in areas such as digital forensics, forensic pathology and forensic imaging – hence providing cutting-edge investigative capabilities – as well as sexual and gender-based violence, and crimes against children.⁷⁹ The latter often remain under-investigated and -prosecuted. This emphasis therefore continues to develop policy areas in which the ICC Office of the Prosecutor has initially made significant contributions in shaping international criminal justice.⁸⁰ The mechanisms have created new forms of evidence collection supported through digitised systems that make millions of pieces of information searchable and accessible. These allow not only the digital searchability but also the capture of newly emerging evidence, for example derived from Social Media sites. They

75 UN HR Council Resolution 23/26: 'The Deterioration of the Situation of Human Rights in the Syrian Arab Republic, and the Need to Grant Immediate Access to the Commission of Inquiry' (25 June 2013) UN Doc. A/HRC/RES/23/26, at para. 9.

76 UN HR Council 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar' (17 September 2018) UN Doc. A/HRC/39/CRP.2, at para. 1659.

77 *Ibid.*, at para. 1660.

78 International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 Terms of Reference, at 11.19, available at <https://iiim.un.org/who-we-are/founding-documents/> (accessed 6 April 2022).

79 Elliott, 'A Meaningful Step towards Accountability?', at 249.

80 ICC, 'Policy Paper on Sexual and Gender-Based Crimes' (June 2014), available at <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gen-der-Based-Crimes--June-2014.pdf>.

all work with civil society organisations⁸¹ and connect the work of state and non-state actors in the field of international criminal justice and extend this – in the case of Myanmar – to international justice as embodied in the work of the ICJ. What started with the establishment of the IIM for Syria has grown into an emerging trend within the UN of considerable significance.

4.2 *Independence and Impartiality – Enhancing Legitimacy?*

The International, Impartial and Independent Mechanism is designed to cooperate with a multitude of different actors engaged in documenting and prosecuting crimes committed in Syria. These actors can be described as loosely connected in a web of interrelations. Inserting independence and impartiality through an institution at the core of such networks is important to work towards justice that is and is seen to be free from political influence and bias. Some of the actors in the networks of justice that are emerging and that are complemented through the IIM are public in nature. Domestic prosecutors or regional networks like the Europol Genocide Network work on the basis of specific, regulated codes of procedures and have undergone professional law-enforcement training.⁸² European states are leading the efforts, not least because they are the host states to large numbers of Syrians. Syrian refugees who bring with them their experiences and evidence of the crimes that they have endured, or some who are alleged perpetrators of crimes in Syria.⁸³ However, these actors are not designed to compile large-scale evidence and make these easily accessible to other actors across jurisdictions.

Additionally, the IIM's independence can better ensure that investigations are free from any specific political agendas. A large part of evidence collection, though, is carried out by non-state actors. Syrian individuals and civil society organisations are carrying the heaviest burden of evidence-collection to date, often taking high risks. These actors themselves are at times victims and witnesses of the crimes they investigate. Other non-state actors such as CIJA are dependent on raising funds and ensuring that donors approve of their work. This private nature can be problematic, as it may raise questions as to the

81 K. Stavrou, 'Civil Society and the IIMM in the Investigation and Prosecution of the Crimes Committed Against the Rohingya' (2021) 36 *Utrecht Journal of International and European Law*, at 95.

82 For more information on their work in the context of Syria, see the Europol website, available at <https://www.eurojust.europa.eu/increase-actions-against-impunity-war-crimes-syrian-regime> (accessed 6 April 2022).

83 See, for example, the first trial verdict against in a German Court for state-sponsored torture in Syrian detention facilities: *OLG Koblenz (Judgment)* (24 February 2021) Case No. 1 StE 3/21.

impartiality of the actors involved and could bear the danger of political bias, one-sided investigations, or tainted evidence. The IIIM's terms of reference, instead, include the task to ensure that any inculpatory as well as exculpatory evidence is collected and presented in case files, where those are prepared for persons that have been identified as responsible. The IIIM can therefore by design best serve to provide accountability for crimes committed in Syria as it inserts elements of independence and impartiality that are difficult to achieve in a network of loosely connected private and public actors.

Independence and impartiality are key ingredients for institutions that follow the rule of law and are perceived as not only legal but also legitimate actors. But does the lack of Syrian consent undermine the legitimacy of the IIIM? Wolfrum, one of the founding editors of the Max Planck Yearbook of UN Law, whose work is celebrated in this volume, contributed to the rich debate⁸⁴ on the notion of legitimacy in international law with a focus on the import of state consent.⁸⁵ Syria, when joining the United Nations, certainly did not sign up to the creation of an investigative body that would seek to collect evidence for criminal proceedings on matters that occurred on its territory and acts conducted by state agents? While it would be far-fetched to argue that this may be the case, it did agree to a system that seeks to protect human rights, peace, and security. The IIIM's central task is to contribute to the enforcement of international norms that undoubtedly reached customary law or even *ius cogens* character, such as the prohibition of torture and crimes against humanity.⁸⁶ The core norms that form some of the foundations of international criminal law are by their very nature on collision course with state consent when state agents are allegedly violating these norms. Legitimacy of any accountability

84 For some of the rich literature on legitimacy and international law, see T. Franck, *The Power of Legitimacy among Nations* (OUP 1990); M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law*, at 907; A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2004); T. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *The American Journal of International Law*, at 88; L. Meyer, *Legitimacy, Justice and Public International Law* (CUP 2009); H. Charlesworth, J.-M. Coicaud, *Fault Lines of International Legitimacy* (CUP 2010); N. Hayashi and C. Bailliet, *The Legitimacy of International Criminal Tribunals* (CUP 2017).

85 For the foundational role of state consent, see R. Wolfrum, 'Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations' in R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (Springer 2008), at 1 and 6.

86 UNGA 'Report of the International Law Commission: Draft articles on Prevention and Punishment of Crimes Against Humanity' (2019), available at https://legal.un.org/ilc/texts/7_7.shtml (accessed 6 April 2022).

mechanism therefore heavily relies on inducing legitimacy through procedures,⁸⁷ legitimacy that can ultimately induce fairness and judicial control. In the absence of any consent-induced legitimacy, the potential to enhance pathways to accountability through an UN-mandated body that operates strictly based on independence and impartiality is the best way forward to ensure that no gap of impunity remains.

4.3 *More Resilience of International Criminal Justice Mechanisms through Decentralised Justice Networks*

The third aspect of significance for international criminal justice is the chance to develop a more resilient and multi-dimensional system for providing international criminal accountability. Investigative mechanisms are an important part in complementing existing structures such as the International Criminal Court and efforts in domestic jurisdictions. Situations such as Syria reveal the gaps and weaknesses in the system, where jurisdictional boundaries leave huge gaps of impunity. Private actors have tried to step into the breach within their capabilities. Yet, these are disparate actors only loosely connected without any legal mandate or authority. Providing connection between such actors through a central repository, serving as a bridge between those private actors such as NGOs or exiled communities and prosecutors in various jurisdictions, can add an additional dimension to the existing structures of international criminal law that may facilitate greater resilience against political attack and backlash.

Since the rise of the idea of criminal accountability as a tool of international security, the approach to international prosecutions in international law has been a centralised one around a small number of key institutions. The *ad hoc* tribunals are a stark example with their primary mandate to investigate and prosecute crimes within their jurisdiction vis-à-vis any domestic jurisdictions. The ICC, as the only permanent international criminal court, is also best described as a centralised actor. Although in a relationship of complementarity to domestic jurisdictions, it is one key institution that is responsible for the investigation and prosecution of those crimes within its jurisdiction. These courts are very vulnerable to political pressure and have been exposed to considerable backlash. The ICC has seen the withdrawal of state parties once preliminary examinations or investigations into a specific country had been announced; the Philippines and Burundi provide examples for this behaviour. Other countries such as Russia, Israel or the United States responded to

87 Wolfrum, 'Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations', at 23.

investigations that implicated their states or citizens with attacks on the ICC's legitimacy. The United States under the Trump Administration went even further in imposing sanctions against the then ICC Prosecutor and some senior staff members when the Office of the Prosecutor moved to commence an investigation in Afghanistan. This move came after more than a decade of preliminarily examining the situation, a length of time in which valuable time for effective investigations was lost.⁸⁸ These are only some examples highlighting weak points in centralised institutions such as the ICC.

The IIIM and other such mechanisms ensure the ability to investigate and therefore address the Achilles Heels of international criminal law. While UNITAD does so on the invitation of Iraq, the IIIM must investigate despite the lack of state consent. It does therefore not receive cooperation by the Syrian state, meeting the same difficulties as the ICC does in situations within its jurisdiction. Yet, securing evidence where possible and having a public actor with appropriate resources, qualified staff, and technological capabilities can significantly enhance investigation efforts. In bringing together the efforts of Syrian Civil Society Organisations and the UN bodies, it provides a chance for new synergic effects. Ensuring the gathering of evidence in compliance with criminal law standards can better facilitate the work of accountability mechanisms. Whether this will be the case in practice, will be shown over the years to come.

Despite their roles as centralised repositories of information, the IIIM, UNITAD, and the IIIM strengthen a decentralised dimension that complements the architecture of international criminal justice with its focal points around the ICC and other tribunals. Uncoupling investigations and prosecutions provide the chance to strengthen prosecutorial efforts in a variety of different jurisdictions. States exercising universal jurisdiction in their domestic court systems have recently begun to provide such fora. Regarding Syria, where no centralised court could spring into action, European states such as Sweden⁸⁹ and Germany are conducting proceedings. These developments have brought domestic courts as international justice actors back into focus, as they can significantly contribute to accountability for crimes committed in Syria. Having said that, such domestic prosecutions will remain fragmented and encounter

88 *Situation in the Islamic Republic of Afghanistan (Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan)* ICC-02/17 (12 April 2019), at para. 93. For a critical discussion of this decision and prosecutorial discretionary decisions in more detail, see A. Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart 2020), at 39 and 155.

89 L. Bjurström, 'Sweden on the Frontline with Syria Cases' (11 February 2021) Justice Info.

significant difficulties in holding the most responsible to account. Highlighting the novelty and chances that mechanisms such as the IIM entail, however, should not be mistaken for the proposition that this is a preferable approach to the ICC. What it does – and this is the significant contribution made by the UN General Assembly – is to provide an additional dimension to the architecture of international criminal justice to increase the chances of holding those responsible for crimes committed in the context of Syria to account.

It is useful to rethink the architecture of international criminal law as a multi-dimensional network of justice actors. To appreciate the opportunities in enhancing the resilience of such networks, it is useful to borrow from network engineering and their insights into decentralisation.⁹⁰ A basic distinction is made in that discipline between ‘centralised’ networks with only one major focal point connecting all actors in a network; ‘decentralised’ networks in which different major hubs connect sets of actors and are again connected among each other; and ‘distributed’ networks in which actors feature connections to some other actors but without clear nodes to connect them.⁹¹ In the latter, there is no clear structure in the interactions between such actors, whereas in the centralised model every interaction is facilitated through one hub. Taking this understanding back to the architecture of international criminal law, a system relying on the International Criminal Court alone would resemble a centralised network, which – when under attack – becomes very vulnerable and unable to continue functioning. Distributed networks, for example embodied in a multitude of NGOs and civil society organisations, may be loosely connected to one another but lack structure, coordination in their approach, and have limited reach, despite their individual commitment and dedication. The introduction of connecting major hubs through mechanisms such as the IIM, UNITAD or the IIMM, may help better connect different actors and fora for prosecutions. Seeing such more centralised institutions in this context, allows a shift from the imaginaries of disparate and centralised networks to a decentralised architecture of international criminal law. The ICC may in that context be one major hub, investigative mechanisms another, connecting domestic efforts and civil society acting across the globe.

There will be no one-size-fits-all approach to how to address specific situations. Yet, the UN General Assembly may have created a mechanism with the IIM that not only triggered similar mechanisms in other contexts but that could also contribute to a more resilient decentralised architecture of justice

90 B. Bodó, J.K. Brekke and J.H. Hoepman, ‘Decentralisation: a Multidisciplinary Perspective’ (2021) 10 *Internet Policy Review*, at 2 and 3.

91 *Ibid.*, at 3–4.

networks. Such networks are linked through major hubs such as the ICC or investigative mechanisms, strengthening the action of actors within the network. This could be a critical chance to achieve a system less vulnerable to attack because different hubs may still serve as connectors and be able to act. This is still a very new development, and it ultimately remains to be seen whether we will be able to observe the predicted lower vulnerability. The contribution of the UN General Assembly action to international criminal justice, however, should not be underestimated.

5 The Evolution of the UN General Assembly as a Security Actor

The role of the UN General Assembly as a security actor has evolved over time and has contributed to normative developments in the law and practice of international security. The appraisal of the IIM as a new mechanism demonstrates how the UN General Assembly has provided a significant contribution in complementing the architecture of international criminal justice, filling the impunity gap left by UN Security Council inaction. It provides a good example for how the UN General Assembly, just like the entire organisation, has adjusted and developed its practice and mandate 'in line with its purpose and functions'.⁹² This section will elaborate in more detail on the notion of a security actor and reflect on the UN General Assembly's role and the normative shifts in international security.

A security actor is understood as an actor in the international legal architecture mandated to preventing or responding to situations and phenomena that threaten international peace and security. The UN Security Council is the most obvious example given the United Nations' main purpose of maintaining international peace and security. However, the international security landscape is multi-level in nature. Therefore, regional organisations, for example, also play important roles as security actors. The African Union entails the promotion of 'peace, security, and stability on the [African] continent'. As such, it features the first collective security system on the continent with the Peace and Security Council, a standing body that aims to prevent and respond to regional conflicts and other security threats. Other regional security actors include the European Union⁹³ and the Organization of American

92 M. de Serpa Soares, '75 Years of International Law-Making at the United Nations' (2020) 23 *Max Planck Yearbook of United Nations Law Online*, at 1 and 28.

93 Charter of the Organization of American States (signed 30 April 1948, entered into force 13 December 1951) 119 *UNTS* 3, at Title v.

States⁹⁴ and its establishment of a Secretariat for Multidimensional Security. All of those address not only the traditional security notions linked to the threat from armed conflict but have acknowledged a broader range of security threats posed by cross-border crime, international terrorism, cybersecurity and other issues.⁹⁵

Within the context of this analysis, the UN General Assembly's mandate is as relevant here as the rise of criminal accountability mechanisms as a tool in international security. To fully appreciate the normative shift and the role that the UN General Assembly asserted over time, it is useful to zoom back in time to 1950, the early years of UN practice. The Korean War between 1950 and 1953 was, similarly to the Syrian conflict, a crisis that left the UN Security Council in paralysis through opposing geopolitical interests among the permanent five members and repeat vetoes.

The 1950 deadlock in the Security Council and US pressure led to the 'Uniting for Peace' General Assembly Resolution 377A(v) of 3 November 1950. The Resolution provided a vehicle to overcome the barrier for the General Assembly to make recommendations in specific situations when the UN SC is engaged with the matter.

[The UN General Assembly r]esolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security ...⁹⁶

In 1950, the UN General Assembly sought to assert the competence to authorize the use of force. Two key scholars engaged in the debate at the time were Kelsen and Andrassy, providing the opposing views on how to delineate competencies for peace and security with a view to forceful measures. Kelsen argued that the spirit of the Charter is violated because 'collective measures' as

94 Ibid., at Article 2(a).

95 See, for example, Commission of the European Communities 'Communication on the EU Security Union Strategy' COM (2020) 605 Final (24 July 2020).

96 UNGA Res 377 (v) 'Uniting for Peace' (3 November 1950), at para. 1 (emphasis added by the author).

envisaged in Article 1 of the Charter can refer only to the enforcement measures outlined in Chapter 7.⁹⁷ Consequently, these collective measures were the sole responsibility of the UNSC. Andrassy, instead, presented a teleological reading of the Charter and argued that the purpose of the UN Charter was 'to save succeeding generations from the scourge of war'.⁹⁸ In a similar vein, some more contemporary scholarly contributions identify 'significant modern potential' of the Uniting for Peace Resolution 'as a safety valve capable of temporarily shifting the responsibility for the maintenance of international peace and security' from the UN Security Council to the General Assembly.⁹⁹ Uniting for Peace has been suggested as a pathway to forceful action in Syria based on the doctrine of the responsibility to protect or as humanitarian intervention.¹⁰⁰ Yet, neither the attempt in 1950 nor recent suggestions to argue for forceful measures on the basis of UN General Assembly action were successful.

The ICJ in *Certain Expenses* discussed the UNGA competence with a view to peacekeeping activities. Article 11(2) of the UN Charter states that the UNGA may discuss any questions relating to peace and security but 'any question, on which action is necessary, shall be referred to the Security Council'. The ICJ found:

[T]he Court considered that the action referred to in [article 11] was coercive or enforcement action. In this context, the word 'action' must mean such action as was solely within the province of the Security Council, namely that indicated by the title of Chapter VII of the Charter ... If the interpretation of the word 'action' in Article 11, paragraph 2, were that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly might make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of

97 H. Kelsen, 'Is the Acheson Plan Constitutional?' (1950) 3 *The Western Political Quarterly*, at 512.

98 J. Andrassy, 'Uniting for Peace' (1956) 50 *AJIL* 563.

99 A. Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18 *Journal of Conflict & Security Law*, at 453 and 456.

100 G. Melling and A. Dennett, 'The Security Council Veto and Syria: Responding to Mass Atrocities Through the "Uniting for Peace" Resolution' (2017) 57 *Indian Journal of International Law*, at 285; Y. Nahlawi, 'Overcoming Russian and Chinese Vetoes on Syria Through Uniting for Peace' (2019) 24 *Journal of Conflict & Security Law*, at 111; M. Ramsden and T. Hamilton, 'Uniting against Impunity: the UN General Assembly as a Catalyst for Action at the ICC' (2017) 66 *International and Comparative Law Quarterly*, at 893.

Article 11, paragraph 2, had no application where the necessary action was not enforcement action.¹⁰¹

Using the ICJ Opinion as an indicator of current practice¹⁰² and state of the law, forcible measures remain within the exclusive competency of the Security Council.¹⁰³ Resolution 377 might have contained a proposal to develop that law, but this has not taken effect. The UNGA may recommend forcible measures to the UNSC; however, the authorization of the use of force as one of the two lawful exceptions to the prohibition of the use of force remains firmly within the UNSC domain.

With a view to Syria, the UN General Assembly limited its action to a small but significant contribution with the establishment of the IIIM. Strengthening the rule of law by addressing the impunity gap for the crimes committed in Syria will not stop the war there but will hopefully in the long run contribute to the enforcement of international human rights and humanitarian law.

6 Conclusion

From Uniting for Peace to the IIIM, the General Assembly has asserted its position as an important actor of peace and security. However, from the early practice and the push for the use of force, the Assembly practice has evolved into creatively developing the variety of non-forcible measures within its mandate. The war narrative underpinning much security discourse might underestimate the potential of non-forcible measures that have to work towards maintaining or restoring peace and security.

With the creation of the IIIM, the General Assembly quietly expands the scope of action towards accountability for international crimes. For Syria, the General Assembly established with the IIIM 'a key track that must lead to comprehensive and fair accountability, although the existence of the IIIM alone must not be taken as meeting the aspirations of survivors and victims

¹⁰¹ *Certain Expenses of the United Nations (Article 17 Paragraph 2 of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151, at 61 (emphasis added by author).

¹⁰² Johnson, 'Uniting for Peace Does It Still Serve Any Useful Purpose', at 111–112. He argues that the only UNGA Resolutions calling upon use of force did so within a collective self-defence context in Korea and South Africa.

¹⁰³ Nahlawi, 'Overcoming Russian and Chinese Vetoes on Syria Through Uniting for Peace', at 117.

regarding accountability'.¹⁰⁴ The IIIM will hopefully be able to serve more prosecution efforts in the future, where to date only a limited number of states have stepped up their efforts at enabling such proceedings in their own jurisdictions. Yet, these domestic efforts alone will not enable accountability for those most responsible. The IIIM should be seen as having created a foundation for a future international prosecution response. It should also serve as a continued reminder to the international community that the need for an international tribunal is as pressing as it was at the point of creating the IIIM. Neither will it address victims needs to uncover the truth and find out about the fate of those who disappeared and are unaccounted for. For Syria, the UN must do much more to stop failing the victims of the conflict. Yet, the IIIM has started laying a pathway for a continued change of practice. Accountability for international crimes is one of those areas which seeks to enforce the respect for human rights, to deter genocide, crimes against humanity, war crimes, and aggression. Creative boundary pushing in the UNGA through non-forcible measures will hopefully contribute to peace and security beyond war.

One of the biggest threats to peace and security in the 21st century is the exacerbating climate emergency that threatens the survival of humanity and may make large swathes of the planet uninhabitable. In view of these looming threats, it is hoped that the discourse in international security law may shift to a more holistic understanding of maintaining and restoring peace and security. This essay appraises the contribution of the General Assembly to international criminal justice through the creation of a new investigative mechanism. It is written in the hope that this example may highlight the potential that the creative use of existing powers of the UN General Assembly can contribute to peace and security beyond war.

Acknowledgments

The author thanks the participants at the ESIL International Law and Security Interest Group workshop in 2021 for their insightful comments of an earlier draft of this article. Thanks goes also to Pia Hüscher, Heloise Guichardaz and Jack Provan for their research assistance in the early stages of this project.

¹⁰⁴ 'Truth and Justice Charter: A Common Vision on the Question of Enforced Disappearance and Arbitrary Detention in Syria by Syrian Victims' and Family Members' Organisations' (10 February 2021), at Section 05.B. available at <https://drive.google.com/file/d/1BV9DABDQ5Ubs3RC3pyu4BSw8eoxRFeJp/view> (accessed 6 April 2022).