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The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace and the Responsibility to Protect

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THE SECURITY COUNCIL VETO IN THE CONTEXT OF ATROCITY CRIMES, UNITING FOR PEACE, AND THE RESPONSIBILITY TO PROTECT

*Ved P. Nanda*¹

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I. INTRODUCTION

After Russia’s thirteen vetoes and seven by China² to shield the Syrian regime from any action, it seems reasonable to ask the question: In light of the findings of several U.N. reports, as well as reports from credible human rights organizations, that Syrian military and security forces have continued to commit atrocity crimes ever since the onset of the Syrian crisis, is it not prudent to explore the measures to protect innocent men, women, and children from such flagrant violations of human rights? Notwithstanding the threat or use of the veto, the

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1. Distinguished University Professor, University of Denver; Director of the Ved Nanda Center for International and Comparative Law, University of Denver Sturm College of Law; Honorary Professor, University of Delhi, India, Faculty of Law.
 2. *UN Security Council Working Methods: The Veto* (Sept. 30, 2019), <https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php> [<https://perma.cc/F6L3-LPX9>] [hereafter Security Council Veto]. Russia’s thirteenth veto and China’s seventh was cast on September 19, 2019, on a draft resolution by Kuwait, Belgium, and Germany seeking a truce in Northwest Syria. See Michelle Nichols, *Russia casts 13th veto of U.N. Security Council Action During Syrian War*, REUTERS (Sept. 19, 2019), <https://ca.reuters.com/article/topNews/idCAKBN1W42CJ-OCATP> [<https://perma.cc/4SZQ-2WRS>].

Uniting for Peace Resolution,³ which I will discuss in this paper, provides such means.

Protests in Syria began in the Spring of 2011, following the uprisings in Tunisia and Egypt, the so-called “Arab Spring.”⁴ The U.N. Human Rights Council established an Independent International Commission of Inquiry on the Syrian Arab Republic,⁵ which found that Syrian government forces and militias had committed gross human rights violations that were widespread and systematic, amounting to crimes against humanity, with the apparent knowledge and consent of the highest-level officials of the Syrian government.⁶ The Human Rights Council reported on the Commission’s findings:

The substantial body of evidence gathered by the Commission indicates that these gross violations of human rights have been committed by Syrian military and security forces since the beginning of the protests in March 2011. The Commission is gravely concerned that crimes against humanity have been committed in different locations in the Syrian Arab Republic during the period under review.⁷

Subsequently, in February 2012, the Commission submitted a second report to the Human Rights Council stating that the Syrian government had “manifestly failed in its responsibility to protect its people. Since November 2011, its forces have committed more widespread, systematic, and gross human rights violations.”⁸ And

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3. See G.A. 5/377(V) (Nov. 3, 1950).
 4. See Joe Sterling, *Daraa: The Spark that Lit the Syrian Flame*, CNN (Mar. 1, 2012), <https://www.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/index.html> [<https://perma.cc/73XS-QH2D>].
 5. *Independent International Commission of Inquiry on the Syrian Arab Republic: About the Commission of Inquiry*, U.N. HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx> [<https://perma.cc/U6NL-WASE>].
 6. See *id.*
 7. U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/S-17/2/Add.1, summary (Nov. 23, 2011), available at https://www.ohchr.org/Documents/Countries/SY/A.HRC.S-17.2.Add.1_en.pdf [<https://perma.cc/J6CU-MX3K>].
 8. U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/19/69, summary (Feb. 22, 2012), available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69.pdf> [<https://perma.cc/5TF4-CDXS>]. Subsequently, in late May 2012, appalled at the indiscriminate and possibly deliberate killing in the area of Homs in Syria, the U.N. High Commissioner for Human Rights said that “These acts may amount to

seven years later, on January 31, 2019, the Commission reiterated its earlier findings: “Attacks by pro-government forces in Idlib and western Aleppo Governorates . . . continue to cause scores of civilian casualties.”⁹ It further stated that the human rights violations “and general absence of the rule of law paint a stark reality for civilians countrywide, including for 6.2 million internally displaced persons and 5.6 million refugees seeking to return.”¹⁰ Human rights organizations, including Human Rights Watch¹¹ and Amnesty International¹² provide similar accounts of atrocity crimes committed by the Syrian government forces.

Russia has cast thirteen vetoes, *inter alia*, to block draft resolutions calling for a ceasefire in Syria’s Idlib province and to establish investigations of chemical weapons use in Syria’s civil war,¹³ calling for

crimes against humanity and other international crimes.” Statement by Navi Pillay, High Commissioner for Human Rights to the Human Rights Council 19th Special Session on “The deteriorating Human Rights Situation in the Syrian Arab Republic and the Killings in El-Houleh” (June 1, 2012), *available at* <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12210&LangID=E> [<https://perma.cc/64GG-RZFW>].

9. U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/40/70, Summary (Jan. 31, 2019), *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/023/20/PDF/G1902320.pdf?OpenElement> [<https://perma.cc/8T88-X6AR>].

10. *Id.*

11. Human Rights Watch (“HRW”) has issued several reports on the topic. For the 2019 HRW Report on Syria, *see World Report 2019: Syria*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2019/country-chapters/syria> [<https://perma.cc/9TTQ-DXCU>].

12. Since the beginning of the civil war in Syria, Amnesty International (“AI”) has released several reports. In its August 2012 report, AI detailed a wide range of state-directed, systematic violations of human rights, including the deliberate targeting of peaceful protesters and injured protesters, torture, targeting of medics providing emergency treatment for the wounded, arbitrary arrests, and disappearances in Syria’s largest and most populous city, Aleppo.

See All-Out Repression: Purging Dissent in Aleppo, Syria, AMNESTY INT’L (2012), <https://www.amnesty.org/download/Documents/24000/mde240612012en.pdf> [<https://perma.cc/3KXD-8R7S>]. For AI’s review of 2018 events, *see Syria: Human Rights in Syria: Review of 2018*, AMNESTY INT’L (Feb. 26, 2019), <https://www.amnesty.org/download/Documents/MDE2499032019ENGLISH.pdf> [<https://perma.cc/DTD2-QBQF>].

13. *See Security Council: Two Draft Resolutions, Zero Consensus on Ceasefire in Syria’s Idlib*, UN News (Sept. 19, 2017), <https://news.un.org/en/story/2019/09/1046802>

a truce in Aleppo,¹⁴ calling for the Security Council to refer Syrian crimes to the International Criminal Court,¹⁵ threatening Syria with sanctions if it did not stop using heavy weapons,¹⁶ condemning a Syrian crackdown on the opposition,¹⁷ and condemning Syria's grave violations of human rights.¹⁸

Thus, it is not surprising that in his address to the Human Rights Council on February 26, 2018, the then U.N. High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, noted "seven years of unremitting and frightful mass killing" in Syria,¹⁹ and said:

Second to those who are criminally responsible – those who kill and those who maim – the responsibility for the continuation of so much pain lies with the five permanent members of the U.N. Security Council. So long as the veto is used by them to block any unity of action, when it is needed the most, when it could reduce the extreme suffering of innocent people, then it is they – the permanent members – who must answer before the victims.²⁰

[<https://perma.cc/K6XA-D6V7>]; Security Council Veto, *supra* note 1; *see also* Security Council - Veto List, DAG HAMMARSKJOLD LIBRARY, https://www.un.org/Depts/dhl/resguide/scact_veto_table_en.htm [<https://perma.cc/UR9G-S7U6>] (listing records for Security Council vote on Middle East (Syria), S/2018/321 (Apr. 10, 2018); Security Council Vote on Middle East (Syria), S/2017/970 (Nov. 17, 2017); Security Council Vote on Middle East (Syria), S/2017/962, (Nov. 16, 2017); Security Council Vote on Middle East (Syria), S/2017/884 (Oct. 24, 2017); Security Council Vote on Middle East (Syria), S/2017/315 (Apr. 12, 2017); Security Council Vote on Middle East (Syria), S/2017/172 (Feb. 28, 2017)).

14. *See* Security Council Vote on Syria, S/2016/1026 (Dec. 5, 2016); Security Council Vote on Middle East (Syria), S/2016/846 (Oct. 8, 2016); Security Council Veto, *supra* note 1.
15. Security Council vote on Syria, S/2014/348 (May 22, 2014). Security Council Veto, *supra* note 1.
16. Security Council vote on Syria, S/2012/77 (Feb. 4, 2012). Security Council Veto, *supra* note 1.
17. Security Council vote on Syria, S/2012/538 (Jul. 19, 2012). Security Council Veto, *supra* note 1.
18. Security Council vote on Syria, S/2011/612 (Oct. 4, 2011). Security Council Veto, *supra* note 1.
19. U.N. High Commissioner for Human Rights, *Opening Statements of the 37th Session of the Human Rights Council* (Feb. 26, 2018), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22702&LangID=E> [<https://perma.cc/US82-6ELN>].
20. *Id.*

Praising the leadership of France and the United Kingdom for their initiative championing a code of conduct for P5 on the use of the veto,²¹ he urged that it was time for China, Russia, and the United States to join them, “for the love of mercy . . . and end the pernicious use of the veto.”²²

To provide an appropriate context for the discussion here, Part II briefly reviews the genesis of the veto, which is followed in Part III by a recounting of the commitment made by world leaders at the 2005 U.N. Summit as they proclaimed their initiative entitled “Responsibility to Protect.”²³ Part IV provides an overview of the Uniting for Peace Resolution and the legal basis for its validity notwithstanding the Charter prohibition on the use of force. Part V is the Conclusion.

II. GENESIS OF THE VETO RIGHT OF THE FIVE PERMANENT MEMBERS OF THE SECURITY COUNCIL

Under the U.N. Charter, the five permanent members of the Security Council are entitled to a veto power.²⁴ Article 27 reads:

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI (Peaceful Settlement of Disputes), and under paragraph 3 of article 52 (encouragement of settlement of local disputes through regional arrangements or regional agencies), a party to a dispute shall abstain from voting.²⁵

This was a major shift from the decision-making process of the League of Nations, which required the unanimous vote of all Council members, both permanent and non-permanent.²⁶

21. *Id.*

22. *Id.*

23. U.N. Office on Genocide Prevention and the Responsibility to Protect, *Responsibility to Protect*, U.N., <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml> [<https://perma.cc/A36N-4V45>].

24. U.N. Charter art. 27.

25. *Id.*

26. *See* League of Nations Covenant art. 5.

This veto power can be traced back to the decisions taken during the San Francisco Conference convened to set up an organization which would preserve peace and help build a better world.²⁷ On June 8, 1945, the Chairman of the Technical Committee on the Structure and Procedures of the Security Council released a “Statement by the Delegations of the Four Sponsoring Governments,” consisting of The United States of America, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics, and the Republic of China, which was subsequently subscribed by the Delegation of France.²⁸

On the voting procedure of the Security Council, the statement reads: “The Yalta voting formula substitutes for the rule of complete unanimity of the League Council a system of qualified majority voting in the Security Council. Under this system, non-permanent members of the Security Council individually would have no ‘veto.’”²⁹ It further states, “It is not to be assumed, however, that the permanent members . . . would use their ‘veto’ power willfully to obstruct the operation of the Council,”³⁰ obviously expressing a hope and optimism that have not borne out as history has unfolded.

Initially, the world leaders--President Roosevelt, Marshal Stalin, and Prime Minister Churchill--who met at Dumbarton Oaks in 1944 to chart the future of the new organization,³¹ the United Nations, could not agree on the structure of the veto.³² As Professor Francis O. Wilcox, who served as a consultant to the congressional members of the American delegation at San Francisco,³³ recounts:

In respect to voting procedure, the Dumbarton Oaks conferees could not reach complete agreement and the matter was

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27. *Shaping our Future Together – 1945: The San Francisco Conference*, U.N. <https://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html> [https://perma.cc/S8UY-G7R2].
28. U.N. Conference on International Organization, *Statement by Mr. John Sofianopoulos, Chairman of Technical Committee III/1 on the Structure and Procedures of the Security Council*, p. 710, S.C. Commission III Vol. 11: Structure and Procedures (June 8, 1945) <https://digitallibrary.un.org/record/1300969?ln=en> [https://perma.cc/MF7N-2A64].
29. *Id.* at 713.
30. *Id.*
31. See Francis O. Wilcox, *The Yalta Voting Formula*, 39 AM. POL. SCI. REV. 943, 944 (Oct. 1945).
32. *Id.*
33. *Id.* at 943.

postponed until the Crimea Conference in February, 1945. There President Roosevelt submitted a formula which was approved by Marshal Stalin and Prime Minister Churchill and was later accepted by China. This formula, in effect, reinforced the special position of the permanent members by assuring them that the Organization could take no important action without their joint consent.³⁴

Concerned with the nature of the veto giving the permanent members of the Security Council power and prestige with the veto, smaller states offered several amendments to weaken their power.³⁵ But the permanent members stayed firm and the Yalta formula was approved by a vote of 30 to 2, with fifteen delegations abstaining.³⁶ Professor Wilcox recounts:

At San Francisco, the issue was made crystal clear by the leaders of the Big Five: it was either the Charter with the veto or no Charter at all. Senator Connally dramatically tore up a copy of the Charter during one of his speeches and reminded the small states that they would be guilty of that same act if they opposed the unanimity principle. ‘You may, if you wish,’ he said, ‘go home from this Conference and say that you have defeated the veto. But what will be your answer when you are asked: ‘Where is the Charter?’”³⁷

Over the years, permanent members have used the veto 290 times as of August 2019.³⁸ After casting the first veto on a draft resolution regarding the withdrawal of foreign troops from Lebanon and Syria on February 16, 1946,³⁹ the USSR cast almost all the vetoes until 1970.⁴⁰ Also, as mentioned earlier, from October 4, 2011, when the USSR vetoed the condemnation of human rights violations by Syrian authorities,⁴¹ it cast every veto until November 16, 2017.⁴² It was in

34. *Id.* at 944.

35. *Id.* at 946.

36. *Id.* at 950.

37. Wilcox, *supra* note 30, at 954.

38. Security Council Veto, *supra* note 1.

39. *Id.*

40. *Id.*

41. S.C. Vote on Syria, S/2011/24 (Oct. 4, 2011).

42. Security Council Veto, *supra* note 1.

response to the Soviet Union's use of vetoes in the early years that the General Assembly adopted the Uniting for Peace Resolution.⁴³

III. ORIGIN AND EVOLUTION OF THE “RESPONSIBILITY TO PROTECT” PRINCIPLE

Secretary-General Kofi Annan initiated the process that would culminate in the endorsement of the “Responsibility to Protect” principle at the U.N. World Summit of Heads of State and Government in September 2005.⁴⁴ In his Millennium Report to the General Assembly in April 2000, the Secretary-General had called upon member states to “unite in the pursuit of more effective policies, to stop organized mass murder and egregious violations of human rights.”⁴⁵ Responding to the severe criticism of humanitarian intervention as a potential response to tragedies such as Rwanda and Srebrenica, he had stated: “[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”⁴⁶

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43. Christian Tomuschat, *Uniting for Peace*, U.N. AUDIOVISUAL LIBRARY OF INT'L L., 1 (2008), http://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf [<https://perma.cc/C48R-JBG6>].
 44. 2005 World Summit Outcome, G.A. Res. 60/1, ¶139, U.N. Doc. A/RES/60/1, 30 (Sept. 16, 2005) [hereinafter World Summit Outcome], https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf [<https://perma.cc/PE8N-8TEM>].
 45. The Secretary-General's Millennium Report, *We the Peoples: The Role of the United Nations in the 21st Century*, 47, U.N. Doc. A54/2000 (April 3, 2000), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/388/97/IMG/N0038897.pdf?OpenElement> [<https://perma.cc/U7CU-KLB8>].
 46. For a discussion of humanitarian intervention, see generally SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER (1994); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1997); James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 DENV. J. INT'L L. & POL'Y 9 (1991-1992); Ved P. Nanda, et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia – Revisiting the Validity of Humanitarian Intervention under International Law – Part II*, 26 DENV. J. INT'L L. & POL'Y (1998); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000); Thomas G. Weiss, *The Sunset of Humanitarian Intervention? Responsibility to Protect in a Unipolar Era*, 35 SECURITY DIALOGUE 135 (2004). Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001), available at

Among several studies in response to the Secretary-General's challenge, the 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS), entitled "The Responsibility to Protect,"⁴⁷ was most influential in giving shape to the doctrine as it evolved and was endorsed by the 2005 World Summit.⁴⁸ The ICISS Report shifted the debate from the "right of humanitarian intervention" or "right to intervene," to the "responsibility to protect."⁴⁹ According to the Report, the newly emerging doctrine would comprise three distinct responsibilities: the responsibility to prevent (with the focus on the importance of early warning mechanisms and conflict prevention);⁵⁰ the responsibility to react (which in extreme cases may include military intervention);⁵¹ and the responsibility to rebuild after military intervention.⁵²

The responsibility to react would apply when a state was either unable or unwilling to protect its citizens from massive human rights violations occurring in the state.⁵³ For such an intervention, the Commission proposed a "just cause" threshold, that is, "serious and

<http://www.iciss.ca/pdf/Commission-Report.pdf>; Gareth Evans & Mohamed Sahnoun, *Intervention and State Sovereignty: Breaking New Ground*, 7 GLOBAL GOVERNANCE 119, 119 (2001); Report of the High-level Panel on Threats, Challenges and Change, Gareth Evans, A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565 (Dec. 2, 2004); James Turner Johnson, HUMANITARIAN INTERVENTION, THE RESPONSIBILITY TO PROTECT, AND SOVEREIGNTY: HISTORICAL AND MORAL REFLECTIONS, 23 MICH. ST. INT'L L. REV 609 (2015); Harold Hongju Koh, *Humanitarian Intervention: Time for a Better Law*, 111 AJIL UNBOUND 287 (2017).

47. See generally Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect, Letter dated 26 July 2002 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General, U.N. Doc. A/57/303, annex (Aug. 14, 2002) [hereafter ICISS Report], <http://undocs.org/A/57/303> [<https://perma.cc/4SAX-XQF8>].
48. Resolution Adopted by the General Assembly on 16 September 2005, 2005 World Summit Outcome, U.N. Doc. A/RES/60/1, at 30, available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf [<https://perma.cc/9HMG-PTTX>].
49. ICISS Report, *supra* note 46, § 2.29 ("[T]he responsibility to protect implies an evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention.").
50. *Id.* at xi.
51. See generally *id.* §§ 4.1–4.43.
52. See generally *id.* §§ 5.1–5.31.
53. *Id.* § 2.29.

irreparable harm” to human beings, such as large-scale loss of life or large-scale ethnic cleansing.⁵⁴ Once this threshold was reached, the Commission proposed four precautionary principles to guide the use of force: 1) right intention to “halt or avert human suffering”;⁵⁵ 2) last resort after all diplomatic and non-military avenues to prevent the conflict or settle it with peaceful means if it has already begun;⁵⁶ 3) proportional means to secure the humanitarian objective of protecting those needing support;⁵⁷ and 4) reasonable prospect of success in ending the atrocities or suffering that triggered the intervention so that the consequences of intervention are not likely to be worse than the consequences of inaction.⁵⁸

The Report offered alternative options if the Security Council was unable to act: an emergency special session of the General Assembly under the “Uniting for Peace” resolution,⁵⁹ or action of regional organizations⁶⁰ “subject to their seeking subsequent authorization from the Security Council. . . . But . . . there are recent cases when approval has been sought *ex post facto* or after the event (Liberia and Sierra Leone), and there may be leeway for future action in this regard.”⁶¹

Addressing the veto issue, the Commission said “the Permanent Five members of the Security Council should consider and seek to reach agreement not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.”⁶² The Report cautioned the Security Council that if the Council were to fail to live up to its responsibility, single states or coalitions might take action,⁶³ and if the action were a success, this “may have enduringly serious consequences for the stature and credibility of the U.N. itself.”⁶⁴

The next stage of the evolutionary process of the Responsibility to Protect doctrine (“R2P”) was reached with the publication of the

54. *Id.* §§ 4.18–4.19, §§ 4.32–4.33.

55. ICISS Report, *supra* note 46, §§ 4.32–4.33.

56. *Id.* § 4.37.

57. *Id.* § 4.39.

58. *Id.* § 4.41.

59. *Id.* §§ 6.29–6.30; Uniting for Peace, G.A. Res. 377(V), U.N. Doc. A/1775 (Nov. 3, 1950).

60. ICISS Report, *supra* note 46, §§ 6.31–6.35.

61. *Id.* § 6.35.

62. *Id.* § 8.29(2).

63. *Id.* § 6.39.

64. *Id.* § 6.40.

December 2004 Report of the High-Level Panel on Threats, Challenges and Change⁶⁵ established by Secretary-General Annan.⁶⁶ Endorsing what it called an “emerging norm,” the Panel embraced a “collective international responsibility to protect”⁶⁷ and supported the ICISS Report’s recommendation that the Security Council was the proper U.N. body to authorize military intervention as a last resort “in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.”⁶⁸

The panel also endorsed the “just cause” threshold recommended in the ICISS’ Report, as well as its precautionary principles,⁶⁹ although it renamed the basic criteria of legitimacy – seriousness of threat, proper purpose, last resort, proper means, and balance of consequences.⁷⁰ However, the Panel did not discuss any alternative to the Security Council’s taking action, although it urged the permanent members to refrain from “use of the veto in cases of genocide and large-scale human rights abuses.”⁷¹ In his March 2005 report, entitled “In Larger Freedom: Towards Development, Security, and Human Rights for All,” Annan accepted the Panel’s recommendations.⁷²

As the final step, the 2005 World Summit considered the Secretary-General’s Report and endorsed each state’s responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity,⁷³ adding that “[t]his responsibility entails the prevention of such crimes.”⁷⁴

The Summit further resolved:

65. High-Level Panel on Threats, Challenges and Change, U.N. Secretary-General, Report of the High-Level Panel on Threats, Challenges, and Change: A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* <https://undocs.org/A/59/565> [<https://perma.cc/GCG5-NMR7>].

66. *Id.* ¶ 24–25.

67. *Id.* ¶ 202–03.

68. *Id.* ¶ 203.

69. *Id.* ¶ 207.

70. *Id.*

71. U.N. Doc. A/59/565, *supra* note 64, ¶ 256.

72. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, U.N. Doc. A/59/2005 (Mar. 21, 2005).

73. World Summit Outcome, *supra* note 43, § 138.

74. *Id.*

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁷⁵

In 2009, Secretary-General Ban Ki-moon released a seminal report, “Implementing the Responsibility to Protect,”⁷⁶ in which he articulated R2P’s three-pillar framework.⁷⁷ Under Pillar One, each state has the primary responsibility to protect its population from atrocity crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity.⁷⁸ Pillar Two states the wider international community’s commitment to encourage and assist individual states to meet that responsibility.⁷⁹ And Pillar Three articulates the international community’s responsibility to take “timely and decisive” action to prevent and halt these crimes, in accordance with the U.N. Charter when a state is “manifestly failing” to protect its population.⁸⁰ The report provides for the General Assembly to be proactive, as provided under Charter articles 10-14 and under the “Uniting for Peace” resolution.⁸¹

On September 14, 2009, recalling the 2005 World Summit Outcome, the General Assembly adopted the resolution,⁸² the Responsibility to Protect, and decided in its operative part “to continue its consideration of the responsibility to protect.”⁸³ Following this, the General Assembly has conducted several Informal Interactive Dialogues on the

75. *Id.* § 139.

76. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing R2P*].

77. *Id.* at 2.

78. *Id.* at 8-9.

79. *Id.* at 9.

80. *Id.*

81. *Id.*

82. G.A. Res. 63/308, ¶ 2 (Oct. 7, 2009), <https://undocs.org/en/A/RES/63/308> [<https://perma.cc/Z279-JJL5>].

83. *Id.* ¶ 1-2.

Responsibility to Protect⁸⁴ and the Secretary-General has released annual reports.⁸⁵ The Security Council has invoked the Responsibility to Protect in more than 65 resolutions,⁸⁶ and the Human Rights Council in 30 resolutions.⁸⁷

The Security Council successfully implemented R2P in situations in Côte d'Ivoire, Libya, and Mali,⁸⁸ while it was unsuccessful in the Democratic Republic of the Congo, Darfur and Blue Nile & South Kordofan in Sudan, South Sudan, and Central African Republic.⁸⁹ Unsuccessful attempts resulted from U.N. Security Council's actual or threatened veto in Yemen, Syria, Myanmar, and Democratic People's Republic of Korea (North Korea).⁹⁰

As mentioned above, Russia and China have persisted in their opposition to the Security Council's invocation of R2P in the Syrian context,⁹¹ notwithstanding that the Syrian regime has been found committing war crimes and crimes against humanity resulting in over 560,000 people killed as of December 2018.⁹² One reason for the vetoes is Russia's and China's opposition to regime change as part of R2P.⁹³ They accuse the 2011 NATO operation of misusing R2P by forcing regime change in Libya, in addition to protecting civilians, for which R2P was designed.⁹⁴

84. *See generally About R2P*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, www.globalr2p.org/about_r2p [https://perma.cc/M5BQ-NLQ7] (accounting for these developments and for several publications on the topic).

85. *Id.*

86. *Id.*

87. *Id.*

88. Jared Genser, *The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement*, 18 CHI. J. INT'L L. 420, 434 (2018).

89. *See generally id.* at 450-78.

90. *See generally id.* at 478-500.

91. *Id.* at 485.

92. *Syria: 560,000 killed in seven years of war*, SYRIAN OBSERVATORY FOR HUM. RTS. (Dec. 12, 2018), www.syriahr.com/en/?p=108829 [https://perma.cc/3RM2-D2DB].

93. Genser, *supra* note 88, at 485.

94. *See generally* JENNA RUSSO, *THE POLITICS OF R2P AND INACTION IN SYRIA: U.S. RUSSIAN, AND CHINESE RESPONSES* (2017); JESS GIFKINS, *THE U.N. SECURITY COUNCIL DIVIDED: SYRIA IN CRISIS*, 4 GLOBAL RESPONSIBILITY TO PROTECT 377 (2012). *See also* U.N. SCOR 66 Sess., 6531st mtg., U.N. Doc. S/PV.6531 (May 10, 2011) (Chinese and Russian delegates discussing protecting civilians in armed conflict); *id.* at 9 (statement by Russia's delegate) ("The noble goal of protecting civilians should not be compromised by

In Libya, the protests and demonstrations against the Muammar Qaddafi regime began in February 2011.⁹⁵ In response to reports that government troops had fired from aircraft at demonstrators, the U.N. Secretary General called for an immediate end to the violence on February 21, 2011.⁹⁶ The following day, in a statement issued by the Security Council, the members condemned the violence and repression against the civilians and demonstrators, and called upon the Libyan government to “meet its responsibility to protect its population.”⁹⁷ On February 25, the Secretary-General again responded to reports about the regime’s use of detention and torture of the opposition, shooting of peaceful demonstrators, and indiscriminate killing by calling upon the Security Council to take concrete action in Libya.⁹⁸

Alarmed at the reports of serious violations of human rights in Libya, the U.N. High Commissioner for Human Rights, Navi Pillay, denounced “the use of live ammunition against peaceful protesters in

attempts to resolve in parallel any unrelated issues. In that regard, we share the concern expressed by Ms. Amos with regard to the situation in Libya. The statement by a representative of the coalition with regard to resolution 1973 (2011) is not in line with the reality.”). Ms. Amos, delegate of Brazil, had said that the use of force in Libya raised concerns “in terms of the potential undermining of the protection of civilians agenda.” *Id.* at 4; *id.* at 20 (statement by China’s delegate) (“There must be no attempt at regime change or involvement in civil war by any party under the guise of protecting civilians.”).

95. Kareem Fahim & David D. Kirkpatrick, *Qaddafi’s Grip on the Capital Tightens as Revolt Grows*, N.Y. TIMES (Feb. 22, 2011), <https://www.nytimes.com/2011/02/23/world/africa/23libya.html> [perma.cc/9RPN-VHQX].
96. Press Release, Secretary-General, Outraged Secretary-General Calls for Immediate End to Violence in Libya, U.N. Press Release SG/SM/13408 (Feb. 22, 2011), *available at* <https://www.un.org/press/en/2011/sgsm13408.doc.htm> [perma.cc/29A8-5K5W].
97. Press Release, Security Council, Security Council Press Statement on Libya, U.N. Press Release SC/10180 (Feb. 22, 2011), *available at* <https://www.un.org/press/en/2011/sc10180.doc.htm> [perma.cc/K8QL-S4QW].
98. Press Release, Security Council, Fundamental Issues of Peace, Security at State, Secretary-General Warns as he Briefs Security Council on Situation in Libya, U.N. Press Release, SC/10185 (Feb. 25, 2011), *available at* <https://www.un.org/press/en/2011/sc10185.doc.htm> [perma.cc/9SUJ-AKWL]. *See also* Press Release, Secretary-General, Secretary-General Tells Security Council Time to Consider Concrete Action in Libya, as Loss of Time Means More Loss of Lives, U.N. Press Release SG/SM/13418-SC/10186 (Feb. 25, 2011), *available at* <https://www.un.org/press/en/2011/sgsm13418.doc.htm> [https://perma.cc/AQH2-PN94].

Libya,”⁹⁹ and called for an international inquiry into the violence.¹⁰⁰ A group of U.N. human rights experts warned that the government of Libya’s gross violation of human rights could amount to crimes against humanity.¹⁰¹

The U.N. Human Rights Council also strongly condemned the “gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators, some of which may also amount to crimes against humanity”¹⁰² in a resolution it adopted on February 25, 2011.¹⁰³ Under the resolution, the Council established an Independent International Commission of Inquiry to investigate the alleged violations, and requested the Commission “to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible to identify those responsible [so that] those individuals responsible are held accountable.”¹⁰⁴

As the repression continued, the Arab League, the African Union, and the Secretary-General of the Organization of the Islamic Conference condemned Libya’s the violation of human rights and international human rights law.¹⁰⁵ The Security Council welcomed this development and recalled the Libyan authorities’ responsibility to protect the population in the preamble of Resolution 1970 of February 26, 2011.¹⁰⁶ In its operative parts, the resolution demanded “an

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99. *U.N. Office of the High Comm’r for Human Rights, Pillay Denounces Violence by Security Forces in Middle East and North Africa*, U.N. NEWS (Feb. 18, 2011), <https://news.un.org/en/story/2011/02/367032-un-rights-chief-condemns-violence-against-protesters-middle-east-north-africa> [perma.cc/NJ2H-S7SV].
100. Press Release, Pillay Calls for International Inquiry into Libyan Violence and Justice for Victims, U.N. Press Release (Feb. 22, 2011), *available at* <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10743&LangID=E> [perma.cc/294S-KMM4].
101. Press Release, Human Rights Council, “Stop the Massacre” – U.N. Experts (Feb. 22, 2011), *available at* <https://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10747&LangID=E> [perma.cc/TD3P-AQ99].
102. Press Release, Human Rights Council, Human Rights Council Passes Resolution on Libya in Special Session (Feb. 25, 2011), *available at* <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10768&LangID=E> [https://perma.cc/9ULB-2VP3].
103. Human Rights Council, Res. 15/1, U.N. Doc. A/HRC/S-15/1 (Feb. 25, 2011).
104. *Id.* ¶ 11.
105. S.C. Res. 1970, 1 (Feb. 26, 2011).
106. *Id.* at 2.

immediate end to the violence,¹⁰⁷ decided to refer the Libyan situation to the International Criminal Court,¹⁰⁸ and imposed sanctions against Libya, including an arms embargo,¹⁰⁹ travel ban against named government officials,¹¹⁰ and an asset freeze.¹¹¹

The repression continued and the Libyan government remained defiant. During March, among several organizations calling for the Security Council and other appropriate international bodies to protect the civilian population in Libya was the African Commission on Human and Peoples' Rights.¹¹² Other calls to protect civilians from airstrikes and thus to impose a no-fly zone over Libya, came from the Secretary-General of the Organization of the Islamic Conference,¹¹³ the European Parliament,¹¹⁴ and several Arab Gulf countries.¹¹⁵ On March 14, 2011, the Permanent Observer of the League of Arab States to the United Nations addressed a letter to the President of the U.N. Security Council, informing him about the Council of the League's decision "[t]o call upon the Security Council, in view of the deterioration in the situation in Libya, to shoulder its responsibility and take the measures necessary to immediately impose a no-fly zone on Libyan military aircraft"¹¹⁶

On March 17, the Security Council adopted Resolution 1973 authorizing member states to take all necessary measures to protect civilians in Libya.¹¹⁷ It reiterated the Libyan authorities' responsibility to protect the Libyan population¹¹⁸ and reaffirmed the primary responsibility of the parties to armed conflicts "to take all feasible steps

107. *Id.* ¶ 1.

108. *Id.* ¶ 4.

109. *Id.* ¶ 9.

110. *Id.* ¶¶ 15-16, Annex I.

111. S.C. Res. 1970, *supra* note 105, ¶¶ 17-22, Annex II.

112. AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, RESOLUTION ON THE HUMAN RIGHTS SITUATION IN THE GREAT SOCIALIST PEOPLES' LIBYAN ARAB JAMAHIRIYA (2011).

113. Abdul Nabi Shaheen, *OIC plans to support no-fly zone over Libya*, GULF NEWS WORLD (March 16, 2011), <https://gulfnnews.com/world/mena/oic-plans-to-support-no-fly-zone-over-libya-1.778130> [<https://perma.cc/V7UT-5KM4>].

114. 2011 O.J. (C119) 158.

115. Kareem Shaheen, *GCC Wants No-Fly Zone Over Libya*, THE NATIONAL (Mar. 8, 2011), <https://www.thenational.ae/uae/government/gcc-wants-no-fly-zone-over-libya-1.414985> [perma.cc/R7DU-XD5B].

116. U.N. SCOR, U.N. Doc. S/2011/137 (Mar. 15, 2011).

117. S.C. Res. 1973 ¶ 4 (Mar. 17, 2011).

118. *Id.* at 1.

to ensure the protection of civilians.”¹¹⁹ Following several months of military operations by NATO, the Qaddafi regime fell, ending his 42-year rule, and he was captured and killed by rebels.¹²⁰

As mentioned above, in the early years, the U.S.S.R. cast almost all the vetoes in the Security Council.¹²¹ As I will discuss next, its vetoes on the Korean situation led to the adoption of the Uniting for Peace resolution.¹²² Now that Russia has again similarly blocked any Security Council action against the Syrian regime,¹²³ the question is pertinent: why not again deploy the Uniting for Peace mechanism to unblock the Security Council?¹²⁴

IV. OVERVIEW OF THE UNITING FOR PEACE RESOLUTION AND HISTORY OF UFP APPLICATION

The Uniting for Peace Resolution was adopted following U.S.S.R. vetoes of the draft resolution of the United States on the “Complaint of Aggression” against the Republic of North Korea, September 5, 1950,¹²⁵ and its veto on September 12, 1950 of another draft resolution related to the Korean War.¹²⁶ At the September 1950 session of the General Assembly, the U.S. delegation requested that the Assembly consider making recommendations in case of any breach of international

119. *Id.*

120. Kareem Fahim, et al., *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES (Oct. 20, 2011), <https://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html> [perma.cc/6MSC-QWSR].

121. Security Council Veto, *supra* note 2.

122. Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. OF CONFLICT & SECURITY L. 453, 457–459 (2013).

123. *See id.* at 454–56.

124. *See* Yasmine Nahalwi, *Overcoming Russian and Chinese Vetoes on Syria Through Uniting for Peace*, 24 J. CONFLICT & SECURITY L. 111 (2019); Andrew Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SECURITY L. 453 (2013); Asian Udoh, *Case Study: Invoking the ‘Uniting for Peace’ Resolution of 1950 to Authorize the Use of Humanitarian Military Intervention and Prevent Mass Atrocities in Syria*, 23 WILLAMETTE J. INT’L L. & DIS. RES. 187 (2015)

125. *See generally* U.N. SCOR, 5th Sess., 496th mtg. U.N. Doc. S/PV.496 (Sept. 5, 1950) (containing the draft U.S. Resolution S/1653). The result of the vote was nine in favor, the U.S.S.R. against, and Yugoslavia abstaining. *Id.* at 18–19.

126. *See* U.N. SCOR, 5th Sess., 501st mtg. U.N. Doc. S/PV.501 (Sept. 12, 1950) (containing the draft U.S. Resolution S/1745/Rev.1). The vote was seven votes to one with two abstentions, India and Yugoslavia, and one member, China not participating in the vote. *Id.* at 13.

peace or act of aggression if the Security Council is unable to discharge its primary responsibility for the maintenance of international peace and security because of the lack of unanimity of the permanent members.¹²⁷ After deliberations and objections by the Soviet Union, the General Assembly adopted Resolution 377A (V), “Uniting for Peace,” by a vote of 55 to 5, on November 3, 1950.¹²⁸

Reaffirming “the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto,” the core of the resolution, Part A, reads: The General Assembly

Resolves 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. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations¹²⁹

All the provisions embodied in this resolution have their source in the U.N. Charter. First, under Article 20, Special Sessions of the General Assembly “shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.”¹³⁰ Article 27(2) states that the Security Council’s decisions “on procedural matters shall be made by an affirmative vote of nine members” without the right to veto,¹³¹ contrasted with article 27(3), under which the Security Council’s decision on non-procedural matters “shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”¹³²

127. *See id.*

128. G.A. Res. 377 (V), at 10 (Nov. 3, 1950).

129. *Id.*

130. U.N. Charter, art. 20.

131. U.N. Charter art. 27, ¶ 2.

132. U.N. Charter art. 27, ¶ 3.

While the controversy arises about the General Assembly's recommendation to "the use of armed force,"¹³³ its authority to make recommendations for non-coercive measures is not controversial.¹³⁴ Under article 24, the Security Council has "primary responsibility for the maintenance of international peace and security,"¹³⁵ which is not exclusive and leaves the General Assembly with secondary responsibility.¹³⁶

To appreciate the roles of the Security Council and the General Assembly related to the maintenance of international peace and security, Articles 11 and 12 provide the pertinent information. Article 12 states that "[w]hile 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."¹³⁷ Article 11 provides for the Assembly to make recommendations on questions relating to the maintenance of international peace and security "except as provided in Article 12."¹³⁸

133. See John W. Halderman, *Legal Basis for United Nations Armed Forces*, 56 AM. J. OF INT'L L. 971, 971-96 (1962).

134. See generally Hans Kelsen, *Is the Acheson Plan Constitutional?*, 3 WESTERN POL. Q. 512, 512-27 (1950).

135. U.N. Charter art. 24 ¶ 1 ("In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.").

136. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 163 (July 20) ("The responsibility conferred [on the Security Council] is 'primary,' not exclusive. . . . The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to 'recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter, setting forth the purposes and principles of the United Nations.' The word 'measures' implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter, unless the Council requests it to do so.").

137. *Id.*

138. U.N. Charter art. 11, ¶ 2 ("The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations . . . and, except as provided in Article 12, may make recommendations with

Thus, under articles 11 and 12, the General Assembly can make recommendations even when the Security Council is seized by peace and security issues.¹³⁹ The validity of this construction of Articles 11 and 12 is affirmed by the International Court of Justice's advisory opinion in *Construction of a Wall Case*¹⁴⁰ by interpreting Article 12 as it has evolved. The Court said:

As regards the practice of the United Nations, both the General Assembly and the Security Council 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. . . . However, this interpretation of Article 12 has evolved subsequently. . . . Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly to deal in parallel with the same matter concerning the maintenance of international peace and security It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.¹⁴¹

The major hurdle for the Uniting for Peace resolution is the statement that the General Assembly may make "appropriate recommendations to Members for collective measures, including . . . the use of armed force when necessary, to maintain or restore international peace and security,"¹⁴² for the Charter Article 2, paragraph 4 prohibits "the threat or use of force" by U.N. members.¹⁴³ This principle may

regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.").

139. U.N. Charter art. 11, ¶¶ 2, 3–12.

140. *See generally* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 138 (July 9).

141. *Id.* at 149–50, ¶ 27.

142. GA Res. 377, *supra* note 128.

143. U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

even have acquired the status of *jus cogens*.¹⁴⁴ Judge Elaraby states in his separate opinion that Article 2(4) “is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted.”¹⁴⁵

Andrew Carswell, however, argues that the Article 2(4) “prohibition binds ‘Members’ as such and not the Organization.”¹⁴⁶ He adds,

the actions of UN members, pursued within the scope of a General Assembly recommendation to use force, will be subsumed within the authority of the UN Organization in cases where an effective delegation of authority has taken place, and will not therefore be captured by the article 2(4) prohibition on the threat or use of force.¹⁴⁷

Thus, the General Assembly recommendations do not fall under Article 2(4).

Carswell makes this assertion by contending that, as the Council’s authorization to use force under Chapter VII exists separately and not under Article 2(4),¹⁴⁸ the General Assembly is also entitled to pass “a substantive resolution recommending the use of force by willing UN members.”¹⁴⁹ He argues that this is so because the Assembly, just like the Council, acts on behalf of the United Nations in exercising its secondary responsibility for the maintenance of international peace and security.¹⁵⁰

It is a valid criticism of Carswell’s position, however, that any regional or international organization could justify its authorization of the use of force, which is against the spirit of the U.N. Charter.¹⁵¹ Yasmine Nahlawi suggests that the Charter authorization to use force under Articles 51 (self-defense) and 42 (authorization by the Security Council under Chapter VII) “are not directly linked to Article 2(4).”¹⁵²

144. *Jus cogens*, WEX, https://www.law.cornell.edu/wex/jus_cogens [perma.cc/M5VN-BKVP].

145. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. at 254.

146. Carswell, *supra* note 124, at 461.

147. *Id.* at 465.

148. *Id.* at 461.

149. *Id.* at 466.

150. *See id.*

151. *See, e.g.*, Yasmine Nahlawi, *Overcoming Russian and Chinese Vetoes on Syria through Uniting for Peace*, 24 J. CONFLICT & SECURITY L. 111, 119 (2019).

152. *Id.*

She asserts that, while these rules are not spelled out within the Charter, “they have been identified [instead] through an integrated reading of the Charter, whereby all of the rules pertaining to the use of force have been connected to each other to yield the currently accepted framework.”¹⁵³

It is on this ground that Nahlawi finds the General Assembly’s right to recommend the use of force as provided by the Uniting for Peace to be “fully consistent with Article 2(4).”¹⁵⁴ She adds that, along with being lawful, it would enjoy a high degree of legitimacy, as well, because 1) it “requires a high threshold for invocation;”¹⁵⁵ 2) the Assembly’s recommendation “would likely specify a clear purpose as well as defined limitations for the use of force;”¹⁵⁶ and 3) as the Uniting for Peace procedure has been employed only eleven times, this “highlights that its invocation has been confined to the most exceptional situations in which the UNSC was paralyzed from acting, and that it has not otherwise created a substantial challenge to legitimate uses of the veto or to the UNSC’s primary responsibility for the maintenance of international peace and security.”¹⁵⁷

V. CONCLUSION

This article has studied the background and legal bases for the Responsibility to Protect doctrine and the Uniting for Peace resolution. Since the successful implementation of the Responsibility to Protect in Libya, the Russian and Chinese opposition has been based on their criticism that NATO misused the doctrine by aiming the use of force at regime change, for which the doctrine was not designed.

Just like the Responsibility to Protect, the Uniting for Peace has also been used with recommendation on the use of force just once – in the Korean situation on February 1, 1951.¹⁵⁸ Even this recommendation was largely symbolic, although it did employ language from the Uniting for Peace: “noting that the Security Council, because of lack of unanimity of the permanent members, has failed to exercise its primary responsibility for the maintenance of international peace and security with regard to Chinese Communist intervention in Korea, . . .”¹⁵⁹ While

153. *Id.* at 119-20.

154. *Id.* at 120.

155. *Id.*

156. *Id.*

157. Nahlawi, *supra* note 151, at 120. See also Carswell, *supra* note 124, at 476–77.

158. See G.A. Res. 498 (V), at 1 (Feb. 1, 1951).

159. *Id.*

the resolution exhorted member states to continue supporting the U.N. troops in Korea,¹⁶⁰ many nations were reluctant to take more forceful action against the People's Republic of China, fearing that the conflict in Korea would escalate.¹⁶¹

None of the other eleven uses of Uniting for Peace was a recommendation for the use of force.¹⁶² The Security Council has not referred any case since 1982,¹⁶³ nor has the General Assembly made any recommendation since 1997.¹⁶⁴

None of the thirteen resolutions vetoed by Russia on the situation in Syria could have led to military intervention and regime change, the outcome opposed by Russia and the basis of its vetoes.¹⁶⁵ In all the cases vetoed by Russia, Uniting for Peace process could have been invoked. To illustrate, the most recent draft resolution sought a ceasefire in Idlib.¹⁶⁶ The contents of the other twelve resolutions reveal that six of them sought to address chemical weapons use in the Syrian conflict, three to introduce general measures, one addressed accountability, and two sought to protect civilians.¹⁶⁷

It is high time that the Uniting for Peace mechanism be used to protect innocent men, women, and children from atrocity crimes.

160. *Id.*

161. *See id.*

162. Nahlawi, *supra* note 151, at 115.

163. *See* S.C. Res. S/14832 (Jan. 19, 1982) (condemning Israel's actions in the Golan Heights); *see also* S.C. Res. 500 (Jan. 28, 1982) (calling an emergency special session of the General Assembly).

164. *See* Larry D. Johnson, "Uniting for Peace": Does It Still Serve Any Useful Purpose, 108 AM. J. OF INT'L L. UNBOUND 106, 108 (2014).

165. Nahlawi, *supra* note 151, at 123.

166. *Id.* at 143.

167. *See* Nahlawi, *supra* note 151, at 129–42 (discussing the content of these twelve resolutions).