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Power Shift: The Return of the Uniting for Peace Resolution

Michael P. Scharf¹

Abstract

In 2022, the United States dusted off the 1950 Uniting for Peace Resolution in order to obtain General Assembly condemnation of the Russian invasion of Ukraine. This was the first time in three decades that the Security Council and General Assembly had utilized the Uniting for Peace mechanism – a process designed to end-run a Security Council veto. Together with the General Assembly’s creation of the international investigative mechanism for Syria in 2016 over Russia’s objection, the use of the Uniting for Peace process to condemn Russia’s aggression represented a shift in power away from the Security Council and to the General Assembly, with potentially broad and long-term implications. This article examines the causes and consequences of that power shift.

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I. Introduction

After the disintegration of the Soviet Union in 1991, foreign policy experts optimistically declared that the world had entered the "post-cold war age."² Within the U.N. Security Council, it was a period of unprecedented collaboration and accomplishment.³ In the few years that followed, the U.N. Security Council adopted more Chapter VII resolutions (condemning international law violations, establishing peace-keeping forces, imposing sanctions, authorizing force, establishing No Fly Zones and Safe Areas, and creating investigative commissions and international criminal tribunals) than in the preceding five decades since the creation of the United Nations.⁴ But with the onset of the Syrian conflict, and rising tensions between China and the United States, by 2012 that began to change.⁵

During the Syrian conflict, Russia vetoed thirteen Security Council Resolutions that would have condemned the Syrian government's atrocities, created a commission to investigate Syria's

² Charles William Maynes and William G. Hayland, THE NATURE OF THE POST-COLD WAR WORLD (Strategic Studies Institute, U.S. Army War College, 1993) (Maynes was the editor of *Foreign Policy* and Hayland was the editor of *Foreign Affairs*), available at:

https://www.globalsecurity.org/military/library/report/1993/ssi_maynes-hyland.pdf

³ See generally KENNETH MANUSAMA, THE UNITED NATIONS SECURITY COUNCIL IN THE POST-COLD WAR ERA: APPLYING THE PRINCIPLE OF LEGALITY (2006).

⁴ *Id.*

⁵ MICHAEL P. SCHARF, MILENA STERIO, AND PAUL R. WILLIAMS, THE SYRIA CONFLICT'S IMPACT ON INTERNATIONAL LAW (2020).

use of chemical weapons, and referred the matter to the International Criminal Court.⁶ In this context, the *Guardian* newspaper reported in 2015 that “[t]he United States has warned that Russia’s continued blanket use of its UN veto will jeopardize the [S]ecurity [C]ouncil’s long-term legitimacy and could lead the U.S. and like-minded countries to bypass it as a decision-making body.”⁷ As the U.S. Permanent Representative to the U.N. told the *Guardian*: “It’s a Darwinian universe here. If a particular body reveals itself to be dysfunctional, then people are going to go elsewhere.”⁸ That threat became reality in December 2016 when the General Assembly, acting unilaterally, created the International Impartial and Independent Investigative Mechanism (IIIM) to document Syrian atrocities and prepare case files for prosecution.⁹

Then in February 2022, Russia’s massive invasion of neighboring Ukraine ushered in a full-on return of the Cold War.¹⁰ The invasion and international response were described as “a major breaking point in history.”¹¹ Five days after the invasion, 11

⁶ MICHAEL P. SCHARF, MILENA STERIO, AND PAUL R. WILLIAMS, *THE SYRIA CONFLICT’S IMPACT ON INTERNATIONAL LAW* (2020).

⁷ Julian Borger and Bastien Inzaurrealde, *Russian Vetoes are Putting UN Security Council Legitimacy at Risk, US Says*, THE GUARDIAN, September 23, 2015.

⁸ *Id.*

⁹ MICHAEL P. SCHARF, MILENA STERIO, AND PAUL R. WILLIAMS, *THE SYRIA CONFLICT’S IMPACT ON INTERNATIONAL LAW* 59-109 (2020)

¹⁰ Elliott Abrams, *The New Cold War*, COUNCIL ON FOREIGN RELATIONS, March 3, 2022, available at: <https://www.cfr.org/blog/new-cold-war-0> (Abrams served as President George W. Bush’s Deputy National Security Advisor for Global Democracy Strategy); John Simpson, *Ukraine invasion: Is this a new Cold War*, BBC NEWS, February 24, 2022 (Simpson is the World Affairs Editor of the BBC), available at: <https://www.bbc.com/news/world-europe-60515342>; Travis Andersen, *Does Russia’s invasion of Ukraine signal the start of a new Cold War?* THE BOSTON GLOBE, March 2, 2022, available at: <https://www.msn.com/en-us/news/world/does-russias-invasion-of-ukraine-signal-the-start-of-a-new-cold-war-foreign-policy-specialists-weigh-in/ar-AAUwzIQ>.

¹¹ Dan De Luce, *A new Cold War without rules: U.S. braces for a long-term confrontation with Russia*, NBC NEWS, March 6, 2022 (quoting Mary Elise Sarotte, professor of history at the Johns Hopkins University School of Advanced International Studies), available at:

members of the UN Security Council, adopted a U.S.-drafted Resolution invoking the authority of the 1950 “Uniting for Peace” Resolution¹² and calling for a special session of the UN General Assembly to take action to respond to Russia’s aggression in circumvention of Russia’s veto at the Security Council.¹³ At that special session, on March 2, the U.N. General Assembly adopted Resolution ES-11/1 by a vote of 141 in favor, 5 opposed, and 35 abstentions.¹⁴ The Resolution characterized Russia’s action as “aggression ... in violation of Article 2 (4) of the Charter” and demanded that Russia “immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders.”¹⁵

This was the first time in three decades that the Security Council and General Assembly had utilized the “Uniting for Peace” procedure – a process designed to end-run a Security Council veto. Together with the General Assembly’s creation of the IIM in 2016, the use of the Uniting for Peace process to condemn Russia’s aggression in 2022 represented a shift in power away from the Security Council and to the General Assembly, with potentially broad and long-term implications.

This article examines the causes and consequences of that power shift. First it surveys the history of the adoption of the Uniting for Peace Resolution and its historic uses. Next, it explores the UN General Assembly’s creation of the IIM and the adoption of Resolution ES-11/1, focusing on the reinterpretation of the U.N.

<https://www.nbcnews.com/news/investigations/new-cold-war-rules-us-braces-long-term-confrontation-russia-rcna18554>

¹² The Uniting for Peace Resolution, Resolution 377 (V) (1950), November 3, 1950.

¹³ UNSC Res. 2623 (2022), available at:

<https://www.securitycouncilreport.org/un-documents/document/s-res-2623.php>

¹⁴ UNGA Res. ES-11/1 (2022), available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/27/PDF/N2227227.pdf?OpenElement> (States opposing were Belarus, North Korea, Eritrea, Russia and Syria).

¹⁵ *Id.* at Operative Paras. 2 and 4.

Charter reflected by those developments. Finally, it analyzes the likely legal and institutional consequences of these developments.

II. The History of the Uniting for Peace Resolution

A. Security Council Deadlock During the Cold War

After the failure of the League of Nations (1920-1945), the countries that negotiated the UN Charter in San Francisco in May-June 1945 formed the new organization around a potent Security Council, made up of the five most powerful States (the Permanent Members)¹⁶ and a handful of others elected on a rotating basis. While the General Assembly would include every member of the organization with an equal vote, the Security Council would have the primary responsibility within the UN system for the maintenance of international peace and security, as well as enforcement of international law.¹⁷

As the price demanded for their support of the new organization,¹⁸ the Permanent Members were accorded a veto over all substantive matters before the Security Council.¹⁹ The delegates at San Francisco granted the veto power to the Permanent Five because of “a tremendous amount of confidence in the certainty that the veto shall not be applied except in exceptional cases.”²⁰ But that confidence was misplaced. The creation of the United Nations

¹⁶ The Permanent Members of the Security Council are China (originally Nationalist China and now the People’s Republic of China), France, the Soviet Union (now Russia), the United Kingdom, and the United States.

¹⁷ U.N. Charter, arts. 41, 42, and 94.

¹⁸ Joseph M. Isanga, *Resurgent Cold War and U.N. Security Council Reform Opportunities*, 47 *Denver J. Int’l L.* 73, 82 (2019).

¹⁹ U.N. Charter, art. 27.

²⁰ Commission III Security Council, *Verbatim Minutes of the First Meeting of Commission III*, Doc. 943 III/5 (June 13, 1945), reprinted in 11 *Documents of the United Nations Conference on International Organization*, San Francisco 13 (1945), at 165 (quoting the address of Mr. Lleras Camarero of Columbia).

corresponded with the dawn of the Cold War.²¹ It was a period marked by gridlock in the Security Council, which was prevented by the Permanent Member veto from intervening to halt atrocities and bloodshed in a variety of conflict areas around the world.²² During the Cold War period, the Soviet Union vetoed 122 Resolutions, the United States vetoed 80, Britain vetoed 32, France vetoed 20, while China vetoed none.²³

Security Council deadlock during the Cold War went through two phases. In the first (1946-1965), when most of the members of the United Nations were West-leaning States, the Soviet Union vetoed 106 resolutions, while the United States vetoed none.²⁴ In the second phase (1966-1989), during which a number of former colonies joined the United Nations as newly independent States, the United States vetoed 67 Security Council Resolutions (most related to Israel), while the Soviet Union vetoed just 13.²⁵

The frequent use of the veto, especially in cases where U.N. action could halt humanitarian disasters, has eroded the legitimacy of the United Nations Security Council. Over the years there have been numerous proposals to amend the U.N. Charter to make it more difficult for the Permanent Five to exercise their veto power.²⁶ But

²¹ Coined by George Orwell in 1945, the term “Cold War” has been used to describe the open yet restricted rivalry that developed after World War II between the United States and the Soviet Union and their respective allies. The Cold War was waged from 1945 to 1991 on political, economic, and propaganda fronts with fighting confined to conventional weapons between proxy nations and insurgent groups. Britannica, *Cold War*, available at: <https://www.britannica.com/event/Cold-War>.

²² Jan Wouters and Tom Ruys, *Security Council Reform: A New Veto for a New Century*, 44 MIL. L. & L WAR REV. 139, (2005).

²³ Joseph M. Isanga, *Resurgent Cold War and U.N. Security Council Reform Opportunities*, 47 Denver J. Int’l L. 73, 84 (2019).

²⁴ Joseph M. Isanga, *Resurgent Cold War and U.N. Security Council Reform Opportunities*, 47 Denver J. Int’l L. 73, 88 (2019).

²⁵ *Id.*

²⁶ See Frederic L. Kirgis, Jr., *The Security Council’s First Fifty Years*, 89 AM. J. INT’L L. 506 (1995); Richard Butler, *Bewitched, Bothered, and Bewildered: Repairing*

Charter amendment requires the consent of the Permanent Five, so all proposals that would weaken the veto have been met with their opposition and have gone nowhere, leading scholars to decry that the “veto is essentially immune from reform.”²⁷

B. The Creation and Uses of the Uniting for Peace Resolution

At the height of the Cold War, the Uniting for Peace Resolution was created to enable the General Assembly to act quickly in an international crisis in the face of Security Council paralysis due to a Permanent Member veto. The brainchild of the United States, the Resolution was adopted by the General Assembly on November 3, 1950 in response to the Soviet Union’s veto of resolutions addressing North Korea’s aggression against South Korea.²⁸

In June 1950, the Security Council had initially authorized Members of the United Nations to “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”²⁹ That resolution was not vetoed by the Soviet Union (an ally of North Korea) because at the time the Soviet Union was boycotting the meetings of the Security Council in an effort to compel the Council to seat the communist Government of Beijing rather than the Nationalist Government of Taiwan as China. This turned out to be an enormous diplomatic blunder since the other members of the

the Security Council, 78 FOREIGN AFFAIRS 9 (1999); John D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552 (1993).

²⁷ John D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 569 (1993).

²⁸ Christian Tomuschat, *Uniting for Peace*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, 2008, available at: https://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf.

²⁹ Christian Tomuschat, *Uniting for Peace*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, 2008, available at: https://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf.

Council and later the International Court of Justice³⁰ took the position that being absent was not the same as a non-concurring vote for purposes of exercising the Permanent Member veto.³¹ When the Soviet delegation returned to the Security Council in August 1950, it voted against a United States draft resolution condemning the continued defiance of the United Nations by the North Korean authorities.³² In order to overcome this impasse, the United States proposed that the General Assembly adopt the Uniting for Peace Resolution.³³ The United States knew that this would dilute the power of its veto, but up to that point in time it had never used the veto and viewed the continued authorization to fight the Korean War as a more important consideration.

The Uniting for Peace Resolution allows the General Assembly to immediately consider matters in which the Security Council has failed in its duty to maintain international peace and security due to the use of the veto.³⁴ It can do so when asked by a

³⁰ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J Reports 1971, p. 16, at para. 22.

³¹ U.N. Charter, Art. 27 (“Decisions of the Security Council on all [substantive] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members”).

³² Christian Tomuschat, *Uniting for Peace*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, 2008, available at: https://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf.

³³ Christian Tomuschat, *Uniting for Peace*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, 2008, available at: https://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf.

³⁴ The Uniting for Peace Resolution, Resolution 377 (V) (1950), November 3, 1950 provides: “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 shall therefore

majority of the members of the Security Council (this procedure is not subject to the veto), or upon its own decision to take up the matter with a two-thirds vote. If the Assembly is not in session, the Uniting for Peace process allows it to convene an emergency session. Then, with an affirmative vote of a two-thirds majority of members present, the General Assembly may issue recommendations it deems necessary in order to restore international peace and security.

In its initial use of this authority, on February 1, 1951, the General Assembly adopted Resolution 498(V), calling upon states to support continued UN military action in Korea, including to repel Chinese aggression. To date, this is the only time the General Assembly has called for use of force under the Uniting for Peace Resolution.³⁵ There is scholarly debate, however, about whether the 1951 General Assembly Resolution was based on the underlying right of collective self-defense, merely constituted a confirmation of an existing Security Council authorization to use force, or represented an independent authorization to take enforcement measures.³⁶

The Uniting for Peace Resolution was next used in 1956 when Egypt nationalized the Suez Canal, prompting Britain, France, and Israel to attack Egypt with the objective to regain western control of the Canal and remove the Egyptian President from power.³⁷ The U.K. and France vetoed Security Council resolutions mandating the immediate withdrawal of armed forces. Invoking the Uniting for Peace Resolution, the United States called for an

meet in emergency special session within twenty-four hours of the request. Such emergency special session may be called if requested by the Security Council on the vote of any seven members [nine since 1965], or by a majority of the Members of the United Nations.”

³⁵ Michael Ramsden, *Uniting for MH17*, 7 *ASIAN J. INT’L L.* 1, 16 (2016).

³⁶ Larry D. Johnson, *Uniting for Peace: Does it Still Serve any Useful Purpose?* 108 *AM. J. INT’L L.* 106, 112 (2014).

³⁷ Asian Udoh, *Case Study: Invoking the “Uniting for Peace” Resolution of 1950 to Authorize the Use of Humanitarian Military Interventions and Prevent Mass Atrocities in Syria*, 23 *Willamette J. Int’l & Dispute Res.* 187, 211 (2015).

emergency Special Session of the General Assembly. The Assembly convened and adopted Resolution 997, calling for an immediate ceasefire and withdrawal of all foreign forces, an arms embargo, the reopening of the Suez Canal, and the placement of U.N. peacekeeping forces to monitor the situation.³⁸ Within a week of the Resolution's adoption, Britain and France withdrew their armed forces.³⁹

General Assembly Resolution 997 demonstrated that the General Assembly could take up a matter that the Security Council had been debating despite Article 12 of the U.N. Charter. That article states that "while the Security Council is exercising in respect of any dispute or situation the recommendations with regard to that dispute or situation unless the Security Council so requests."⁴⁰ In the 2004 *Construction of a Wall Case*, the International Court of Justice confirmed that the interpretation of Article 12 has evolved through state practice, and that there was no bar "for the General Assembly to deal in parallel with the same matter [as the Security Council] concerning the maintenance of international peace and security."⁴¹

General Assembly Resolution 997 also indicated the wide panoply of powers that could be exercised by the General Assembly under the Uniting for Peace Resolution which were traditionally viewed as belonging exclusively to the Security Council. Importantly, the Resolution did not purport to authorize force or enforcement action. Nor has any subsequent General Assembly Resolution invoking the Uniting for Peace Resolution.

³⁸ Asian Udoh, *Case Study: Invoking the "Uniting for Peace" Resolution of 1950 to Authorize the Use of Humanitarian Military Interventions and Prevent Mass Atrocities in Syria*, 23 Willamette J. Int'l & Dispute Res. 187, 211 (2015).

³⁹ Asian Udoh, *Case Study: Invoking the "Uniting for Peace" Resolution of 1950 to Authorize the Use of Humanitarian Military Interventions and Prevent Mass Atrocities in Syria*, 23 Willamette J. Int'l & Dispute Res. 187, 211 (2015).

⁴⁰ U.N. Charter, Art. 12.

⁴¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 138 (July 9).

Under the U.N. Charter, the General Assembly can only “recommend” use of force, not “authorize” it as the Security Council is empowered to do.⁴² This is significant because Article 2(4) of the U.N. Charter prohibits use of force except in self-defense or when authorized by the Security Council.⁴³ In the “Certain Expenses” advisory opinion of 1962, the International Court of Justice noted that under the U.N. Charter, only the Security Council can authorize enforcement by coercive action against an aggressor.⁴⁴ This suggests that the Uniting for Peace Resolution can only be used to call for use of force in a situation in which the U.N. Charter would permit collective self-defense to respond to an armed attack.⁴⁵ However, some scholars argue that a General Assembly recommendation for use of force under the Uniting for Peace process can have the same legal affect as a Security Council authorization because the prohibition on the use of force binds members and not the United Nations organization.⁴⁶ Thus, where the organization delegates authority to use force through a recommendation, such force will not run afoul of the Article 2(4) prohibition.⁴⁷

⁴² Christian Tomuschat, *Uniting for Peace*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, 2008, available at: https://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf.

⁴³ U.N. Charter Arts 51 (armed force in self-defense) and 42 (armed force authorized by the Security Council).

⁴⁴ Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 ICJ REP. 151, 163 (July 20).

⁴⁵ U.N. Charter, Art. 51.

⁴⁶ Andrew Carswell, Unblocking the UN Security Council: The Uniting for Peace Resolution, 18 J. Conflict & Security L. 453, 461 (2013); Ved Nanda, *Challenges to the Security Council Veto: The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace, and the Responsibility to Protect*, 51 CASE WESTERN RES. J. INT’L L. 119, 139 (2020).

⁴⁷ Andrew Carswell, Unblocking the UN Security Council: The Uniting for Peace Resolution, 18 J. Conflict & Security L. 453, 461 (2013); Ved Nanda, *Challenges to the Security Council Veto: The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace, and the Responsibility to Protect*, 51 CASE WESTERN RES. J. INT’L L. 119, 139 (2020).

Since its first use in 1951, the Uniting for Peace Resolution has been invoked only eleven other times -- seven times at the request of a majority of members of the Security Council and four times unilaterally by the General Assembly. In each case, the General Assembly recommended non-use of force measures, such as: establishing a consensual peace keeping force (Suez Canal, 1950), establishing a commission of inquiry (Hungary 1956), calling for the withdrawal of foreign troops from Jordan and Lebanon (1958), calling for an embargo of weapons to the Congo (1960), calling for the rescission by Israel of unilateral measures in Jerusalem (1967), providing assistance to East Pakistani refugees (1971), calling for the withdrawal of foreign troops from Afghanistan (1980), calling for the withdrawal of Israel from territories occupied since 1967 (1980), condemning South Africa for the occupation of Namibia and calling for assistance to the liberation struggle (1981), calling on members to apply sanctions on Israel (1982), and requesting an advisory opinion of the ICJ on the legal consequences of the construction of a wall in the occupied Palestinian territory (1997).⁴⁸

The Soviet Union considered the Uniting for Peace mechanism to be an illegitimate usurpation by the General Assembly of powers reserved to the Security Council. It therefore refused to pay its assessed share for the peacekeeping forces authorized by the General Assembly for the middle east (1958) and Congo (1960). In an advisory opinion that has been described “as a paradigm shift in the character of the UN,”⁴⁹ the International Court

⁴⁸ Security Council Report, Security Council Deadlocks and Uniting for Peace: An Abridged History, October 2013, available at https://www.securitycouncilreport.org/atf/cf/%7B65BF96F9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security_Council_Deadlocks_and_Uniting_for_Peace.pdf; Larry D. Johnson, *Uniting for Peace: Does it Still Serve any Useful Purpose?* 108 AM. J. INT’L L. 106, 112 (2014).

⁴⁹ Laishram Malem Mangal, *Case Commentary on Certain Expenses of the United Nations Advisory Opinion of 20 July 1962*, RESEARCH GATE, July 2020, available at: https://www.researchgate.net/publication/342719409_Case_Commentary_Ce

of Justice determined that the expenses for the peacekeeping forces created by the General Assembly under the Uniting for Peace process were expenses of the organization that the Soviet Union was obligated to pay.⁵⁰ In so doing, the Court confirmed the power of the General Assembly to authorize peacekeeping forces with the consent of the territorial state, saying that the power of the Security Council to take action to maintain or restore international peace and security “is primary, not exclusive.”⁵¹ To support its opinion, the International Court of Justice articulated a broad approach to the implied powers doctrine, noting that “when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.”⁵²

III. Is the Uniting for Peace Resolution Still Relevant Today?

Until the 2022 Ukraine crisis, the Security Council had not referred any matter under the Uniting for Peace procedure since 1982, and the General Assembly had not unilaterally invoked it since 1997.⁵³ Professor Christian Tomuschat believes this reluctance reflected concern that the Uniting for Peace Resolution “has a potential that could subvert the well-equilibrated balance of

[tain expenses of the United Nations Advisory Opinion of 20 July 1962-converted](#)

⁵⁰ Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 ICJ REP. 151, (July 20), available at: <https://www.icj-cij.org/en/case/49/advisory-opinions>.

⁵¹ Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 ICJ REP. 151, (July 20), at p. 16, available at: <https://www.icj-cij.org/en/case/49/advisory-opinions>.

⁵² Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 ICJ REP. 151, 168 (July 20), available at: <https://www.icj-cij.org/en/case/49/advisory-opinions>.

⁵³ Ved Nanda, *Challenges to the Security Council Veto: The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace, and the Responsibility to Protect*, 51 CASE WESTERN RES. J. INT’L L. 119, 141 (2020).

power within the United Nations.”⁵⁴ This concern led the Soviet Union and later Russia to continuously object to the Resolution as authorizing the General Assembly to act in an *ultra vires* manner.⁵⁵ Meanwhile, after the Uniting for Peace Resolution was used in 1967, 1980, 1982, and 1997 to condemn and recommend sanctions against Israel, the United States soured on its utility. These concerns explain the dearth of times the Resolution has been invoked, and the length of time that transpired since its last use and 2022.

Moreover, Larry Johnson, former Deputy Legal Counsel of the United Nations, has argued that the Uniting for Peace Resolution is no longer needed.⁵⁶ He points out that since the General Assembly is now in session year-round, the Uniting for Peace Resolution is not necessary to call a special session.⁵⁷ He notes that the International Court of Justice confirmed in the “Wall” case that there is no bar to the General Assembly taking up a matter of which the Security Council is seized with or without invoking the Uniting for Peace Resolution.⁵⁸ He argues that since the General Assembly has exercised the powers of the Uniting for Peace Resolution a number of times without invoking the Resolution, such as in calling for voluntary sanctions, the Resolution is not a necessary predicate to such action.⁵⁹ And with respect to the General Assembly recommending the use of force pursuant to the Uniting for Peace

⁵⁴ Christian Tomuschat, *Uniting for Peace*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, 2008, available at: https://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf.

⁵⁵ Asian Udoh, *Case Study: Invoking the “Uniting for Peace” Resolution of 1950 to Authorize the Use of Humanitarian Military Interventions and Prevent Mass Atrocities in Syria*, 23 Willamette J. Int’l & Dispute Res. 187, 217 (2015).

⁵⁶ Larry D. Johnson, *Uniting for Peace: Does it Still Serve any Useful Purpose?* 108 Am. J. Int’l L. 106, 112 (2014).

⁵⁷ Larry D. Johnson, *Uniting for Peace: Does it Still Serve any Useful Purpose?* 108 Am. J. Int’l L. 106, 112 (2014).

⁵⁸ Larry D. Johnson, *Uniting for Peace: Does it Still Serve any Useful Purpose?* 108 Am. J. Int’l L. 106, 112 (2014).

⁵⁹ Larry D. Johnson, *Uniting for Peace: Does it Still Serve any Useful Purpose?* 108 Am. J. Int’l L. 106, 112 (2014).

resolution, Johnson argues that the Assembly can do so only within the limited context of supporting the exercise by States of their inherent right to individual or collective self-defense under Article 51 of the Charter.⁶⁰

A. The General Assembly's Creation of the IIIM

The Cold War began its return eight years before the Russian invasion of Ukraine, stemming from events in Syria, a close ally of Russia. Despite significant evidence of atrocity crimes being committed in the ongoing civil war in Syria — particularly by government forces — the U.N. Security Council was paralyzed by the Russian veto, unable to take any steps towards accountability. In May 2014, Russia vetoed a Security Council resolution that would have referred the situation in Syria to the International Criminal Court.⁶¹ Later, Russia vetoed a Security Council resolution that would have established an investigative mechanism to document Syrian use of chemical weapons and other atrocities.⁶² In all, Russia vetoed 13 resolutions to prevent accountability of the Syrian government since the outbreak of the Syrian civil war.⁶³

In contrast, in the 1990s the Security Council first condemned atrocities in the former Yugoslavia and Rwanda, then established an investigative commission to document them, and finally created ad hoc tribunals to prosecute the perpetrators.⁶⁴ Also, ten years later, the Security Council referred the situations in The

⁶⁰ Larry D. Johnson, *Uniting for Peace: Does it Still Serve any Useful Purpose?* 108 Am. J. Int'l L. 106, 112 (2014).

⁶¹ I. Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, THE GUARDIAN, 22 May 2014.

⁶² *Russia's 12 Vetoes on Syria*, RTE, April 11, 2018, available at: <https://www.rte.ie/news/world/2018/0411/953637-russia-syria-un-veto/>

⁶³ *Russia's 12 Vetoes on Syria*, RTE, April 11, 2018, available at: <https://www.rte.ie/news/world/2018/0411/953637-russia-syria-un-veto/>

⁶⁴ See generally, MILENA STERIO AND MICHAEL SCHARF, THE LEGACY OF AD HOC INTERNATIONAL TRIBUNALS IN INTERNATIONAL CRIMINAL LAW (2019).

Sudan and Libya to the ICC for prosecution.⁶⁵ But in Syria, the Security Council could do absolutely nothing. This led the United States Representative to bluntly declare: “The United States is disgusted that a couple of members of this Council continue to prevent us from fulfilling our sole purpose here, which is to address an ever-deepening crisis in Syria and a growing threat to regional peace and security. For months, this Council has been held hostage by a couple of members.”⁶⁶

Enter Liechtenstein’s U.N. Ambassador Christian Wenaweser, who had formerly served as President of the International Criminal Court’s Assembly of State Parties. In the fall of 2016, Ambassador Wenaweser hatched a bold plan for an end-run around the Security Council that did not involve invoking the disfavored Uniting for Peace Resolution. For months, Wenaweser canvassed U.N. Delegates, arguing: “We have postponed any meaningful action on accountability too often and for too long.”⁶⁷ Commenting on the outsized role Wenaweser played, Harvard Law Professor Alex Whiting writes, “the short history of international criminal justice, from Nuremberg to the present, is full of heroic individuals and their improbable and creative ideas that have pushed the project forward.”⁶⁸

Galvanized by Ambassador Wenaweser’s efforts, on December 21, 2016, the United Nations General Assembly took a historic step in establishing a mechanism to investigate and preserve evidence of international crimes in Syria, the first time the Assembly

⁶⁵ Security Council Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, March 31, 2005, <https://www.un.org/press/en/2005/sc8351.doc.htm>; Situation in Libya, ICC-01/11, available at: <https://www.icc-cpi.int/libya>.

⁶⁶ U.N. SCOR., 67th Sess., 6711th mtg., at 5, U.N. Doc. S/PV.6711 (Feb. 4, 2014).

⁶⁷ Michelle Nichols, *UN Creates Team to Prepare Cases on Syria War Crimes*, REUTERS, December 21, 2016, available at: <https://www.reuters.com/article/us-mideast-crisis-syria-warcrimes-idUSKBN14A2H7?il=0>

⁶⁸ Alex Whiting, *An Investigation Mechanism for Syria: The General Assembly Steps Ito the Breach*, 15 *Journal of International Criminal Justice* 231, (2017).

has established such a body.⁶⁹ Despite objection by Russia, the General Assembly adopted Resolution 71/248 by a vote of 105 to 15 with 52 abstentions, creating the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, known in shorthand as the IIIM.⁷⁰

The IIIM is empowered to collect evidence from other bodies including the Independent International Commission of Inquiry established by the Human Rights Council, and to conduct its own investigations “including interviews, witness testimony, documentation and forensic material.”⁷¹ The General Assembly resolution directs the IIIM to analyze the collected evidence and prepare files of evidence that could be provided to “national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”⁷²

This was the first time in history that the General Assembly established an investigative body to assemble and analyze evidence of international crimes for the purpose of preserving evidence for future international or domestic trials. Its authority to do so was questioned by Russia. During the debate on the resolution and subsequently in a *note-verbale* dated February 8, 2017, the Russian Government complained that “the General Assembly acted *ultra*

⁶⁹ Alex Whiting, *An Investigation Mechanism for Syria: The General Assembly Steps Ito the Breach*, 15 *Journal of International Criminal Justice* 231 (2017).

⁷⁰ UN Doc. A/71/L.48, 21 December 2016.

⁷¹ The Secretary-General, *Report of the Secretary General on the Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/71/755, 19 January 2017, at §12.

⁷² UN Doc. A/71/L.48, 21 December 2016, at § 4.

vires — going beyond its powers as specified” in the UN Charter.⁷³ Specifically, Russia argued that

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.⁷⁴

There was a time when it was not settled whether the Security Council, itself, had the power to establish a prosecutorial institution, let alone whether the General Assembly could do so. But that question was answered in the affirmative by the Appeals Chamber of the Yugoslavia Tribunal in 1995 based on the extraordinary powers vested in the Security Council under Chapter VII of the UN Charter to maintain international peace and security.⁷⁵ The General Assembly has much more limited powers, and they do not include the power to prosecute international crimes. Yet, it is not clear that the powers of the IIIM are “prosecutorial in nature” in the sense that they entail the prosecution of individuals, a power that could only be conferred by the Security Council. Rather, the resolution and Secretary General’s report describe a “prosecutorial” body only in respect to the *standards* that will be adopted by the IIIM when collecting and analyzing evidence. If one views the IIIM

⁷³ The Secretary-General, *Note verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary General*, UN Doc. A/71/793, 14 February 2017.

⁷⁴ *Id.*

⁷⁵ *Prosecutor v. Tadic*, Case No. IT-94-1-T (Trial Chamber, Decision on the Defense Motion: Jurisdiction of the Tribunal, 10 August 1995), affirmed, *Prosecutor v. Tadic*, Case No. IT-94-1-AR72 (Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995); VIRGINIA MORRIS AND MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, Vol. 1 at 95-97 (1998).

not as a sort of investigative judge or prosecutor but simply as a fact-finding body that will adhere to a criminal law standard in performing its functions, its creation would seem to be squarely within the powers of the General Assembly. In this respect the IIIM is not much different than the several commissions established by the General Assembly-created Human Rights Council to investigate international criminal law violations in Palestine (2006), Lebanon (2006), Darfur (2006), Libya (2011), Cote d'Ivoire (2011), Syria (2012), Eritrea (2014), DPRK (2014), and Ethiopia (2021).⁷⁶

Article 10 of the UN Charter gives the General Assembly the power to “discuss” and make “recommendations” concerning “any questions or matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter.”⁷⁷ As such, it is within the mandate of the General Assembly to consider questions of threats to peace and security in Syria and whether a referral to the ICC or the establishment of an ad hoc tribunal is warranted. Further, Article 22 of the Charter empowers the General Assembly to “establish such subsidiary organs as it deems necessary for the performance of its functions.”⁷⁸ Therefore, the General Assembly has the authority to establish a “subsidiary organ” to collect and assess the available evidence of international crimes in Syria in order to inform the General Assembly’s discussion and recommendations on these matters. On the other hand, the evidence collected by the IIIM would undeniably not be used solely (or even primarily) for the purpose of the General Assembly’s discussion and recommendations, but it is not clear that additional uses of the information would render the creation of the IIIM beyond the power of the General Assembly.

Whatever the merits of Russia’s legal argument, the establishment of this novel institution by the General Assembly

⁷⁶ Michael Ramsden, *Uniting Against Impunity: The UN General Assembly as a Catalyst for Action at the ICC*, 66 *Int’l & Comp. L. Quarterly* 893 (2017); International Commission of Human Rights Experts on Ethiopia. see: <https://www.ohchr.org/en/hr-bodies/hrc/ichre-ethiopa/index>.

⁷⁷ UN Charter, Article 10.

⁷⁸ UN Charter, Article 22.

clearly evinces a fundamental power shift away from the Security Council and to the General Assembly caused by the international community's frustration with the abuse of the veto to prevent action to deal with international atrocities. In providing a legal justification for this power shift, Professor Jennifer Trahan of New York University argues

[t]he veto power is being abused in a way never anticipated when the Charter was drafted, and in a way that is at odds with other bodies of international law (such as the highest level *jus cogens* norms) and the “purposes and principles” of the UN Charter, with which the Security Council (including its permanent members) are bound, under article 24.2 of the Charter, to act in accordance.⁷⁹

⁷⁹ Jennifer Trahan, *Russia's Illegitimate Veto*, *Opinio Juris* (Apr. 23, 2018), <https://opiniojuris.org/2018/04/23/the-narrow-case-for-the-legality-of-strikes-in-syria-and-russias-illegitimate-veto/>. Trahan argues that there are three ways in which the Russian veto of the proposal to refer the matter of Syria to the International Criminal Court, or to at least establish an international investigative mechanism for Syria was incompatible with the UN Charter. First, the veto power derives from the UN Charter, which is subsidiary to *jus cogens* norms. Thus, a veto that violates *jus cogens* norms, or permits the continued violation of *jus cogens* norms, would be illegal. The Charter (and veto power) must be read in a way that is consistent with *jus cogens*. Second, the veto power derives from the UN Charter, which states in Article 24(2) that the Security Council “[in] discharging [its] duties ... shall act in accordance with the Purposes and Principles of the United Nations.” A veto in the face of a credible draft resolution aimed at curtailing or alleviating the commission of genocide, crimes against humanity or war crimes does not accord with the Charter's purposes and principles. And finally, a permanent member of the Security Council that utilizes the veto power also has other treaty obligations, such as those under the Genocide Convention, which contains an obligation to “prevent” genocide. A Permanent Member's use of the veto that would enable genocide, or allow its continued commission, would violate that state's legal obligation to “prevent” genocide. A similar argument can be made as to allowing the perpetration of at least certain war crimes, such as “grave breaches” and violations of Common Article 3 of the 1949 Geneva Conventions. For a contrary view, see Mohamed Helal, *On the Legality of the Russian Vetoes and the Harsh Realities of International Law, A Rejoinder to Professor Jennifer*

To some, this extraordinary action by the General Assembly confirmed Larry Johnson's view that the Uniting for Peace Resolution was no longer necessary. The power of the General Assembly was ascending without it.

B. Humanitarian Intervention: The Bombing of the Syrian Chemical Weapons Facilities

In its 2001 report on "Responsibility to Protect," the International Commission on Intervention and State Sovereignty opined that the General Assembly could play an important role in legitimizing force to halt atrocities where the Security Council is prevented from doing so by the veto.⁸⁰ But fearing a slippery slope in which the Responsibility to Protect principle would be used in conjunction with the Uniting for Peace Resolution to target certain States (such as Israel), the "responsibility to protect" concept as adopted by the Assembly in the 2005 World Summit Outcome resolution does not contemplate the Assembly recommending that States use coercive force to stop a State from committing atrocity crimes against its own population.⁸¹

This explains why the General Assembly did not invoke the Uniting for Peace Resolution in the context of Syrian use of chemical weapons against the Syrian population in 2013-2018. With the Security Council paralyzed and the General Assembly not perceived as a viable option, on April 14, 2018, the United States, United Kingdom, and France acted on their own in conducting

Trahan, *Opinio Juris*, May 4, 2018, available at: <http://opiniojuris.org/2018/05/04/on-the-legality-of-the-russian-vetoes-in-the-un-security-council-and-the-harsh-reality-of-international-law-a-rejoinder-to-professor-jennifer-trahan/>

⁸⁰ Rep. of the Int'l Comm'n. on Intervention and State Sovereignty, *The Responsibility to Protect* (Dec. 2001).

⁸¹ 2005 World Summit Outcome, GA Res. 60/1 (Sept. 16, 2005).

airstrikes against three Syrian chemical weapons facilities.⁸² They justified their use of force as necessary to prevent the Assad regime from continuing to use chemical weapons against the Syrian population in the context of Security Council paralysis to establish accountability for this international crime. Before the Syrian airstrikes, most countries and experts had taken the position that there was no international law right of humanitarian intervention under customary international law or the UN Charter except when authorized by the UN Security Council.⁸³

This was confirmed in 1999, when Russia blocked the Security Council from authorizing force against Serbia to safeguard Kosovar Albanians in the Serb province of Kosovo from ethnic cleansing, and NATO launched a 78-day bombing campaign against Serbia without Security Council authorization. The United States and United Kingdom justified the action as a *sui generis* act to save hundreds of thousands of lives.⁸⁴ The UN described it as “unlawful but legitimate.”⁸⁵ In the years since the 1999 NATO airstrikes, countries have used force for humanitarian purposes without Security Council authorization on several other occasions, including the U.S.-U.K. imposition of a no-fly zone over Iraq to protect the Marsh Arabs from Saddam Hussein’s reprisals,⁸⁶ the Russian invasion of South Ossetia, Georgia ostensibly to protect

⁸² Michael P. Scharf, *Striking a Grotian Moment: How the 2018 Airstrikes on Syria have Changed International Law Related to Humanitarian Intervention*, 19.2 CHICAGO JOURNAL OF INTERNATIONAL LAW 586-614 (2019).

⁸³ Michael P. Scharf, *How the War on ISIS Changed International Law*, 48 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 15-68 (2016).

⁸⁴ U.S. Secretary of State Madeleine Albright, Press Conference with Russian Foreign Minister Igor Ivanov, Singapore, 26 July 1999, available at: <http://secretary.state.gov/www/statements/1999/990726b.html>; UK Prime Minister Tony Blair, UK Parliamentary Debates, Commons, 26 April 1999, co 30.

⁸⁵ Independent Int’l Comm’n on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 4 (2000).

⁸⁶ HC Deb 26 February 2001 vol 363 cc 620-34.

ethnic Russians living there from attack,⁸⁷ and the U.S. airstrikes against the ISIS terrorist group to save the besieged Yazidis on Mount Sinjar, Iraq.⁸⁸ But never before the April 14, 2018 airstrikes against Syria had humanitarian use of force been accompanied by a clear legal justification based on a right of humanitarian intervention.

In contrast to the prior cases, the countries participating in the April 2018 airstrikes on Syria embraced a common legal justification – humanitarian intervention – rather than cite only factual considerations that render use of force morally defensible as they had in the past. The United Kingdom was the most explicit of the three, telling the Security Council that its actions were legally justified on the basis of “humanitarian intervention” in the context of preventing use of chemical weapons when the Security Council had been paralyzed by a Permanent Member’s veto.⁸⁹ It stated that “[a]ny State is permitted under international law, on an exceptional

⁸⁷Brian Barbour and Brian Gorlick, *Embracing the Responsibility to Protect”: A Repertoire of Measures Including Asylum for Potential Victims*, 20 INTERNATIONAL JOURNAL OF REFUGEE LAW 533, 559 (2008).

⁸⁸Helene Cooper and Michael D. Shear, *Militants Seize of Mountain in Iraq is Over, Pentagon Says*, THE NEW YORK TIMES, August 14, 2014, available at: http://www.nytimes.com/2014/08/14/world/middleeast/iraq-yazidi-refugees.html?_r=0; Helene Cooper, Mark Landler, and Alissa J. Rubin, *Obama Allows Limited Airstrikes on ISIS*, THE NEW YORK TIMES, August 7, 2014, available at: <http://www.nytimes.com/2014.08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html>.

⁸⁹A policy paper issued by the UK Prime Minister’s Office stated: “The UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force is humanitarian intervention....” Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai, and Elvina Pothelet, *Mapping States Reactions to the Syria Strikes of April 2018*, JUST SECURITY, April 22, 2018, available at: <https://www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018/>

basis, to take measures in order to alleviate overwhelming humanitarian suffering.”⁹⁰

The United Kingdom’s position was that humanitarian intervention in such cases without Security Council authorization would not be in violation of Article 2(4) of the UN Charter because that provision only prohibits the use of force that is “against the territorial integrity or political independence of any state” and “inconsistent with the Purposes of the United Nations.”⁹¹ Humanitarian intervention, the United Kingdom argued, is consistent with the Charter’s Purposes and Principles, which include “maintaining international peace and security,” “promoting and encouraging respect for human rights,” and “sav[ing] succeeding generations from the scourge of war.” According to the United Kingdom, humanitarian intervention in response to use of chemical weapons is not seeking to threaten the integrity of a state or bring about political change, but only to save lives and enforce the global ban on chemical weapons.⁹² The United Kingdom’s argument would have been strengthened if the General Assembly had authorized the action under the Uniting for Peace Resolution, thereby rendering it a collective action taken by the U.N. rather than by just three States.⁹³

For its part, the United States told the Security Council that “[t]he United States is deeply grateful to the United Kingdom and

⁹⁰ Provisional Verbatim Record of the Security Council, Threats to International Peace and Security: The Situation in the Middle East, UN Doc. S/PV.8233, April 14, 2018.

⁹¹ Richard Ware, *Briefing Paper: The Legal Basis for Air Strikes Against Syrian Government Targets*, HOUSE OF COMMONS LIBRARY, April 16, 2018, available at: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8287>

⁹² Richard Ware, *Briefing Paper: The Legal Basis for Air Strikes Against Syrian Government Targets*, HOUSE OF COMMONS LIBRARY, April 16, 2018, available at: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8287>

⁹³ Andrew Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SECURITY L. 453, 461 (2013); Ved Nanda, *Challenges to the Security Council Veto: The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace, and the Responsibility to Protect*, 51 CASE WESTERN RES. J. INT’L L. 119, 139 (2020).

France for their part in the coalition to defend the prohibition of chemical weapons. We worked in lock step: *we were in complete agreement*” (emphasis added).⁹⁴ As such, the United States can be held to have implicitly adopted the rationale of the United Kingdom.⁹⁵ This is particularly significant because the United States has never before recognized a right of humanitarian intervention outside of Security Council authorization under international law.

Out of a total of seventy states that publicly commented on the airstrikes at the United Nations or elsewhere, only a small handful of countries questioned their legality.⁹⁶ This suggests that the United Kingdom, France and the United States could have easily garnered the votes of two-thirds the General Assembly to obtain authorization under the Uniting for Peace Resolution if they had decided to go that route. Such action would have avoided the possibility of mixed motives and self-interests. As one author has observed, “the most effective safeguard that the developing world has against unilateral misuse of force by those with the military capabilities is by an unbiased U.N. authorization of collective force.”⁹⁷

⁹⁴ Provisional Verbatim Record of the Security Council, Threats to International Peace and Security: The Situation in the Middle East, UN Doc. S/PV.8233, April 14, 2018.

⁹⁵International Law Commission, Draft Articles on State Responsibility, Art. 11 (2008), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (citing international cases where a State’s unequivocal acknowledgment and adoption of another’s position will render the State retroactively responsible for it.).

⁹⁶ Fifty-six separate states and NATO (consisting of 28 member States) – for a total of over seventy countries -- publicly expressed opinions about the April 14, 2018 airstrikes. Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai, and Elvina Pothelet, *Mapping States Reactions to the Syria Strikes of April 2018*, JUST SECURITY, April 22, 2018, available at: <https://www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018/>

⁹⁷ Asian Udoh, *Case Study: Invoking the “Uniting for Peace” Resolution of 1950 to Authorize the Use of Humanitarian Military Interventions and Prevent Mass Atrocities in Syria*, 23 Willamette J. Int’l & Dispute Res. 187, 223-224 (2015).

The implications of the April 2018 airstrikes are far-reaching. Like the creation of the IIIM, the growing recognition of a right of humanitarian intervention without Security Council authorization represents a fundamental power shift from the Security Council – which had historically been viewed as holding the keys to use of force – to coalitions of states who assert a right to act to save lives when the Council is paralyzed.

C. Russia’s 2022 Invasion of Ukraine: Reemergence of the Uniting for Peace Resolution

While the United States had been wary of resorting to the Uniting for Peace Resolution for the past fifty years,⁹⁸ in response to Russia’s invasion of Ukraine in February 2022 the United States decided the time was right to dust off the Resolution and once again put it to use. On February 27, 2022, eleven members of the Security Council voted in favor of the U.S.-sponsored resolution calling for an emergency session of the General Assembly under the Uniting for Peace process; only Russia opposed, while three members abstained (China, India and the United Arab Emirates).⁹⁹ Twenty-four hours later, in an emergency session broadcast live around the world, an overwhelming number of States joined together to express their collective disapprobation of the Russian aggression.

Ukraine’s representative, who introduced the resolution, said that “for almost a week, his country has been fighting missiles and bombs. Half a million people have fled as the Russian Federation tries to deprive his country of the right to exist, carrying

⁹⁸ The last time the United States proposed General Assembly action under the Uniting for Peace Resolution was in response to the Soviet invasion of Afghanistan in 1980. Security Council Report, Security Council Deadlocks and Uniting for Peace: An Abridged History, October 2013, available at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security_Council_Deadlocks_and_Uniting_for_Peace.pdf

⁹⁹ [Ukraine: Vote on Draft “Uniting for Peace” Resolution* : What's In Blue : Security Council Report](#)

out a long list of war crimes.”¹⁰⁰ The U.S. representative urged countries to vote in favor of the Resolution, saying her country “is choosing to stand with the Ukrainian people and will hold the Russian Federation accountable for its actions.”¹⁰¹ The representative of the European Union, speaking for the 28 EU States, added: “This is not just about Ukraine, this is not just about Europe, this is about defending an international order based on rules. ... Today's historic vote clearly shows the Russian Federation’s isolation from the rest of the international community.”¹⁰²

The Special Session resulted in the adoption of Resolution ES-11/1 by a large majority --141 in favor, 5 against and 35 abstentions.¹⁰³ The Resolution did not go as far as some of the prior Uniting for Peace Resolutions. It did not call for sanctions, peacekeepers, or collective use of force. But it did return to a legal characterization that the General Assembly had long avoided by declaring the Russian invasion to constitute an act of “aggression”¹⁰⁴ – recognized as a crime under international law.¹⁰⁵ Specifically, the Resolution deplored “in the strongest terms the “aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of

¹⁰⁰ U.N. Press Release, Eleventh Emergency Special Session, 2 March 2022, available at:

<https://press.un.org/en/2022/ga12407.doc.htm>.

¹⁰¹ U.N. Press Release, Eleventh Emergency Special Session, 2 March 2022, available at:

<https://press.un.org/en/2022/ga12407.doc.htm>.

¹⁰² U.N. Press Release, Eleventh Emergency Special Session, 2 March 2022, available at:

<https://press.un.org/en/2022/ga12407.doc.htm>.

¹⁰³ UNGA Res. ES-11/1 (2022), available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/27/PDF/N2227227.pdf?OpenElement>

¹⁰⁴ UNGA Res. ES-11/1 (2022), available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/27/PDF/N2227227.pdf?OpenElement>

¹⁰⁵ See Michael Scharf, Universal Jurisdiction and the Crime of Aggression, 53 Harv. Int’l L. J. 358-389 (2012), available at: <https://harvardilj.org/wp-content/uploads/sites/15/2012/10/HLI201.pdf>

Charter” and condemned Russia’s declaration as to the necessity of this “special military operation.”¹⁰⁶

Resolution ES-11/1 further demanded Russia to “cease its use of force against Ukraine” as well as to “immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders.”¹⁰⁷ It also condemned “all violations of international humanitarian law and violations and abuses of human rights,” demanding that parties to the conflict “fully comply with their obligations under international humanitarian law to spare the civilian population.”¹⁰⁸

The finding that Russia committed aggression in Ukraine has already had an effect in the *Ukraine v. Russia* case, where the International Court of Justice drew upon Resolution ES-11/1 to support the ordering of provisional measures to protect the rights of Ukraine from being subject to the use of force by Russia based upon false allegations of genocide under the Genocide Convention.¹⁰⁹ And it could be of legal relevance in criminal cases in either domestic courts or an ad hoc tribunal prosecuting Russian leaders for the crime of aggression.¹¹⁰

Resolution ES-11/1 is unlikely to be the General Assembly’s final word on the Ukraine situation. Rather, it is anticipated that the resolution will be a door opener to a variety of possible collective

¹⁰⁶ UNGA RES. ES-11/1 (2022), Operative Para. 2 and Preamble Para. 10, available at: [HTTPS://DOCUMENTS-DDS-NY.UN.ORG/DOC/UNDOC/LTD/N22/272/27/PDF/N2227227.PDF?OPENELEMENT](https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/27/PDF/N2227227.PDF?OPENELEMENT)

¹⁰⁷ UNGA RES. ES-11/1 (2022), Operative Para. 4, available at: [HTTPS://DOCUMENTS-DDS-NY.UN.ORG/DOC/UNDOC/LTD/N22/272/27/PDF/N2227227.PDF?OPENELEMENT](https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/27/PDF/N2227227.PDF?OPENELEMENT)

¹⁰⁸ UNGA RES. ES-11/1 (2022), Operative Para. 12, available at: [HTTPS://DOCUMENTS-DDS-NY.UN.ORG/DOC/UNDOC/LTD/N22/272/27/PDF/N2227227.PDF?OPENELEMENT](https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/27/PDF/N2227227.PDF?OPENELEMENT)

¹⁰⁹ ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (UKRAINE V. RUSSIAN FEDERATION), ORDER OF 15 MARCH 2022, available at: [HTTPS://WWW.ICJ-CIJ.ORG/EN/CASE/182/ORDERS](https://www.icj-cij.org/en/case/182/orders)

¹¹⁰ See Michael Scharf, Universal Jurisdiction and the Crime of Aggression, 53 Harv. Int’l L. J. 358-389 (2012), available at: <https://harvardilj.org/wp-content/uploads/sites/15/2012/10/HLI201.pdf>

actions by the General Assembly as the crisis unfolds in the months and years ahead. For example, the General Assembly's finding in Resolution ES-11/1 that the "rights and benefits" of membership¹¹¹ entail good faith obligations could provide a foundation for future claims that the Russian government has not acted in accordance with the expectations incumbent on a U.N. member state. While the General Assembly cannot unilaterally suspend Russia from the U.N. through Article 5 of the UN Charter,¹¹² it could potentially use that finding to reject Russia's credentials and block Russian diplomats from participating in U.N. bodies. Usually, credentials challenges involve competing government claims to represent the State, but there is precedent for the General Assembly to factor in a regime's adherence to the U.N. Charter in assessing whether to accept or reject credentials. The credentials of the South African apartheid regime were thus rejected for many years by the General Assembly due to its "flagrant violation" of the U.N. Charter.¹¹³

Another way in which the General Assembly's determinations might assist the international community's response to Russia's invasion of Ukraine is in supporting the legal justification and coalescing political will for the continuation and strengthening of sanctions against Russia. In response to Russia's war of aggression against Ukraine, the United States, European Union, and several other States have imposed the most comprehensive economic sanctions ever leveled on a major world power.¹¹⁴ Individual sanctions (including freezing of assets and restrictions on travel) have now been imposed on more than a

¹¹¹ UNGA RES. ES-11/1 (2022), Preamble Para. 3, AVAILABLE AT: [HTTPS://DOCUMENTS-DDS-NY.UN.ORG/DOC/UNDOC/LTD/N22/272/27/PDF/N2227227.PDF?OPENELEMENT](https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/27/PDF/N2227227.pdf?OpenElement)

¹¹² U.N. Charter, Art. 5 (suspension requires a recommendation by the Security Council followed by a decision by the General Assembly).

¹¹³ Raymond Suttner, *Has South Africa been Illegally Excluded from the United Nations General Assembly*, 17 THE COMPAR. & INT'L L. J. OF SOUTHERN AFRICA 279-301 (1984).

¹¹⁴ Stefan Meister and David Jalivand, *Sanctions Against Russia*, ++++++, June 8, 2022, available at: <https://dgap.org/en/research/publications/sanctions-against-russia>

thousand Russian decision-makers in key political and economic positions. Almost 50 percent of the Russian central bank's foreign exchange reserves have been frozen, and Western banks have been prohibited from undertaking transactions with it, making it extremely difficult for Russia to service debt. Other Russian banks have been removed from the SWIFT system, making international transactions more difficult for Russian companies. Russian airlines have been banned from European and US airspace; their aircraft are no longer being maintained and they cannot obtain parts. In addition, Russian energy and arms companies can no longer receive loans from Western banks. Key technologies for aviation, shipping, and raw material extraction and processing are subject to an export ban.¹¹⁵ While Russia has the monetary reserves and revenue from continuing oil and gas exports to fund its military operations, "it may not be able to arm it as easily if sanctions continue."¹¹⁶ Restrictions on imports of aviation parts and high-tech goods mean that Russia will "have very limited ability to make tanks, missiles...and fighter jets."¹¹⁷

Russia is the world's second-largest exporter of crude oil, accounting for most of its foreign trade.¹¹⁸ Significantly, the United States and EU States have agreed to ban imports of Russian coal, gas, and petroleum, but with transitional periods for countries that

¹¹⁵ Stefan Meister and David Jalivand, *Sanctions Against Russia*, June 8, 2022, available at: <https://dgap.org/en/research/publications/sanctions-against-russia>

¹¹⁶ Ashish Valentine, Are sanctions actually hurting Russia's economy?, National Public Radio, July 1, 2022, available at: <https://www.npr.org/2022/07/01/1109033582/are-sanctions-actually-hurting-russias-economy-heres-what-you-need-to-know>.

¹¹⁷ *Id.*

¹¹⁸ Yahoo Finance, Who is still Buying Russian Oil and Gas?, July 3, 2022, available at: https://finance.yahoo.com/news/still-buying-russian-oil-gas-150000467.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAALc7hUsjHpvOb5KwAGqLOWUva0-dkNhMLbR7aYK1VDnT-UWIsY3loBUR1CXjcM0FQuWCXg8gf3cmRA1ozywINtPodl4C1eDpLFpfd5TIBjX0Aakrmlunx5a9sgGVSIMS74liEZyfcq-Fnp-zemUNpg9K6L8mvfP8TrKq2D1z4ES

are particularly affected and exemptions for pipeline deliveries.¹¹⁹ Despite these sanctions, Russia exported \$97.7 billion worth of fossil fuels in the first 100 days since its invasion of Ukraine, at an average of \$977 million per day.¹²⁰ Most of the Russian oil, gas, and coal went to China, India, Turkey, Japan, South Korea, and Egypt, which have not imposed bans on Russian oil.¹²¹ Through these exports, Russia is keeping its economy afloat. This demonstrates an axiom of trade sanctions – they don't work well unless they are applied universally, as they were against Iran in the early 2000s.¹²²

The General Assembly has used the Uniting for Peace Resolution in the past to call upon members to impose diplomatic sanctions and trade embargoes as a countermeasure to induce compliance with international law by a law-breaking State.¹²³ For States questioning the legitimacy of such sanctions, the General Assembly could play a useful role certifying that the conditions for

¹¹⁹ Stefan Meister and David Jalivand, *Sanctions Against Russia*, June 8, 2022, available at: <https://dgap.org/en/research/publications/sanctions-against-russia>

¹²⁰ *Who is still Buying Russian Oil and Gas?*, YAHOO FINANCE, July 3, 2022, available at: [https://finance.yahoo.com/news/still-buying-russian-oil-gas-150000467.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAALc7hUsjHpvOb5KwAGqLOWUva0-dkNhMLbR7aYK1VDnT-UWIsY3loBUR1CXjcMOfQuWCXg8gf3cmRA1ozywINtPodI4C1eDpLFpfd5TIBjX0Aakrmlunx5a9sgGVSIMS74IiEZYfcg-Fnp-zemUNpg9K6L8mvfP8TrKq2D1z4ES](https://finance.yahoo.com/news/still-buying-russian-oil-gas-150000467.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAALc7hUsjHpvOb5KwAGqLOWUva0-dkNhMLbR7aYK1VDnT-UWIsY3loBUR1CXjcMOfQuWCXg8gf3cmRA1ozywINtPodI4C1eDpLFpfd5TIBjX0Aakrmlunx5a9sgGVSIMS74IiEZYfcg-Fnp-zemUNpg9K6L8mvfP8TrKq2D1z4ES;); Nicolla Conte, *Who's Still Buying Fossil Fuels from Russia*, June 22, 2022, available at: <https://elements.visualcapitalist.com/importers-of-russian-fossil-fuels/>

¹²¹ *Who is still Buying Russian Oil and Gas?*, YAHOO FINANCE, July 3, 2022.

¹²² *Sanctions on Iran*, COUNCIL ON FOREIGN RELATIONS, July 15, 2015, available at: <https://www.cfr.org/background/international-sanctions-iran>

¹²³ Security Council Report, *Security Council Deadlocks and Uniting for Peace: An Abridged History*, October 2013, available at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security_Council_Deadlocks_and_Uniting_for_Peace.pdf; Larry D. Johnson, *Uniting for Peace: Does it Still Serve any Useful Purpose?* 108 AM. J. INT'L L. 106, 112 (2014).

the valid invocation of the law of countermeasures under Article 49 of the International Law Commission's Draft Articles on State Responsibility (proportionality, proper purpose, and temporal limitation) have been met.¹²⁴

Finally, in collaboration with Ukraine, acting under the Uniting for Peace Resolution, the General Assembly could establish a "hybrid tribunal" to prosecute the Crime of Aggression. Such a court has been proposed by a number of experts and organizations.¹²⁵ The International Criminal Court can prosecute war crimes, crimes against humanity, and genocide committed by Russian nationals in Ukraine because the Ukraine government lodged a declaration accepting the Court's jurisdiction over such crimes since 2013.¹²⁶ But a separate international tribunal is needed because the International Criminal Court does not have jurisdiction over Russian aggression under the terms of the 2010 Kampala Aggression Amendment to the ICC Statute.¹²⁷ Moreover, although

¹²⁴ International Law Commission, Draft Articles on State Responsibility (2001) (Art. 49), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; Michael Ramsden, *Uniting for Peace, the Emergency Special Session on Ukraine*, Harvard International Law Journal Online (2022).

¹²⁵ On April 28, 2022, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution proposing the establishment of an ad-hoc international tribunal investigate and prosecute the crimes of Russia's military aggression in Ukraine, available at <https://www.coe.int/en/web/portal/-/pace-calls-for-an-ad-hoc-international-criminal-tribunal-to-investigate-war-crimes-in-ukraine>; *Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine*, March 4, 2022, available at <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>; Jennifer Trahan, JUST SECURITY, Mar. 7, 2022, <https://www.justsecurity.org/80545/un-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-themodel/>.

¹²⁶ See First and Second Declarations lodged by Ukraine, dated November 2013 and April 2014, available at <https://www.icc-cpi.int/ukraine>.

¹²⁷ Rome Statute for an International Criminal Court, Arts. 8 Bis, 15 Bis (5). Since Russia is not a party to the ICC Statute and has not accepted the

Ukraine has a criminal statute granting Ukraine courts jurisdiction over the Crime of Aggression,¹²⁸ Ukraine would not be able to prosecute the top Russian leaders because of the doctrine of Head of State Immunity, which does not apply to international courts.¹²⁹

As discussed above, the General Assembly's powers are limited to making recommendations, as confirmed by the International Court of Justice in the *Certain Expenses* case and the General Assembly lacks the ability to take enforcement action, which is the exclusive prerogative of the Security Council.¹³⁰ As the International Criminal Tribunal for the Former Yugoslavia's Appeals Chamber made clear in the *Tadić case*, the establishment of a criminal tribunal is a form of such coercive or enforcement action.¹³¹ But the General Assembly's past practice has indicated a way around those limitations. The General Assembly can support an exercise of criminal jurisdiction possessed by one or more UN Member States. The foremost example is the GA's creation of the

Aggression Amendment, Russian nationals cannot be prosecuted by the ICC for the Crime of Aggression unless the Security Council referred the case.

¹²⁸ Article 437 of the Ukrainian Criminal Code states that (1) "planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes, - shall be punishable by imprisonment for a term of seven to twelve years" and (2) "conducting an aggressive war or aggressive military operations, - shall be punishable by imprisonment for a term of ten to fifteen years."

¹²⁹ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14), available at: <https://www.icj.org/public/files/case-related/121/121-20020214-JUD-01-00-EN>

¹³⁰ *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 165 (July 20)

¹³¹ *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 37-40, 44 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Since the ICTY was created under Article 41 of the Charter by the Security Council, the passage is dicta as applied to the General Assembly creation of a Tribunal. Professor Michael Ramsden has argued that the General Assembly would have the implied power to create such a tribunal under Article 22 of the UN Charter. See Michael Ramsden, *Uniting for MH17*, 7 *ASIAN J. INT'L L.* 1, 11 (2016).

Extraordinary Chambers in the Courts of Cambodia (ECCC). In the case of the ECCC, the General Assembly introduced a resolution recommending the UN Secretary General to enter into a bilateral agreement with the Government of Cambodia for establishing a criminal tribunal,¹³² and subsequently, the resolution establishing the ECCC was approved by the General Assembly.¹³³

IV. Conclusion

The Security Council and General Assembly's resort to the Uniting for Peace mechanism for the first time since 1982 reflects the failure of the Security Council to fulfill its responsibility to respond to threats to international peace and security. With the Security Council paralyzed once again by the veto during a new Cold War, institutional power has shifted to the General Assembly.

The United States conceived the Uniting for Peace mechanism during the Korean War to end-run the Soviet veto and supported its use for several decades thereafter. But after the Uniting for Peace mechanism began to be used as a way to sanction Israel notwithstanding U.S. vetoes at the Security Council, the United States concluded that the mechanism should be relegated to the dustpan of history, where it remained unused for 30 years. The dawn of a new Cold War, sparked by Russia's invasion of Ukraine, changed the calculus. In resorting to the Uniting for Peace mechanism in 2022, the United States had little to lose because the General Assembly through diplomatic practice and International Court of Justice decisions, had slowly amassed the power to act on matters of which the Security Council was seized, to recommend

¹³² Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, available at:

https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf

¹³³Resolution 57/228 of May 13, 2003, <http://www.unakrt-online.org/sites/default/files/documents/A-Res-57-228B.pdf>

imposition of sanctions, and to create investigative bodies and hybrid tribunals without invoking the Uniting for Peace resolution.

The foundation of the Uniting for Peace Resolution imbued Resolution ES-11/1 with tremendous symbolic value, and the Resolution's determination that Russia had committed an unprovoked act of aggression had an immediate impact on the Russia-Ukraine International Court of Justice case and has set the stage for subsequent actions by the General Assembly. These might include a credentials challenge to suspend the Russian delegation from participation at the United Nations, endorsement of diplomatic and economic sanctions, and the creation of a hybrid tribunal to prosecute Russian leaders for the crime of aggression.

This article's discussion of possible steps the General Assembly can take under the Uniting for Peace Resolution to continue to engage in the Ukraine crisis in the face of Security Council paralysis would not be complete without recognizing the significant political challenges that stand in the way of taking such action. In the context of the Ukraine crisis, the diplomatic winds can change quickly reflecting the evolving situation on the ground. But as Professor Michael Ramsden has observed, as States seek "creative solutions to overcome misuses of the Security Council veto, it is the General Assembly, now as in 1950, that can step into the breach."¹³⁴

¹³⁴ Michael Ramsden, *Uniting for Peace, the Emergency Special Session on Ukraine*, Harvard International Law Journal Online (2022).