

## “UNITING FOR PEACE” AND HUMANITARIAN INTERVENTION: THE AUTHORISING FUNCTION OF THE U.N. GENERAL ASSEMBLY

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*Abstract:* Although the end of the Cold War has seen the functional expansion of the United Nations Security Council, concerns still remain over its legitimacy, driven in part by its failure to address serious and persistent human rights abuses. While this has resurrected arguments in favour of the doctrine of humanitarian intervention outside the U.N. Charter framework, little attention has been paid to how the U.N. General Assembly may authorise such enforcement action under a U.N. mandate through the invocation of the *Uniting for Peace* mechanism. Some dismiss *Uniting for Peace* as little more than a relic of the Cold War, but, if properly conceived, the General Assembly may authorise a humanitarian intervention where the Security Council is deadlocked and has failed to accomplish its primary responsibility of maintaining international peace and security. This article will consider the constitutional foundations of the *Uniting for Peace* resolution and the scope for the General Assembly to assume analogous functions to that of the Security Council in authorising enforcement action.

### I. INTRODUCTION

The United Nations Security Council (Council) is, by any legal measure, an extraordinary institution. Possessing a broad power to render mandatory decisions that bind members of the United Nations (U.N.), it may also authorise measures up to and including forcible coercive action where it determines there is a “threat to the peace, breach of the peace, or act of aggression.”<sup>1</sup> In discharging its “primary responsibility” of maintaining international peace and security, the Council has embraced a teleological interpretation of its mandatory and coercive powers under the U.N. Charter to address diverse security concerns. The expansion of the Council’s constitutional powers following the end of the Cold War has included the introduction of measures aimed at compelling the seizure of assets belonging

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<sup>1</sup> See U.N. Charter arts. 39–42. The Council is one of six principal organs of the U.N., alongside the General Assembly, the Trusteeship Council, the Economic and Social Council, the International Court of Justice, and the Secretariat. The Council comprises fifteen Members: five of whom are permanent (United States, United Kingdom, China, Russia, and France). The other ten members of the Council are appointed on a non-permanent basis and hold their place for two-year terms. U.N. Charter art. 23. The Council is commonly regarded as the “executive” arm of the U.N. given that it possesses binding powers and a membership of states who are often able to ensure effective implementation. For further discussion of the Council’s structure and powers, see EDWARD C. LUCK, *UN SECURITY COUNCIL: PRACTICE AND PROMISE* (2006); NEIL FENTON, *UNDERSTANDING THE UN SECURITY COUNCIL: COERCION OR CONSENT?* (2004).

to terrorists, the creation of international *ad hoc* tribunals, the power to make a referral to the International Criminal Court (ICC), and the ability to qualify a humanitarian crisis as a “threat to the peace” even without any apparent cross-border security dimension to the crisis.<sup>2</sup>

Despite the impressive growth in the Council’s activities after the end of the Cold War, its legitimacy remains in question.<sup>3</sup> Although legitimacy may be measured in different ways, one concern in particular continues to resonate: the perceived “misuse” of the veto in situations involving serious human rights abuse, arising where permanent members act in their own national interest instead of in a manner that best promotes the protection of human rights and international security. The failure of the Council to avert genocide in Rwanda or to exert any meaningful influence over the humanitarian intervention in Kosovo prompted discussion on the continued suitability of the U.N. collective security framework in an era where human rights go beyond mere abstract moral claims to having a universal (*erga omnes*) character.<sup>4</sup>

The responsibility to protect (*RtoP*) doctrine, a set of principles proposed in a 2001 report by the International Commission on Intervention and State Sovereignty, attempted to inculcate within the U.N. a set of norms that would guide the Council’s exercise of discretion.<sup>5</sup> The authors of the *RtoP* report noted that the Council “should deal promptly with any request

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<sup>2</sup> See generally THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 (Vaughn Lowe et al. eds., 2008).

<sup>3</sup> See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552 (1993) (offering a systematic analysis of Council legitimacy); Martin Binder & Monika Heupel, *The Legitimacy of the UN Security Council: Evidence from Recent General Assembly Debates*, 59 INT’L STUD. Q. 238 (2015); Ian Hurd, *The UN Security Council and the International Rule of Law*, 7 CHINESE J. INT’L POL. 361 (2014); Devon Whittle, *The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action*, 26 EUR. J. INT’L L. 671 (2015); SIMON CHESTERMAN, THE UN SECURITY COUNCIL AND THE RULE OF LAW: FINAL REPORT AND RECOMMENDATIONS FROM THE AUSTRIAN INITIATIVE 2004–2008 (2008), [http://iilj.org/research/documents/UNSC\\_and\\_the\\_Rule\\_of\\_Law.pdf](http://iilj.org/research/documents/UNSC_and_the_Rule_of_Law.pdf).

<sup>4</sup> *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. Rep. 3, ¶ 33 (Feb. 5) (holding that basic rights of human persons are *erga omnes*). For criticism of Council inaction in Rwanda, see Michael N. Barnett, *The UN Security Council, Indifference, and Genocide in Rwanda*, 12 CULTURAL ANTHROPOLOGY 551 (1997); Linda Melvern, *The Security Council: Behind the Scenes*, 77 INT’L AFF. 101 (2001).

<sup>5</sup> See generally INT’L COMM’N INTERVENTION AND ST. SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001) [hereinafter ICISS REPORT] (arguing that *RtoP* is enshrined in two key principles: 1) State sovereignty implies responsibility, with the primary responsibility for the protection of a State’s people vesting with the State itself; and 2) the non-intervention principle that underpins sovereignty yields to the international responsibility to protect where a population is suffering serious harm due to State failure).

for authority to intervene where there are allegations of large-scale loss of human life or ethnic cleansing.”<sup>6</sup> Further, in light of this changing landscape there is growing state support for a code of conduct proposed by France, which would require permanent members of the Council to voluntarily abstain from using a veto in cases “involving mass atrocity crimes.”<sup>7</sup> Although *RtoP* has gained some traction within the U.N., the failure of the Council to agree on a resolution to ease the humanitarian crisis in Syria has provoked widespread condemnation amongst states, prompting the U.N. General Assembly (Assembly) to pass a strongly worded resolution, by a large majority, “deploring the *failure* of the Security Council.”<sup>8</sup> In the field of international justice, the Council has also been criticised for condoning impunity given that it was deadlocked on both a referral to the ICC to investigate the Syrian situation and also on the creation of an *ad hoc* tribunal for the MH17 airline disaster.<sup>9</sup>

While some may contend that the Council’s 2012 deadlock over Syria stemmed from reasonable disagreement among the permanent members on the appropriate course of action, the prospect of the Council returning to the post-Cold War levels of cooperation that contributed to its functional expansion remains far from certain. Not all permanent members wholeheartedly share the view that the Council’s functions include the regulation of human rights situations within a state, reflecting a conception of security that prioritises national sovereignty over human rights.<sup>10</sup> Additionally, recent tensions among the permanent members over Russia’s intervention in Crimea have provoked references to a “new Cold War,” a view apparently most recently shared by Russian Prime Minister Dmitry

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<sup>6</sup> *Id.* at 50.

<sup>7</sup> Meetings Coverage, Security Council, U.N. Speakers Call for Voluntary Suspension of Veto Rights in Cases of Mass Atrocity Crimes, as Security Council Debates Working Methods, U.N. Meetings Coverage SC/11164 (Oct. 29, 2013). During this meeting, representatives for the following states spoke in support of France’s proposal: Australia, Chile, Germany, Hungary, Liechtenstein, Malaysia, Maldives Mexico, Rwanda, Singapore, Slovenia, Switzerland, and Ukraine.

<sup>8</sup> G.A. Res. 66/253 B, (Aug. 3, 2012) (133 votes to 12, with 31 abstentions) (emphasis added).

<sup>9</sup> Meetings Coverage, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Meetings Coverage SC/11407 (May 22, 2014); U.N. SCOR, 70th Sess., 7498th mtg, U.N. Doc. S/PV.7498 (July 29, 2015). See also Michael Ramsden, *Uniting for MH17*, ASIAN J. INT’L L. (forthcoming 2016).

<sup>10</sup> Alex J. Bellamy, *The Responsibility to Protect Turns Ten*, 29 ETHICS & INT’L AFF. 161, 175–76 (2015). Non-permanent member votes are important, but permanent members are *primus inter pares*, thus the most important focus for analysis on Council decision-making. David P. Forsythe, *The U.N. Security Council and Response to Atrocities: The P-5 and International Criminal Law*, 34 HUM. RTS. Q. 840, 841 (2012).

Medvedev.<sup>11</sup> Robert Legvold cautioned that these “new Cold War” tensions “will affect nearly every important dimension of the international system.”<sup>12</sup> Given the likelihood of Council deadlock in the future on serious human rights abuses, it is necessary to evaluate the feasibility of invoking other collective security mechanisms to alleviate such crises.

In this respect, there have been calls for the Assembly to make use of the *Uniting for Peace (UfP)* resolution.<sup>13</sup> This resolution contemplates Assembly action where, due to an absence of unanimity, the Council fails to maintain international peace and security in the view of the Assembly.<sup>14</sup> The Assembly first invoked *UfP* to recommend the continuation of U.N. action in Korea in 1950 following the Soviet Union’s veto of this mandate. *UfP* has since been used to condemn acts of aggression and alien occupation, to support peacekeeping operations, and to augment claims of a people to self-determination, as with Palestine.<sup>15</sup> In providing a basis for the Assembly to assume an enhanced role in regulating international security, it may therefore provide a solution in instances where the international community supports a “humanitarian intervention” that is otherwise stymied by a Council Member’s veto.

Still, uncertainties remain as to the continued relevance of *UfP* in a world that has moved on since the end of the Cold War. From the perspective of those who consider *UfP* obsolete in the modern era, the *UfP* bore political relevance then precisely because it was a device for the permanent members (mainly the United States) to enjoy collective legitimacy for their actions when they were assured of support within the

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<sup>11</sup> See James Stavridis, *Are We Entering a New Cold War?*, FOREIGN POL’Y (Feb. 17, 2016), <http://foreignpolicy.com/2016/02/17/are-we-entering-a-new-cold-war-russia-europe/>.

<sup>12</sup> Robert Legvold, *Managing the New Cold War*, 93 FOREIGN AFF. 74, 75 (2014).

<sup>13</sup> G.A. Res. 377 (V), (Nov. 3, 1950) (the *Uniting for Peace (UfP)* resolution). There have been calls for the Assembly to invoke *UfP* in a variety of contexts, including the securing of accountability for mass crimes. See, e.g., U.N. Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, ¶ 1971, U.N. Doc. A/HRC/12/48 (Sept. 24, 2009); Independent Fact Finding Committee on Gaza to the League of Arab States, *Report of the Independent Fact-Finding on Committee on Gaza: No Safe Place*, ¶ 610 (Apr. 30, 2009); U.N. Human Rights Council, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, ¶¶ 362, 1201, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014); U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, ¶ 139, U.N. Doc. A/HRC/28/69 (Feb. 5, 2015).

<sup>14</sup> G.A. Res. 377 (V), *supra* note 13.

<sup>15</sup> See Christina Binder, *Uniting for Peace Resolution (1950)*, in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW, ¶¶ 9–10 (Rudiger Wolfrum ed., 2006); Keith S. Petersen, *The Uses of the Uniting for Peace Resolution Since 1950*, 13 INT’L ORG. 219 (1959).

Assembly. Once the Assembly evolved to the point where it no longer generated majorities that favoured Western states, *UfP* was no longer used in the mainstream of U.N. practice.<sup>16</sup> Changes in international politics and realignment of the balance of power would thus make *UfP* something of an unpredictable mechanism, a “double-edged sword” for states that sponsored such resolutions.<sup>17</sup> Furthermore, *UfP* is premised on the claim that “something should be done,” but there remains the belief that international security should not be overregulated, with the veto at least serving to ensure selective intervention in this respect.<sup>18</sup>

The Assembly of old was also differently composed than the one of today, with much larger states and, arguably, a stronger capacity and legitimacy to make decisions affecting international peace and security.<sup>19</sup> The process of decolonisation and self-determination has produced many more states that in turn are able to vote in the Assembly, and to do so on an equal basis irrespective of the material differences between states.<sup>20</sup> As it stands, China’s vote (representing a population of almost 1.3 billion) is given equal weight to Tuvalu’s (representing a population of about 11,000) in the Assembly. Although the difference in material capabilities of states should have no bearing on the legitimacy of a state’s view on what constitutes a human rights abuse, it may be relevant to the enforcement of measures to address such abuse. The point here is that while the Council may suffer from a number of defects, at least it attributes greater weight to

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<sup>16</sup> Andrew J. Carswell, *Unblocking the Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SECURITY L. 453, 455–56 (2013).

<sup>17</sup> *Id.*

<sup>18</sup> See ADAM ROBERTS & DOMINIK ZAUM, *SELECTIVE SECURITY: WAR AND THE UNITED NATIONS SECURITY COUNCIL SINCE 1945* (2008).

<sup>19</sup> The U.N. comprised 51 founding members in 1945; today it has 193 members, and all of them have a vote in the Assembly. As to changes in voting in the Assembly, see Peter Ferdinand, *Rising Powers at the UN: An Analysis of the Voting Behaviour of BRICS in the General Assembly*, 35 THIRD WORLD Q. 376 (2014); Nicolas Burmester & Michael Jankowski, *The Unsolved Puzzle: Pacific Asia’s Voting Cohesion in the United Nations General Assembly—A Response to Peter Ferdinand*, 16 BRIT. J. POL. & INT’L REL. 680 (2014); Michal Onderco, “Tell Me What You Want”: *Analyzing the Visegrád Countries’ Votes in the UN General Assembly*, 28 E. EUR. POL. & SOCIETIES 63 (2014); DIANA PANKE, *UNEQUAL ACTORS IN EQUALISING INSTITUTIONS: NEGOTIATIONS IN THE UNITED NATIONS GENERAL ASSEMBLY* (2013).

<sup>20</sup> See U.N. Charter, art. 18(1) (“Each member of the General Assembly shall have one vote.”). As to size disparities in the Assembly and how this impacts on voting, see Diana Panke, *Is Bigger Better? Activity and Success in Negotiations in the United Nations General Assembly*, 30 NEGOT. J. 367 (2014).

the choices of bigger states who have the political and material capabilities necessary to carry out the difficult role of managing international security.<sup>21</sup>

It is therefore undeniable that the Assembly also suffers from a number of shortcomings in terms of its ability to ensure that the U.N. adapts to changing threats to international peace and security. Still, this article will focus on the more fundamental legal question of whether the Assembly may assume functions analogous to those of the Council in the event of deadlock. While the success of this legal proposition will ultimately turn on its application, which is inevitably a political choice, the following analysis provides a sufficiently clear legal basis for *UfP* to facilitate broad support, from large and small states alike, for the Assembly to assume an extraordinary function in those circumstances where the Council has failed to address serious human rights abuses. There are, admittedly, a number of obstacles. Unlike the Council's impressive powers, the Assembly is limited to making "recommendations," which, as the phrase suggests, carry no direct legal effect.<sup>22</sup> Many still question the legal significance of the *UfP* resolution and its contemporary impact on U.N. practice.<sup>23</sup> More still challenge the notion that the Assembly's resolutions are capable of binding or authorising the membership to do that which would otherwise contravene international law.<sup>24</sup> Given recent condemnations of the use of vetoes and general uncertainty as to the continued application of *UfP*, a fresh analysis of these legal issues that goes to the heart of the U.N. Charter's division of powers in maintaining international peace and security is warranted.

This article will consider the extent to which an Assembly resolution could augment a "humanitarian intervention" pursuant to a U.N. mandate. The focus on humanitarian intervention, involving the use of coercive force to forestall a humanitarian crisis, has attracted controversy precisely because it involves intervention without consent of the host State.<sup>25</sup> *UfP* practice

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<sup>21</sup> DAVID L. BOSCO, FIVE TO RULE THEM ALL: THE UN SECURITY COUNCIL AND THE MAKING OF THE MODERN WORLD 19 (2009).

<sup>22</sup> See U.N. Charter arts. 10–14.

<sup>23</sup> Larry D. Johnson, "Uniting for Peace": Does it Still Serve Any Useful Purpose?, AM. J. INT'L L. UNBOUND (July 15, 2014), <http://www.asil.org/blogs/uniting-peace/-does-it-still-serve-any-useful-purpose>.

<sup>24</sup> Stefan Talmon, *The Legalizing and Legitimizing Function of UN General Assembly Resolutions*, AM. J. INT'L L. UNBOUND (July 18, 2014), <http://www.asil.org/blogs/legalizing-and-legitimizing-function-un-general-assembly-resolutions>.

<sup>25</sup> Generally, "humanitarian intervention" is a concept used to describe the use of force outside of the U.N. Charter, although some also use the phrase to describe instances of U.N. action that serve a

regarding the deployment of forces, on the other hand, has generally concerned the recommendation to U.N. members to participate in peacekeeping operations that have occurred at the host State's invitation, thus removing some of the controversies associated with Assembly recommendations made under *UfP*.<sup>26</sup> Furthermore, the focus on humanitarian intervention here is prompted by the regular and periodic assertions by governments in favour of a right to intervene outside of the Charter framework in order to avert humanitarian crises.<sup>27</sup> For example, large-scale human rights abuse in Syria provoked the British government to argue in 2013 that the failure of the Council to act would justify unilateral intervention based on a putative customary law exception to the use of force.<sup>28</sup> While there are serious doubts as to the basis for unilateral humanitarian intervention under custom, the question remains whether the Assembly may perform an authorising function for any such coercive intervention, such as to qualify it as enforcement action under the U.N. Charter.

Accordingly, this article will test the constitutional authority of the Assembly to authorise humanitarian intervention. Grounded in a teleological interpretation of the U.N. Charter and *UfP* practice, it will argue, provided the political will exists, that the Assembly may perform such a function. The Assembly is able to do this because the U.N. Charter permits a broad approach to implied powers and the imperfect observance of formal provisions where the assumption of power by this organ furthers the purposes of the U.N. This interpretation of the Charter is apparent not only from the reasoning of the International Court of Justice (ICJ) but also from the practice and relations of the principal U.N. organs, particularly the Assembly and Council, since 1945. A historical survey of *UfP* practice also supports the Assembly's authority to take enforcement action in extraordinary circumstances.

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humanitarian purpose. See Carrie Booth Walling, *Human Rights Norms, State Sovereignty, and Humanitarian Intervention*, 37 HUM. RTS. Q. 383 (2015).

<sup>26</sup> See Binder, *supra* note 15; *infra* Part II(A)(1) (describing the uses of *UfP*).

<sup>27</sup> For a survey of recent arguments, see generally FABIAN KLOSE, *THE EMERGENCE OF HUMANITARIAN INTERVENTION* (2015); Juan Carlos de la Cuevas, *Exceptional Measures Call for Exceptional Times: The Permissibility Under International Law of Humanitarian Intervention To Protect a People's Right to Self-Determination*, 37 HOUST. J. INT'L L. 491 (2015).

<sup>28</sup> Prime Minister's Off., *Policy Paper: Chemical Weapon Use by Syrian Regime: UK Government Legal Position* (Aug. 29, 2013), <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version> [hereinafter *Chemical Weapon Use by Syrian Regime*]

## II. “UNITING FOR PEACE” AND “HUMANITARIAN INTERVENTION”

The necessary starting point for analysing the scope of the Assembly’s authority to authorise the use of force is Article 2(4) of the U.N. Charter, which prohibits members from using force against another state.<sup>29</sup> If the state in which a humanitarian crisis exists does not consent to outside intervention, then it is necessary to establish an exception to the use of force prohibition.<sup>30</sup> While there is reasoned disagreement on the scope of Article 2(4), consensus exists on two Charter-based exceptions.<sup>31</sup> First, under Article 51, states may act individually or collectively in self-defence if an “armed attack” occurs. Second, the Council may take military enforcement action under Chapter VII upon finding that there is a “threat to the peace, breach of the peace, or act of aggression.”<sup>32</sup>

A humanitarian crisis does not qualify as an “armed attack” directed against a state; this term is defined by the International Court of Justice (ICJ) as requiring a cross-border incursion involving military force of a particular intensity.<sup>33</sup> Humanitarian crises mostly occur within states rather than across borders; a mass exodus of refugees also does not constitute an armed attack, given that it does not involve the use of armed force that can be attributed to

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<sup>29</sup> For a thorough treatment on the scope of the use of force principle under Article 2(4), see THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller et al. eds., 2015). See also Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT’L L. 275, 285 (1973) (arguing that there are only limited circumstances in which force can be used under the U.N. Charter).

<sup>30</sup> See Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT’L L.J. 1 (2013) (analysing the consent principle and the extent to which it precludes international responsibility).

<sup>31</sup> Some have argued that the text of Article 2(4) itself only precludes the use of force that affects the “territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations Charter.” On this permissive view, for instance, armed force that has the sole purpose to prevent human rights abuse, or to protect nationals abroad, or as reprisals for prior breaches of international law, would not violate Article 2(4). However, this permissive view is inconsistent with the Charter’s *travaux préparatoires*, which indicated that the inclusion of this phrase was intended to strengthen the prohibition rather than to create exceptions to it. Furthermore, reference to “territorial integrity or political independence” is more of a reference to the totality of statehood rather than limiting the prohibitive scope of Article 2(4). Finally, the restrictive interpretation of Article 2(4) is reinforced in subsequent State practice, as reflected in the Assembly’s declaration in Resolution 2625. G.A. Res. 2625 (XXV) (Oct. 24, 1970) (“No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.”). See also STEPHEN HALL, FOUNDATIONS OF INTERNATIONAL LAW 481–82 (2012).

<sup>32</sup> U.N. Charter art. 39.

<sup>33</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27).



a State.<sup>34</sup> Therefore, the use of force to avert a humanitarian crisis does not fall within the right to self-defence, and thus a Chapter VII authorisation is required. If the Council determines that human rights abuse within a state constitutes a “threat to the peace” and authorises enforcement action, then a “humanitarian intervention” is permitted.<sup>35</sup> The Council has used its Chapter VII powers for humanitarian purposes; the imposition of no-fly zones in Iraq in 1991 is a notable early example.<sup>36</sup> Accordingly, a Council authorisation justifies what would otherwise be an unlawful use of force.<sup>37</sup>

However, actual or anticipated Council deadlock on grave humanitarian situations has led states to assert a legal basis for intervention outside the Charter framework.<sup>38</sup> The humanitarian intervention doctrine was most recently asserted by Britain in response to the use of chemical weapons against civilian populations in Syria in 2013. The British Prime Minister argued that intervention would be lawful provided it was necessary, proportionate to the aim of relief of humanitarian need, and supported by evidence of “extreme humanitarian distress on a large scale.”<sup>39</sup> Even in the absence of Council authorisation, it “would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria.”<sup>40</sup> The legality of this proposition turns on whether Article 2(4) is a comprehensive prohibition on the use of force.<sup>41</sup> The length of this article precludes a detailed analysis

<sup>34</sup> Bruno Simma, *NATO, The U.N. and the Use Of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 5 (1999). In *Nicaragua v. United States*, in defining “armed attack,” the ICJ drew from the Definition of Aggression annexed to Assembly Resolution 3314 (XXII): “[I]t may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (*inter alia*) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein.’” *Nicar. v. U.S.*, 1986 I.C.J., *supra* note 33, at ¶ 195 (quoting Article 3, paragraph (g) of the Definition of Aggression annexed to Assembly Resolution 3314 (XXII)).

<sup>35</sup> C.J. Apperley & Ian Brownlie, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT’L & COMP. L.Q. 878, 894, 904 (2000).

<sup>36</sup> S.C. Res. 688 (Apr. 5, 1991).

<sup>37</sup> See generally DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY* (1999).

<sup>38</sup> See Nigel Rodley, *Humanitarian Intervention*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 775, 775–96 (Marc Weller ed., 2015) [hereinafter Rodley, *Humanitarian Intervention*] (providing an analysis of state practice).

<sup>39</sup> *Chemical Weapon Use by Syrian Regime*, *supra* note 28. See also Johnson, *supra* note 23.

<sup>40</sup> *Id.*

<sup>41</sup> Carsten Stahn, *Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and “What The Law Ought To Be,”* 19 J. CONFLICT & SECURITY L. 25, 33 (2013).

here of the competing positions, but strong arguments militate against humanitarian intervention outside of the Charter framework.

Specifically, there is little evidence showing that the humanitarian intervention doctrine has matured into custom, which requires state practice that is “extensive and virtually uniform” together with *opinio juris*.<sup>42</sup> The few examples cited to show state acquiescence to the putative norm’s formation are equivocal and may easily be justified on alternative legal bases. For example, the interventions of India in East Pakistan (1971), Vietnam in Cambodia (1978), and Tanzania in Uganda (1979) each brought an end to serious human rights abuses, but the basis for the interventions was hotly contested and the intervening states prevaricated about their legal justifications.<sup>43</sup> Similarly, the NATO intervention in Kosovo in 1999 did not precipitate a change in custom.<sup>44</sup> The acceptance of the responsibility to protect doctrine (*RtoP*) and international criminal law bolstered the case for unilateral humanitarian intervention as a customary norm.<sup>45</sup>

It is true that *RtoP* derives from the same normative root as the humanitarian intervention doctrine: both are concerned with protecting civilian populations from serious human rights abuses. But *RtoP* supports U.N. collective security rather than challenging it. The Assembly’s 2005 adoption of the World Summit Outcome Document affirms *RtoP* action through the Council: it recognises that the international community is “prepared to take collective action, in a timely and decisive manner, *through the Security Council*, in accordance with the Charter, including Chapter VII, on a case-by-case basis . . . [where] national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>46</sup> Similarly, the emergence of international criminal law only supports the case for post-conflict accountability. It is possible to conceive of accountability for atrocities as a

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<sup>42</sup> North Sea Continental Shelf Cases (Federal Republic of Germany (F.R.G) v. Den.; F.R.G v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb. 20).

<sup>43</sup> See generally Franck & Rodley, *supra* note 29.

<sup>44</sup> Apperley & Brownlie, *supra* note 35, at 904.

<sup>45</sup> Daniel Bethlehem, *Stepping Back a Moment—The Legal Basis in Favour of a Principle of Humanitarian Intervention*, EJIL TALK! BLOG EUR. J. INT’L L. (Sept. 12 2013), <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention>.

<sup>46</sup> G.A. Res. 60/1, ¶ 139 (Sept. 16, 2005) (emphasis added). The same paragraph also notes rather generally the Assembly’s role under *RtoP*: “We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.” *Id.*

multi-staged process, including humanitarian intervention and international criminal law, but the two have developed along quite different legal paths. While international criminal law has advanced with the support of multilateral treaties (e.g., the Rome Statute) and Chapter VII powers (notably, establishing the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda), the humanitarian intervention doctrine is lacking in “extensive and virtually uniform” acceptance of its customary status.<sup>47</sup>

The principal concern about the doctrine is that it will be abused; that risk might be alleviated were the Assembly, acting under the Uniting for Peace Resolution (*UfP*), to assume an authorising function.<sup>48</sup> The character of the Assembly as a multilateral forum could assuage concerns that humanitarian intervention is premised on the unilateral assessment of self-interested states. While these concerns will always persist regardless of forum, there is at least the prospect that a humanitarian intervention authorised by the U.N.’s general membership in a consensual process would confer legality and legitimacy on the operation. Indeed, it is indicative that Britain and the United States chose to pursue action in Kosovo through NATO instead of invoking *UfP*, perhaps because of the political risk that the resolution might fail.<sup>49</sup> Those States perhaps chose to maintain the intervention’s putative legitimacy, despite its questionable legality. Still, in the event of a veto being exercised in the Council, the Assembly provides a suitable alternative multilateral forum in which to authorise humanitarian intervention, provided the political will exists.

The use of *UfP* as a basis for humanitarian intervention lacks precedent but is not without supporters. During the conflict in Kosovo in the late 1990s, Canada considered using *UfP* to gain authorisation for the NATO action.<sup>50</sup> At that time, scholars recognised the validity of the 1950 resolution as a basis for the Assembly to act where a Council resolution was blocked and

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<sup>47</sup> See *F.R.G. v. Den.*; *F.R.G. v. Neth.*, 1969 I.C.J., *supra* note 42, at ¶ 77 (Feb. 20) (explaining the classic formulation for establishing custom).

<sup>48</sup> See Group of 77 Summit in Havana, Cuba: Declaration of the South Summit, ¶ 54 (Apr. 10–14, 2000), [http://www.g77.org/Docs/Declaration\\_G77Summit.htm](http://www.g77.org/Docs/Declaration_G77Summit.htm) (containing criticisms composed by the Group of 77, a coalition of southern nations). See also Mohammed Ayoob, *Third World Perspectives on Humanitarian Intervention and International Administration*, 10 GLOBAL GOVERNANCE 99 (2004).

<sup>49</sup> Nigel White, *Relationship Between the Security Council and General Assembly*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 293, 306 (Marc Weller et al. eds., 2015) [hereinafter White, *Relationship Between*].

<sup>50</sup> Paul Heinbecker, *Kosovo*, in THE U.N. SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 537, 543 (David Malone ed., 2004).

suggested that humanitarian intervention could be appropriate under *UfP*.<sup>51</sup> The major issue, however, is whether the Assembly is able to assume the Council's function in authorising forcible coercive measures. During the Kosovo crisis some British officials appeared to doubt the use of *UfP* to effectuate a humanitarian intervention, partly because an Assembly resolution cannot equate to a Chapter VII authorisation.<sup>52</sup> It is therefore critical to determine whether the Assembly possesses the constitutional power to authorise such coercive action.

A. *Coercive Measures and the Uniting for Peace Resolution*

In the text of the U.N. Charter, only the Council is empowered to take forcible coercive measures.<sup>53</sup> By contrast, the Assembly's function is essentially deliberative—it may “discuss,” “promote,” and “recommend.”<sup>54</sup> Unlike Council decisions, an Assembly recommendation does not bind the membership, unless pertaining to internal operational matters, such as admission of U.N. members or budget apportionment.<sup>55</sup> Given the hortatory nature of the Assembly's express powers, in stark contrast to the coercive powers attributed to the Council, it must be analysed how the Assembly is able to authorise a humanitarian intervention. A starting point for this analysis is the relevant text from the *UfP* resolution, which was passed following growing frustration over Council inaction, most notably with respect to the deadlock on the continuation of the U.N. mandate in Korea in 1950. The *UfP* resolution provides in its relevant part:

*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

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<sup>51</sup> See Apperley & Brownlie, *supra* note 35, at 904 (“The argument that a resolution would have been ‘blocked’ by Russia and/or China is unattractive, in part because the matter could then have been taken to the U.N. General Assembly (in a Special Emergency Session) on the basis of the Uniting for Peace Resolution of 1950. Presumably the NATO States had no hope of obtaining a two-thirds majority in the General Assembly.”).

<sup>52</sup> See, e.g., HOUSE OF COMMONS FOREIGN AFF. COMM., MINUTES OF EVIDENCE, 1999, HC 28-II, ¶¶ 63–64 (UK), <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmcaff/28/9111818.htm> (Statement by Mr. Emyr Jones Parry); HOUSE OF COMMONS, FOURTH REPORT OF THE SELECT COMMITTEE ON FOREIGN AFFAIRS, 2000, HC 28-II, ¶ 128 (UK), <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmcaff/28/2813.htm#a35>.

<sup>53</sup> U.N. Charter art. 42.

<sup>54</sup> *Id.* arts. 11–17, 55.

<sup>55</sup> South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.) (Second Phase), Judgment, 1966 I.C.J. Rep. 6, 50–51 (July 18).

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.<sup>56</sup>

During the discussion of the *UfP* resolution, Assembly members advanced many arguments for and against the resolution, including its precise scope. Opposing interpretations of the U.N. Charter were used to prove the assertions of each side.<sup>57</sup> From this, and subsequent practice, there are two competing theories on the resolution’s scope. The first is that the “recommendations to members for collective measures” only reflects the Assembly’s deliberative functions; such a recommendation has no legal significance and members have no duty to follow it. The recommendation would not make lawful what is otherwise an unlawful use of force. For brevity, this theory is labelled “weak *UfP*.” By contrast, “strong *UfP*” theory asserts that the Assembly may recommend that members take enforcement action. While such a recommendation is not binding on the membership, it serves to authorise states to use force in accordance with a U.N. mandate. In the following parts of this article, the basic features of these two theories will be outlined. This article will then advance the claim that the U.N.’s constitutional structure is such that the Assembly can assume enforcement powers to authorise a humanitarian intervention under a U.N. mandate.

### 1. “Weak *UfP*”

According to weak *UfP*, the Assembly cannot authorise force because the resolution only recognises the ability of the Assembly to act concurrently with the Council to discuss and make non-binding recommendations to U.N. members. This assertion of power was made despite Article 12(1), which forbids the Assembly from making recommendations with respect to a dispute or situation where the Council is still exercising its functions. In its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ observed that decades of practice

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<sup>56</sup> G.A. Res. 377 (V), *supra* note 13 (emphasis added).

<sup>57</sup> See J. Andrassy, *Uniting for Peace*, 50 AM. J. INT’L L. 563 (1956).

have modified Article 12(1) to permit the Assembly to act concurrently with the Council, even where the Council was deliberating on a situation implicating international peace and security.<sup>58</sup> However, the constitutional significance of *UfP* should not be overstated. That the Assembly may recommend the use of armed force should be interpreted within the Charter framework and general international law.<sup>59</sup> In particular, Article 2(4) prohibits U.N. members from using force, subject to the exceptions of self-defence and Chapter VII authorisations. An Assembly recommendation is not acknowledged as a possible exception to Article 2(4), which undermines any supposed permissive effect of an Assembly recommendation to use force.

The ability to take coercive action is exclusively vested in the Council.<sup>60</sup> Pursuant to Article 11, if the Assembly forms a view on the need to use force, it should convey a recommendation to the Council for “enforcement action.”<sup>61</sup> The text of *UfP* confirms the Assembly’s limited role, in that it suggests that the Assembly may only make a recommendation in the case of a “breach of the peace, or act of aggression.”<sup>62</sup> In the context of weak *UfP*, the terms “breach of the peace” or “act of aggression” are equated to an armed attack by one state against another.<sup>63</sup> An Assembly recommendation to use force is thus a simple declaration of the right to self-defence.<sup>64</sup>

*UfP* practice also provides some support for the Assembly’s limited role. The ICJ’s Advisory Opinion *Certain Expenses of the United Nations* distinguished an Assembly-mandated peacekeeping operation (premised on host state’s consent) from an “enforcement action” under Chapter VII, the

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<sup>58</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 27 (July 9). The ICJ’s finding on Article 12(1) was primarily based on the conclusion that the Assembly’s request for an advisory opinion was not a “recommendation.” *Id.* ¶¶ 49, 51–54.

<sup>59</sup> See Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure*, 34 BRIT. Y.B. INT’L L. 1, 5 (1958).

<sup>60</sup> See G.A. Res. 60/286, ¶ 1 (Oct. 9, 2006) (acknowledging the Council’s primary responsibility for peace and security).

<sup>61</sup> U.N. Charter art. 11.

<sup>62</sup> G.A. Res. 377 (V), *supra* note 13.

<sup>63</sup> YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE § 906 (5th ed. 2011).

<sup>64</sup> See Christian Tomuschat, *Uniting for Peace*, United Nations Audiovisual Library of International Law 3 (2008), [http://legal.un.org/avl/pdf/ha/ufp/ufp\\_e.pdf](http://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf). See also Dominik Zaum, *The Security Council, the General Assembly, and War: The Uniting for Peace Resolution*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR, *supra* note 2, at 154, 171.

latter being the Council’s exclusive preserve.<sup>65</sup> Furthermore, that the Assembly acting under *UfP* asked the Council to take action in a number of situations underlines the Council’s exclusive role in authorising coercive measures by states.<sup>66</sup>

Practice according to weak *UfP* is interpreted as reinforcing the *jus ad bellum* justifications of self-defence or host state consent and not coercive action. Identifying practice is ambiguous given that relevant subsequent resolutions do not always cite the *UfP* resolution, but some conclusions may be drawn nonetheless.<sup>67</sup> The Assembly’s reaction to the Council’s withdrawal of support for the Republic of Korea during the 1950s is an example where *UfP* may have provided justification for Assembly action even though it was not cited. The 1950 U.N. Council Resolution on Korea concerned an attack by forces from North Korea on the Republic of Korea. The Council characterised this as an armed attack and “breach of the peace,” recommending “that Members of the United Nations furnish such assistance to the Republic of Korea.”<sup>68</sup> Following a Soviet veto on the continuation of the U.N. mission, the Assembly passed Resolution 498(V), which called on states to “lend every assistance to the United Nations action in Korea.”<sup>69</sup> Here, “every assistance” suggests a continuation of the Council’s recommendation to assist South Korea to repel an armed attack.<sup>70</sup> The same justification underpins the Assembly’s condemnation in Resolution ES-8/1, which noted South Africa’s “unprovoked massive armed aggression against Angola,” calling on the “international community to provide ‘military assistance’ to ‘front line States in order to defend their sovereignty’ . . . against renewed acts of aggression by South Africa.”<sup>71</sup>

Resolutions under *UfP* have also been based on host state consent. The power of the Peace Observation Commission, established to report on situations where tension exists, is dependent on the consent of the state into whose territory it enters.<sup>72</sup> Similarly, the Assembly created various

<sup>65</sup> Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Rep. 151 (July 20).

<sup>66</sup> See, e.g., G.A. Res. 8/2, ¶ 12 (Sept. 14, 1981) (illustrating the Assembly asked the Council to impose sanctions on South Africa for its continued occupation of Namibia).

<sup>67</sup> Binder, *supra* note 15, § 9.

<sup>68</sup> S.C. Res. 83 (June 27, 1950).

<sup>69</sup> G.A. Res. 498 (V), ¶ 4 (Feb. 1, 1951).

<sup>70</sup> Johnson, *supra* note 23.

<sup>71</sup> G.A. Res. 8/2, *supra* note 66, at ¶ 7.

<sup>72</sup> U.N. Secretary-General, Summary Study of the Experience Derived from the Establishment and Operation of the Force, ¶ 10, U.N. Doc. A/3943 (Oct. 9, 1958).

peacekeeping missions with a consensual foundation, for instance recommending members to “assist” the Congo in upholding “law and order.”<sup>73</sup> The consensual foundation of the *UfP* is what ensured its broad support within the Assembly during the Cold War. Thus, it was only because Egypt consented to the deployment of the United Nations Emergency Force (UNEF) on its territory that the Soviet Union abstained in the Assembly rather than opposing the force’s establishment.<sup>74</sup>

## 2. “Strong UfP”

According to strong *UfP* theory, the purposes underpinning the U.N. Charter enable the Assembly to authorise coercive measures where the Council has failed to discharge its primary responsibility to the collective security community. Pursuant to Article 1(1), a key purpose of the U.N. Charter is to maintain international peace and security through “collective measures.”<sup>75</sup> Article 1(1) does not specify which entity is to engage in collective measures—peace and security are underpinnings of the U.N. Charter writ large and not just the functions of the Council.<sup>76</sup> Under Article 24, “Members confer on the Security Council primary responsibility for the maintenance of peace and security.”<sup>77</sup> The term “primary responsibility” implies that secondary responsibility falls on the Assembly, given that it is the only organ within the U.N. that represents all members (and thus is the collective that conditionally confers power on the Council). As the ICJ in *Certain Expenses of the United Nations (Certain Expenses)* observed, the U.N. Charter makes it “abundantly clear” that the Assembly is also concerned with international peace and security.<sup>78</sup> That the Assembly may recommend “measures” under Article 14 for the peaceful adjustment of any situation itself “implies some kind of action.”<sup>79</sup> The overarching purpose of

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<sup>73</sup> G.A. Res. 1474 (ES-IV), ¶ 2 (Sept. 17–19, 1960).

<sup>74</sup> ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING 1946–1967: DOCUMENTS AND COMMENTARY 262 (1969).

<sup>75</sup> U.N. Charter art. 1, ¶ 1.

<sup>76</sup> See, e.g., G.A. Res. ES-7/7 (Aug. 19, 1982) (explaining the General Assembly is “[d]eeply aware of the responsibility of the *United Nations* under its Charter for the maintenance of international peace”) (emphasis added).

<sup>77</sup> U.N. Charter, art. 24, ¶ 1.

<sup>78</sup> *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. Rep. 151 (July 20).

<sup>79</sup> *Id.*



the U.N. thus provides the Assembly with the power to recommend enforcement measures where the Council is deadlocked.<sup>80</sup>

Still, Article 11(2) directs the Assembly to refer any question where “action” is necessary to the Council. *Certain Expenses* may be interpreted under weak *UfP* theory as showing that only the Council may authorise coercive action. However, in that case the ICJ was referring to the Council having a monopoly on *mandatory* coercive action, defined as being a decision binding on the U.N. membership, for instance to contribute forces.<sup>81</sup> The ICJ stated that the Council may “order coercive action.”<sup>82</sup> By contrast, where the Assembly recommends action, it does not bind U.N. members.<sup>83</sup> Accordingly, the voluntary peacekeeping force in *Certain Expenses* did not constitute Council “action.”<sup>84</sup> Crucially, then, the ICJ opinion envisages members contributing voluntarily to U.N. “action” occurring outside of a Chapter VII mandate. Furthermore, this reading is consistent with the view, as expressed by Judge Lauterpacht, that Assembly recommendations may “on proper occasions” provide a “legal authorisation” for members to act on them.<sup>85</sup> While Judge Lauterpacht did not elaborate further on this statement, the authorising function of Assembly resolutions is bound to be context-specific, based on the acceptance of strong *UfP* and the Council’s failure to maintain international security.

The scope of the use of force prohibition in the U.N. Charter is also instructive. The Assembly is not subject to this prohibition, which binds “all Members” by contrast to the “Organization.”<sup>86</sup> Article 2 distinguishes between Organization and Members, with subparagraph (4) only referring to

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<sup>80</sup> See Nigel D. White, *From Korea to Kuwait: The Legal Basis of United Nations’ Military Action*, 20 THE INT’L HIST. REV. 597, 603 (1998) [hereinafter White, *From Korea to Kuwait*] (explaining that it was contemplated the Council members would act, to use President Roosevelt’s phrase, as “trustees” for the international community. Although this is not used as a legal term of art, the point was that Council decision-making was supposed to serve the international community rather than the national interests of Council members).

<sup>81</sup> NIGEL WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 78 (2d ed. 2005).

<sup>82</sup> *Certain Expenses of the United Nations*, 1962 I.C.J., *supra* note 65.

<sup>83</sup> Kay Hailbronner & Eckart Klein, *Functions & Powers: Article 10*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 226, 237–38 (Bruno Simma et al. eds., 1995).

<sup>84</sup> *Certain Expenses of the United Nations*, 1962 I.C.J., *supra* note 65.

<sup>85</sup> *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Advisory Opinion, 1955 I.C.J. Rep. 115 (June 7) (separate opinion by Lauterpacht, J.).

<sup>86</sup> U.N. Charter art. 2, ¶ 4.

“Members” when stating the prohibition.<sup>87</sup> Therefore, the salient issue is whether acts of members pursuant to an Assembly resolution may be attributed to the U.N. so as to fall outside of Article 2(4). It is well recognised that U.N. organs may delegate their power to subsidiary bodies.<sup>88</sup> Indeed, in *Certain Expenses* the ICJ did not question the constitutional foundation of peacekeeping operations in the Congo and Suez, even though their powers were directly or tacitly supported by Assembly resolutions.<sup>89</sup> Furthermore, the Collective Measures Committee, a subsidiary organ established under *UfP*, noted that “in the event of a decision or recommendation of the United Nations to undertake collective measures . . . States should not be subjected to legal liabilities under treaties or other international agreements as a consequence of carrying out United Nations collective measures.”<sup>90</sup> As a subsidiary organ tasked with giving effect to *UfP*, this statement is strong evidence as to the legal nature of recommendations under this mechanism, placing Assembly-mandated military action within the Charter framework and thus not subject to Article 2(4).

Still, it is necessary to establish that a delegation of authority is valid. The delegator must not exceed its own authority, and must expressly and specifically prescribe the power being delegated, retain “overall authority and control,” and have the ability to rescind the delegated power.<sup>91</sup> The most pertinent requirement here is that the delegation must not exceed the delegator’s own authority. Given the admittedly deliberative functions of the Assembly, such a delegation to use force is based on teleological reasoning. The constitutional justification for a teleological construction of the U.N. Charter is explored in Part II(B) below, but it suffices to note that this interpretive basis for delegated powers is not unprecedented. As the ICJ noted in *Certain Expenses*, the Council may decide to take enforcement action even though a necessary requirement for such decision, Article 43 agreements, did not come into effect.<sup>92</sup> The dilemma faced by the Council, therefore, was that it would have been unable to give effect to its resolutions given the unavailability of a standing U.N. force. The solution was to treat

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<sup>87</sup> 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.”) (emphasis added).

<sup>88</sup> See D.W. BOWETT ET AL., UNITED NATIONS FORCES: A LEGAL STUDY 299–301 (2008).

<sup>89</sup> *Certain Expenses of the United Nations*, 1962 I.C.J., *supra* note 65.

<sup>90</sup> U.N. GAOR, 6th Sess., Supp. 13, 33, U.N. Doc. A/1891 (1951). See also Talmon, *supra* note 24.

<sup>91</sup> SAROOSHI, *supra* note 37, at 34.

<sup>92</sup> *Certain Expenses of the United Nations*, 1962 I.C.J., *supra* note 65.

Council resolutions as an authorisation for states to intervene under a U.N. mandate pursuant to the resolution. There is now no disputing the Council’s ability to delegate enforcement action despite lacking textual support in the U.N. Charter; this authorisation mechanism has been used to legally support intervention in a number of situations in places such as Kuwait, Haiti, East Timor, Sierra Leone, and Somalia, to name a few.<sup>93</sup> Furthermore, that there exists a distinction between a Council “decision” and an Assembly “recommendation” does not alter the conclusion that the Assembly is able to delegate authority.<sup>94</sup> In the absence of Article 43 agreements, to establish a standing U.N. force, the Council may only recommend that U.N. members contribute toward a Chapter VII operation.<sup>95</sup> Whether the delegation takes place in a non-binding recommendation or by decision is of no legal consequence—such recommendations are sufficient to delegate Chapter VII authority to willing states.<sup>96</sup>

#### B. *Constructing the Assembly’s Powers Under the U.N. Charter*

Whether the Assembly is ultimately able to recommend coercive measures will depend on resolving the conflict between the doctrines of attributed and implied powers. Whereas weak *UfP* has textual support in the U.N. Charter, strong *UfP* relies more broadly on the teleological argument that the U.N. should effectively ensure and maintain international peace and security.

##### 1. *Teleological Interpretation and Implied Powers in the U.N. Charter*

The attributed powers doctrine prescribes that an organ may only perform actions authorised by U.N. members.<sup>97</sup> Powers not expressly conferred are the result of intentional omissions, which must be respected.<sup>98</sup> By contrast, the implied powers doctrine, underpinned by teleological interpretation, permits an organ to assume powers that are essential to, or in

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<sup>93</sup> Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by “Coalitions of the Able and Willing”*, 11 EUR. J. INT’L L. 541, 543 (2000).

<sup>94</sup> See Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. OF INT’L L. 879, 880 (2005) (discussing the differences between decisions and recommendations).

<sup>95</sup> SAROOSHI, *supra* note 37, at 149; DINSTEIN, *supra* note 63, § 887.

<sup>96</sup> SAROOSHI, *supra* note 37, at 149; DINSTEIN, *supra* note 63, § 887.

<sup>97</sup> For an analysis on the differences between attributed and implied powers doctrines, see Viljam Engstrom, *Reasoning on Powers of Organizations*, in RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 56–83 (Jan Klabbbers & Åsa Wallendahl eds., 2011).

<sup>98</sup> JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW 63 (2015).

furtherance of, the organisation's functioning.<sup>99</sup> These implied powers might arise (narrowly) from the stated provisions or (broadly) from the general purposes of the organisation and the needs of the international community.<sup>100</sup>

Methods of treaty interpretation are therefore central to determining the scope of the Assembly's powers. The U.N. Charter does not set out specific rules on interpretation, making analysis of general principles necessary. Article 33 of the Vienna Convention on the Law of Treaties (VCLT) instructs that a treaty should be interpreted in accordance "with the ordinary meaning . . . and in light of its object and purpose."<sup>101</sup> This provision reflects a compromise of sorts between a textual and teleological approach, although the primacy given to the text may limit the scope of a teleological interpretation where it undermines the ordinary meaning of a word.<sup>102</sup> The VCLT provides a useful framework for "ordinary" treaties, but as Sands and Klein noted, treaties establishing international organisations warrant special treatment.<sup>103</sup> This is so with the U.N. Charter, a treaty possessing a constitutional character: a universal and comprehensive mandate, representing the international community and containing certain hierarchical elements.<sup>104</sup> The U.N. Charter should therefore be subject to different rules of interpretation having regard to the "intrinsically evolutionary nature of a constitution."<sup>105</sup>

The adoption of a teleological approach adheres to interpretive norms and is established in ICJ jurisprudence as central to the U.N.'s dynamic constitutional order. In *Reparations for Injuries Suffered in the Service of the Nations Advisory Opinion (Reparations)*, the ICJ found that "[u]nder international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it

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<sup>99</sup> Dapo Akande, *The Competence of International Organizations and the Advisory Jurisdiction of the ICJ*, 9 EUR. J. INT'L L. 437, 445 (1998).

<sup>100</sup> *Id.*

<sup>101</sup> Vienna Convention on the Law of Treaties art. 33, May 23, 1969, 1155 U.N.T.S. 331.

<sup>102</sup> Int'l Law Comm'n, Draft Articles on the Law of Treaties with Commentaries, U.N. Doc. A/CN.4/191, at 218 (1966) (noting the tension in Article 33, but observing that the majority of jurists preferred a primacy of the text approach).

<sup>103</sup> PHILIPPE SANDS & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS* 454 (6th ed. 2009).

<sup>104</sup> Sabine von Schorlemer, *The United Nations*, in *RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS* 466, 474 (Jan Klabbers & Åsa Wallendahl eds., 2011).

<sup>105</sup> OPPENHEIM'S INTERNATIONAL LAW 1268 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); *Certain Expenses of the United Nations, Advisory Opinion*, 1962 I.C.J. Rep. 151 (July 20).

by *necessary implication*, as being essential to the performance of its duties.”<sup>106</sup> From the ICJ’s point of view, the U.N. should be effective in achieving its objectives. The ICJ’s position is further underpinned in *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, where the court found that the Assembly was competent to establish an employment tribunal despite lacking the express powers to do so.<sup>107</sup> The doctrine of implied powers was broadly articulated in *Certain Expenses*, where the ICJ stated 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.”<sup>108</sup> The ICJ disavowed a literal interpretation of the U.N. Charter where doing so left the U.N. “impotent in the face of an emergency situation.”<sup>109</sup> What is remarkable here is the distinction drawn between purposes and powers: an asserted power that is rationally connected to a purpose of the U.N. will be lawful. The creation of a peacekeeping force, furthering international security, even without any textual support in the U.N. Charter, was thus *intra vires*.<sup>110</sup>

However, a more recent ICJ advisory opinion concerning the competencies of the World Health Organization (WHO) suggests a departure from these earlier functionalist interpretations. In *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the ICJ noted that international organisations do not possess a general competence, but are governed by the “‘principle of specialty,’ that is to say, they are invested by the States which create them with the powers, the limits of which are a function of the common interests of promotion those States entrust to them.”<sup>111</sup> The principle of specialty is synonymous with the attribution principle.<sup>112</sup> Accordingly, the WHO lacked the competence to consider the legality of nuclear weapons, as this question was “immaterial” to the WHO’s

<sup>106</sup> *Reparation for Injuries Suffered in the Service of the Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 182 (Apr. 11).

<sup>107</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. Rep. 47, 57 (July 13).

<sup>108</sup> *Certain Expenses of the United Nations*, 1962 I.C.J., *supra* note 65.

<sup>109</sup> *Id.* at 61.

<sup>110</sup> See also Nigel White, *The UN Charter and Peacekeeping Forces: Constitutional Issues*, in *THE UN, PEACE AND FORCE*, 42, 46 (Michael Pugh ed., 1996).

<sup>111</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request by the World Health Organization), Advisory Opinion, 1996 I.C.J. Rep. 66, 78 (July 8).

<sup>112</sup> HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 158 (rev. 5th ed. 2011).

functioning.<sup>113</sup> This reflects Judge Hackworth's dissent in *Reparations*, which states that "powers not expressed cannot freely be implied [but must] flow from a grant of express powers."<sup>114</sup>

Although a narrow approach may be applied to specialised agencies like the WHO, this approach is not applicable to the U.N.'s principal organs.<sup>115</sup> The reasoning in *Certain Expenses* shows a liberal approach with respect to powers that are used to further peace and security, over which the Assembly has broad competence under Articles 11 and 12 of the U.N. Charter.<sup>116</sup> Indeed, the broad competencies and membership of the Assembly are incomparable to that of a specialised agency such as the WHO.<sup>117</sup> Therefore, it is apparent that the preponderance of judicial authority favours a broad approach to the implied powers of principal organs, where doing so furthers a purpose of the U.N.

This broad approach is not only borne out in the courtroom, but also in the practice of other U.N. organs. Realisation of the U.N. Charter's purposes has required the redistribution of powers between the U.N.'s principal organs and thus the imperfect observance of the formal power divisions in the Charter.<sup>118</sup> This reflects the accepted position that the U.N. Charter is a "living" instrument, providing justification for procedural latitude in giving effect to subsequent practice.<sup>119</sup> Accordingly, U.N. organs have assumed an increasingly broad array of powers to address new international security challenges.<sup>120</sup> This has led the Council to assume functions of the Assembly, and as evident from *UfP*, vice-versa. The phenomena of "legislative" resolutions provides a good example of how the Council has assumed a standard-setting function (traditionally the Assembly's function), thereby bypassing the slower processes of customary

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<sup>113</sup> Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J., *supra* note 111, at 76.

<sup>114</sup> Reparation for Injuries Suffered in the Service of the Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 198 (Apr. 11).

<sup>115</sup> White, *Relationship Between*, *supra* note 49, at 295.

<sup>116</sup> U.N. Charter arts. 11–12.

<sup>117</sup> *Id.*

<sup>118</sup> Ruth Wedgwood, *Unilateral Action in the UN System*, 11 EUR. J. INT'L L. 349, 349 (2000).

<sup>119</sup> See Reparation for Injuries Suffered in the Service of the Nations, 1949 I.C.J., *supra* note 106, at 182.

<sup>120</sup> von Schorlemer, *supra* note 104, at 467–70.

law formation to imbue broadly worded resolutions with the force to bind the entire U.N. membership.<sup>121</sup>

Such changes are possible because of the essentially “decentralized” nature of the U.N.<sup>122</sup> Questions as to permissible constitutional limits are most acute in legal systems where a supreme, impartial organ is able to render an authoritative decision on the division of powers within an international organisation. The U.N., on the other hand, is comprised of organs that are co-equals, with none formally possessing the power of authoritative interpretation.<sup>123</sup> Further, the Council does not possess the legal authority to control acts of the Assembly.<sup>124</sup> The Council may seek to pass a resolution objecting to any assertion of legal power made by the Assembly, but the prospect of this passing turns on it having the support of all permanent members. However, the political reality remains that the Assembly is only ever likely to recommend enforcement action under *UfP* with the support of at least one permanent member, which is borne out in practice.<sup>125</sup>

Within such a decentralised order, as the ICJ noted, each organ must “in the first place at least, determine its own jurisdiction.”<sup>126</sup> This suggests a residual, although limited, role for judicial review. The ICJ cannot subject an Assembly resolution to the same form of review as found in domestic constitutional systems, as it does not possess the power to generally invalidate a decision according to a hierarchy of norms.<sup>127</sup> The ICJ’s advisory jurisdiction has no binding force, and decisions taken in contentious cases would only produce legal effects for parties in those

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<sup>121</sup> See generally Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L L. 175 (2005).

<sup>122</sup> von Schorlemer, *supra* note 104, at 467.

<sup>123</sup> Commission IV Judicial Organization, Summary Rep. of Fourteenth Meeting of Committee IV/2, U.N. Doc. 843 IV/2/37 (June 7, 1945), reprinted in 13 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945, 645, 645–46 (1998); Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Rep. 151, 168 (July 20).

<sup>124</sup> The reverse, on the other hand, is true: the Assembly has power under Article 17 of the U.N. Charter to control the budget and thus consider the validity of Council resolutions, at least insofar as determining the validity of expenditures. U.N. Charter art. 17, ¶ 1.

<sup>125</sup> Tomuschat, *supra* note 64, at 4.

<sup>126</sup> Certain Expenses of the United Nations, 1962 I.C.J., *supra* note 65.

<sup>127</sup> ANTONIOS TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL: COUNTERMEASURES AGAINST WRONGFUL SANCTIONS 59 (2011).

proceedings.<sup>128</sup> This is not to deny the wider (de)legitimising force of an ICJ decision; if it were to hold an Assembly resolution to be *ultra vires*, states may voluntarily desist from relying on the resolution as a legal basis for action.<sup>129</sup> But the perceived validity of an Assembly resolution would also be dictated by other factors which cannot be readily discounted, including the conviction of the large number of members within the Assembly who impliedly asserted the legal position that a resolution is *intra vires* to the organ's powers.

Even so, as noted above, it is very unlikely that the ICJ would cast doubt on the legality of an Assembly resolution given the broad approach it has taken to implied powers. Such unlikelihood is further reinforced by the deferential standard of review adopted by the ICJ. A resolution would have to be "manifestly *ultra vires*" to be invalidated by the ICJ.<sup>130</sup> As Judge Fitzmaurice noted when reviewing the validity of *UfP* expenditure, "only if the invalidity of the expenditure was apparent on the face of the matter, or *too manifest* to be open to reasonable doubt, would such a *prima facie* presumption [of validity] not arise."<sup>131</sup> A resolution that violated the *jus cogens* is indicative of a fundamental defect.<sup>132</sup> A resolution supporting strong *UfP*, duly certified by the Assembly as falling within the purposes of the U.N., would not sustain a finding of manifest *ultra vires* by the ICJ.

## 2. *U.N. Practice and Interpretation*

The purpose of this analysis has been to lay the foundation for the argument that the Assembly's passage of the *UfP* resolution reflected an accepted interpretation by the membership as to the scope of this organ's powers under the U.N. Charter. Furthermore, any future resolution

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<sup>128</sup> See Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of the Political Organs of the United Nations?*, 46(2) INT'L COMP. L.Q. 309, 334 (1997) (stating that only one third of members have accepted the optional clause of Article 36(2)).

<sup>129</sup> THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 26 (1990).

<sup>130</sup> See Ebere Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations*, 77 AM. J. INT'L L. 239, 249 (1983); *Certain Expenses of the United Nations*, 1962 I.C.J., *supra* note 65 (Morelli J., concurring).

<sup>131</sup> *Certain Expenses of the United Nations*, 1962 I.C.J., *supra* note 65, at 204–05 (July 20). Also see the "fundamental defect" standard noted in WHO advisory opinion. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request by the World Health Organization), Advisory Opinion, 1996 I.C.J. Rep. 66, 82 (July 8).

<sup>132</sup> See Thomas Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?* 86 AM. J. INT'L L. 519, 521–22 (1992).



recommending coercive measures would have an authorising effect. In making this argument, it is necessary to address two major concerns.

First, it may be argued that members’ intent as to the permissibility of strong *UfP* cannot readily be discerned from the existing body of resolutions. Powers under the U.N. Charter may develop, but as the VCLT provides, this must come with “subsequent practice.”<sup>133</sup> The ICJ, in its 1971 Advisory Opinion regarding South Africa’s continued presence in Namibia, advised that this practice must be “established.”<sup>134</sup> On this view, if the Assembly recommended coercive measures in the future, it would lack the legal basis to do so unless and until such measures become customary. The assumption underpinning this argument is that if a power cannot be discerned from the text, it is necessary to establish that it has emerged as a “customary power” after a long gestation period.<sup>135</sup>

Yet, the suggestion that there is no practice supporting strong *UfP* is misconceived. Although the Council’s 1950 resolution on Korea appeared to endorse collective self-defence, it was passed amidst debate as to the legal viability of Council “authorisations” in the absence of Article 43 special agreements to establish a standing force.<sup>136</sup> This demonstrates that Council members regarded Resolution 83, in response to the North Korean attack on South Korea, as authorising U.N. enforcement action; otherwise, any discussion on the resolution’s authorising effect would clearly be superfluous.<sup>137</sup> Moreover, it is intriguing to note that once the Soviet Union resumed its seat on the Council and vetoed the continuation of enforcement action, the Assembly resolution that supported continuation went even further than the Council’s seemingly more limited mandate. Assembly Resolution 376 sought to achieve “a unified, independent and democratic government of Korea,” including the crossing of the 38th parallel, an objective that clearly goes beyond the stricter confines of self-defence

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<sup>133</sup> U.N. Charter art. 31, ¶ 3(b).

<sup>134</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, 1971 I.C.J. Rep. 16, 22 (1970).

<sup>135</sup> This reflects a distinction sometimes drawn in the literature (not one that the ICJ recognises) between “implied” and “customary” powers, the former being conferred at the time of the organisation’s creation, the latter postdating the constitutional instrument and arising from practice. See SCHERMERS & BLOKKER, *supra* note 112, at 181–82.

<sup>136</sup> S.C. Res. 83, *supra* note 68; S.C. Res. 84 (July 7, 1950); S.C. Res. 85 (July 31, 1950).

<sup>137</sup> White, *From Korea to Kuwait*, *supra* note 80, at 613.

principles.<sup>138</sup> There was a general recognition amongst states and other actors that Korea was a U.N. operation, not self-defence.<sup>139</sup>

Even beyond Korea, there is some support for Assembly-recommended enforcement action in the context of peacekeeping operations. While the essential premise of such operations is host state consent, there have been episodes where the consenting government has disintegrated, thus engaging peacekeeping troops in broader enforcement measures against secessionist fighters and mercenaries. This argument provides some explanation for the mandate of the U.N. Operation in the Congo (ONUC), which given the lack of government stability was based more broadly on maintaining Congo's territorial integrity against secessionist fighters and facilitating a process in which a new government could be elected.<sup>140</sup> The Assembly's endorsement of this mandate, albeit temporary, provides tacit support for this organ's capacity to recommend voluntary enforcement action.<sup>141</sup> Although there is only limited practice of strong *UfP*, this does not negate its probative value, given that U.N. enforcement action is itself a rare occurrence. What is important from these examples is the absence of any significant dissent to the Assembly authorising enforcement action, which provides the strongest evidence of the constitutionality of these measures.<sup>142</sup>

Additionally, the notion that there must always be an established practice for an organ to exercise implied powers is open to debate. The requirement of "established practice" exists in order to distil a general consensus amongst the membership that the treaty in question necessarily includes the powers that are asserted. This is readily apparent from Article 31 of the VCLT, which refers to "any subsequent practice . . . which establishes the *agreement* of the *parties* regarding its interpretation."<sup>143</sup> Finally, it falls upon the members themselves to interpret the scope of an organ's powers under the U.N. Charter.<sup>144</sup> This is based on the principle that

<sup>138</sup> G.A. Res. 376 (Oct. 7, 1950); White, *Relationship Between*, *supra* note 49, at 311.

<sup>139</sup> White, *From Korea to Kuwait*, *supra* note 80, at 614.

<sup>140</sup> N.D. WHITE, *KEEPING THE PEACE* 254–61 (2nd ed. 1997).

<sup>141</sup> The Council transferred the mandate of the United Nations Operation in the Congo to the Assembly. *See* S.C. Res. 157 (Sept. 4, 1960).

<sup>142</sup> G.A. Res. 376, *supra* note 138 (passed with 47 in favour, 5 against and 7 abstentions); G.A. Res. 1474, *supra* note 73 (relating to the Congo and was adopted without a dissenting vote).

<sup>143</sup> Vienna Convention on the Law of Treaties art. 31., May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (emphasis added).

<sup>144</sup> Oscar Schachter, *The Relation of Law, Politics and Action in the United Nations*, in 109 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 180 (1963),

an interpretation of the treaty is as binding on the parties as the treaty itself.<sup>145</sup> During the drafting of the U.N. Charter, the point was made that if an interpretation of the treaty “is not generally acceptable it will be without binding force,” thus recognising that interpretations receiving general approval will be authoritative.<sup>146</sup> Furthermore, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ confirmed that the Assembly had the competency to interpret its own powers under Article 12 of the U.N. Charter.<sup>147</sup> Therefore, while a debate may ensue about the scope of the Assembly’s powers and the proper legal method for determining it, ultimately the organisation derives the source of its authority from the membership. The scope of powers is to be determined by the members themselves.

Admittedly, this will often require a long gestation period to evince an accepted interpretation, especially if there is interpretive disagreement amongst members. It may also take a long time because the general membership is unable to directly manifest its will over the organ interpreting particular powers under the U.N. Charter. For example, the Council has adopted a practice of interpreting Article 27 “concurring” votes to not include abstentions.<sup>148</sup> In the *Namibia* Advisory Opinions, the ICJ noted that this had become established practice within the Council, but what is significant is the court’s observation that this practice “has been generally accepted by *Members* of the United Nations.”<sup>149</sup> The ICJ thus acknowledged the sovereignty of U.N. members to control interpretation of the Charter. That a practice needed to develop to evince the members’ intent is explicable by the fact that the general membership to which the ICJ refers

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[http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/the-relation-of-law-politics-and-action-in-the-united-nations-volume-109-ej.9789028614628.165\\_256?s.num=1&s.au=schachter%2c+Oscar](http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/the-relation-of-law-politics-and-action-in-the-united-nations-volume-109-ej.9789028614628.165_256?s.num=1&s.au=schachter%2c+Oscar)”.

<sup>145</sup> HANS Kelsen, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* xiii (4th ed. 1964).

<sup>146</sup> U.N. Conf. Int’l Orgs., Rep. of the Rapporteur of Committee IV/2, U.N. Doc. 933 IV/2/42(2) ¶ 7 (June 12, 1945), reprinted in 13 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, *supra* note 123, at 703; Schachter, *supra* note 144, at 187.

<sup>147</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, 136 (July 9).

<sup>148</sup> U.N. Charter art 27(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, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”).

<sup>149</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, 1971 I.C.J., *supra* note 134, at 22 (emphasis added).

was not initially engaged in the Council's interpretive exercise of defining what constitutes a concurring vote.

The key point from this analysis is that the membership is vested with authority to interpret the U.N. Charter, but this may manifest in different ways and, moreover, at differing rates of rapidity. Uniquely, the Assembly comprises the entire U.N. membership. It thus has the capacity to crystallise an accepted interpretation of the U.N. Charter in a much more direct form than the other organs, who rely on the more laborious process of showing acquiescence from the general membership over time.<sup>150</sup> When members vote for an Assembly resolution, they are necessarily asserting or implying a position relative to one or more legal propositions raised.<sup>151</sup> They are claiming that the Assembly has the competence to act in the manner it intended in the resolution. Unlike the other organs, the Assembly is therefore able, if the political will exists, to render an accepted interpretation of the U.N. Charter with unusual rapidity. Where this is the case, action taken with the active support of a significant majority of states is not *ultra vires* but rather reflects the powers of the Assembly within a dynamic constitutional system.<sup>152</sup>

Still, the basic objection to this argument is that the Assembly could, in a single resolution such as *UfP*, authoritatively interpret the scope of its implied powers. To accept that a single resolution can generate a constitutional power would be akin to finding that the Assembly is a legislative body. Indeed, a proposal by the Philippine delegation conferring legislative powers on the Assembly was rejected during the drafting of the U.N. Charter.<sup>153</sup> Rather, there is a need for significant persistent recitation of a resolution to evince members' intent.<sup>154</sup> Thus, the Universal Declaration of Human Rights attained the status of customary international law not because of its affirmation in a single resolution but because of its recitation in subsequent resolutions.<sup>155</sup> Members should not be held to their

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<sup>150</sup> *But see* Hailbronner & Klein, *supra* note 83, at 237 (citing the original intention of the drafters to exclude the Assembly's power of "authentic" interpretation).

<sup>151</sup> Schachter, *supra* note 144, at 176.

<sup>152</sup> Salo Engel, *Procedures for the De Facto Revision of the Charter*, in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 108, 112–13 (1965).

<sup>153</sup> *Journal no. 18 of the United Nations Conference on International Organization* (May 15, 1945), reprinted in 2 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945, 64, 64 (1998).

<sup>154</sup> See Samuel A. Bleicher, *Legal Significance of Re-citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444, 457 (1969).

<sup>155</sup> *Id.*

vote on resolutions that they regarded as meaningless or subject to change: there should be no obstacle to a “change of heart” by members.<sup>156</sup> Under this reasoning, a single resolution by the Assembly authorising coercive action would be insufficient to establish a constitutional power.

A resolution’s interpretive significance will turn on whether it is reasonable to expect the state to remain faithful to its vote in the future.<sup>157</sup> The issue is not whether an Assembly recommendation is binding, but whether it evinces sufficient evidence from the U.N. general membership as to the scope of the Assembly’s constitutional powers. The legal significance of a resolution will depend on the language employed, its motives, and the general context that led to its passage.<sup>158</sup> The context of the deadlock over Korea in 1950 constituted, to borrow a phrase, a “Grotian moment” that brought into focus the acute need for constitutional realignment, meaning that the Assembly resolution was to be taken as representing the members’ accepted interpretation of the power of the Assembly to recommend coercive measures.<sup>159</sup> That the vote was overwhelmingly in favour of the resolution (fifty-two to five, with two abstentions) further supports its certification as an accepted interpretation of the Assembly’s powers under the U.N. Charter. Similarly, if the Assembly were to recommend coercive measures in the form of a humanitarian intervention to avert serious human rights abuse, the votes of members would be taken to represent their categorical view as to the powers of the Assembly. This conclusion would be further enhanced were the Assembly to debate the constitutionality of any proposed measure, emphasizing that the membership accepted the significance of their Assembly vote. Therefore, even a single resolution affirming the Assembly’s coercive power, given the solemnity of the context and its constitutional significance, would constitute an accepted interpretation of the powers of the Assembly under the U.N. Charter.

This leads to the second criticism of majoritarian constitution making—that such an approach holds minorities to a constitutional interpretation they do not support. More fundamentally, this majoritarian conception essentially subjects legal text to a political process, where any

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<sup>156</sup> *Id.* at 453–57.

<sup>157</sup> *Id.* at 446–53.

<sup>158</sup> *Id.* at 477.

<sup>159</sup> The phrase “Grotian moment” here is borrowed from a theory that customary international law may emerge rapidly where the context permits. See MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS (2013).

resolution is legally validated no matter how far removed it is from the language of the Charter and the originally attributed powers of the organ. Thus, the principle of state consent is not “frontally assaulted but cunningly outflanked.”<sup>160</sup> It is true that the Assembly could endorse a course of action that is *ultra vires*. The validity of an act by an organ rests with the members themselves, with their assent validating an act that is otherwise unconstitutional.<sup>161</sup> However, concerns may be raised that the powers of the Assembly are open to abuse where there is too much constitutional latitude for change. This is inevitably a concern within a dynamic constitutional system where the locus of power is the membership itself, but there are still reasons to be optimistic that the Assembly will capably provide its own customary checks and balances, particularly given its universal and diverse composition. Indeed, it is noteworthy that the Assembly debate in 1950 on *UfP* represented a wide spectrum of viewpoints, with the ultimate justification for *UfP* not deriving from a crude argument of unfettered power but based on a close teleological reading of the U.N. Charter and the adoption of an interpretation that fell within a spectrum of reasonable interpretive possibilities.<sup>162</sup>

Further, the criticism that minority-voting members are held to the legal effect of resolutions against their will can be persuasively addressed. The requirement of member unanimity remains an important mechanism for constitutional reform in many international organisations, but the U.N. Charter explicitly departs from this principle. This was necessary because otherwise a single state would effectively hold veto power over the U.N.’s constitutional development, which is problematic with a near universal membership.<sup>163</sup> The inclusion of majoritarian decision-making is thus underpinned by the need for the U.N. Charter to be effective in achieving its purposes, the same teleological assumption supporting the Assembly’s strong *UfP* powers. Thus, both the Council and Assembly can act where there is majority support.<sup>164</sup> An amendment to the U.N. Charter does not

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<sup>160</sup> Prosper Weil, *Toward Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 438 (1983).

<sup>161</sup> Elihu Lauterpacht, *The Legal Effect of Illegal Acts of International Organisations*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 88, 120 (1965).

<sup>162</sup> For an analysis, see J. Andrassy, *supra* note 57.

<sup>163</sup> C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 419 (1996).

<sup>164</sup> U.N. Charter arts. 18, 27 (supporting the conclusion that, of course, there must also be permanent member unanimity for Council decisions).

require unanimity but rather requires a two-thirds majority.<sup>165</sup> By analogy, Michael Akehurst argued that if a large number of members in the minority could unsuccessfully oppose an amendment, then it must follow that the distillation of a constitutional power could be supported with similar voting outcomes.<sup>166</sup> Furthermore, the ICJ has never insisted upon unanimity when evaluating the relevance of subsequent practice to determining members’ agreement, noting in the *Namibia* Advisory Opinion that the practice at issue “has been *generally* accepted . . . .”<sup>167</sup> It is therefore reasonable to assume that U.N. members accepted the possibility that subsequent interpretations may not be ones that they preferred.<sup>168</sup>

That said, one potential hurdle to an Assembly resolution having constitutional effects concerns the actual size of the majority. The argument above is premised on members expressing their will through the Assembly as to the scope of this organ’s powers. However, this premise is undermined where the technical majority achieved for a resolution does not significantly represent the will of the membership. Under Article 18(2) of the U.N. Charter, an Assembly resolution only requires the affirmative votes of two-thirds of those “present and voting,” and not the membership as a whole. The legal or legitimising value of a resolution that only has the support of a small number of members would “tend towards zero.”<sup>169</sup> This is a valid point, in that an interpretation of the U.N. Charter would require the support of a significant number of members for it to be accepted. An actual two-thirds majority of U.N. members, rather than a technical majority, is therefore required.<sup>170</sup>

### C. *Constitutional Controls on the Assembly’s UfP Powers*

A compelling case may therefore be made for strong *UfP*, grounded in the doctrine of implied powers and a teleological interpretation of the U.N.’s foundational documents. Nonetheless, questions remain about the scope of *UfP* and the legal considerations that the Assembly should take into account

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<sup>165</sup> U.N. Charter art. 1

<sup>166</sup> Michael Akehurst, *The Hierarchy of the Sources of International Law*, in *THE BRITISH YEAR BOOK OF INTERNATIONAL LAW: 1974–1975* 273, 278 (1977).

<sup>167</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 22 (1970).

<sup>168</sup> Bleicher, *supra* note 154, at 449. See also Anthony D’Amato, *On Consensus*, 8 *CAN. Y.B. INT’L L.* 104, 121–22 (1970).

<sup>169</sup> Talmon, *supra* note 24, at 10.

<sup>170</sup> Abstentions may also be construed as an acquiescence to the terms of the resolution given that any objection could have been expressed in a negative vote. See Bleicher, *supra* note 154 at 449.

when recommending coercive measures. As there is limited *UfP* practice in this area, and none in the context of humanitarian intervention, this paper suggests a possible legal framework, which may provide guidance for the future application of *UfP* to questions of humanitarian intervention.

1. *Council Trigger for UfP*

The first consideration is what role the Council should perform under *UfP*. The Assembly may act where the Council has failed in its primary responsibility, but the *UfP* specifies that the Council may request that the Assembly convene an emergency special session.<sup>171</sup> The *UfP* resolution also triggers the Assembly's consideration of a situation where a majority of U.N. members make such a request. While either the Assembly or Council may trigger the *UfP* procedure, there is good reason, grounded in practice, for the Council to make this determination.

First, to do so respects the language of Article 12 of the U.N. Charter in that the Council's request would constitute a certification that it is no longer "exercising" its functions on a particular situation.<sup>172</sup> This would provide the Assembly with a broad constitutional mandate to make appropriate recommendations. By respecting the Council's right to trigger *UfP*, harmony will be maintained between the two organs.<sup>173</sup> If the Council made such a request, it would amount to a procedural vote, and thus would not be subject to the veto of the permanent members. Under Article 27(2), a procedural matter does not require unanimity, but a qualified majority of Council members (nine out of fifteen). The interpretation of such a vote as a procedural matter is reinforced by the organization of the U.N. Charter, which places a request by the Security Council for the Assembly to convene a special session under the section labelled "Procedure."<sup>174</sup>

Second, as the Assembly would be taking coercive measures in recommending humanitarian intervention it is necessary to find that a situation constitutes a "threat to the peace, breach of the peace or act of aggression" under Article 39 of the U.N. Charter. The Assembly could very well arrive at this determination itself as a necessary prerequisite to acting under *UfP*. Indeed, the Assembly has characterised situations as such in

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<sup>171</sup> G.A. Res. 377 (V), *supra* note 13.

<sup>172</sup> Carswell, *supra* note 16, at 469–70.

<sup>173</sup> Tomuschat, *supra* note 64.

<sup>174</sup> U.N. Charter art. 20.



many resolutions.<sup>175</sup> But given that the Council is empowered to make a determination under this provision, where it makes a request to the Assembly it is implicitly qualifying the situation as one in which coercive measures may be taken.<sup>176</sup> This would not only buttress the Assembly’s power to recommend enforcement action but ensure that there is inter-organ consensus that a situation qualifies for such measures being taken.

Third, practice establishes the Council’s integral role in triggering the *UfP* mechanism where armed forces are to be engaged. Thus, it was the Council who first made the request to the Assembly with respect to major conflicts, both international (Korea, Suez, Hungary, and Afghanistan) and internal (Congo).<sup>177</sup> By contrast, the Assembly invoked *UfP* without a Council request only in non-conflict situations, such as the process of decolonisation and the question concerning Palestinian statehood.<sup>178</sup> The established practice of the Council triggering the *UfP* procedures in conflict situations provides an effective check on the Assembly. This does not mean, however, that the Assembly is unable to invoke *UfP* of their own volition. Ultimately, the Assembly has control over its agenda, but to assume jurisdiction it must assess whether the Council has failed to exercise its primary responsibility.<sup>179</sup> But the involvement of the Council in requesting Assembly action serves to address any lingering (albeit unfounded) concerns that the Council is being constitutionally usurped, further legitimating the process and ensuring it has support of at least some permanent members, which may be necessary to ensure successful action.

## 2. *Predicates to Assembly Action Under UfP*

The Assembly may act in instances where, “because of lack of unanimity of the permanent members, [the Council] fails to exercise its primary responsibility.”<sup>180</sup> There are two conditions: that the veto has been exercised, and that this results in the Council “failing” to exercise its primary responsibility.<sup>181</sup> Therefore, not all negative decisions will justify the

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<sup>175</sup> See, e.g., G.A. Res. 2107 (XX), ¶ 7 (1965).

<sup>176</sup> Carswell, *supra* note 16, at 466.

<sup>177</sup> Petersen, *supra* note 15, at 224, 226, 228.

<sup>178</sup> See Zaum, *supra* note 64, at 155.

<sup>179</sup> Andrassy, *supra* note 57, at 578.

<sup>180</sup> G.A. Res. 377, *supra* note 13, at ¶ 1.

<sup>181</sup> Carswell, *supra* note 16, at 469.

invocation of *UfP*, the veto being a legitimate Charter technique to prevent the overregulation of international peace and security.<sup>182</sup>

A narrow approach in determining Council “failure” is to apply the abuse of rights doctrine, which requires that the right-holders (permanent members) not use their veto in a manner that causes harm to the community.<sup>183</sup> An abuse may be manifested where a decision is arbitrary, taken for an extraneous purpose, or in bad faith.<sup>184</sup> The language of “abuse” captures the moral impetus and discourse of recent condemnations of Council vetoes.<sup>185</sup> However, finding abuse is likely to prove elusive. To be sure, permanent members have vetoed resolutions for extraneous purposes. The United States vetoed the extension of peacekeeping mandates in Bosnia and Herzegovina because it had not received a concession in the drafting of the ICC Statute.<sup>186</sup> Similarly, China ended a peacekeeping operation in Macedonia, apparently because Yugoslavia recognised Taiwan’s statehood.<sup>187</sup> These decisions pursued purposes that were extraneous to that of collective peace and security.<sup>188</sup> However, most negative votes are, at least ostensibly, connected to the Council’s broad purposes, with disagreement between the permanent members focused on the appropriate measures to take. When China and Russia vetoed a Council resolution on Syria, they did so on the basis that U.N. action would be counterproductive.<sup>189</sup> Similarly, in vetoing a referral to the ICC, Russia cautioned this measure would throw “oil to the fire” during on-going

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<sup>182</sup> ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 262 (1994); Phillipa Webb, *Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria*, 19 J. CONFLICT & SECURITY L. 471, 486 (2014).

<sup>183</sup> Competence of General Assembly for Admission of State to United Nations, Advisory Opinion, 1950 I.C.J. Rep. 4, 15 (Mar. 3) (dissenting opinion by M. Alvarez, who first spoke of abuse of rights by the Council in the context of the veto). See also Carswell, *supra* note 16, at 470–71; BARDO FASSBENDER, U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE 174–75 (1998).

<sup>184</sup> See U.N. Charter art. 2, ¶ 2 (obligating members to act in “good faith”); *Id.* art. 24, ¶ 2 (requires the Council to “act in accordance with the Purposes and Principles of the United Nations,” which may reasonably include abuse of rights as a general principle of law); Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389 (2002).

<sup>185</sup> ICISS REPORT, *supra* note 5, at 34.

<sup>186</sup> U.N. SCOR, 56th Sess., 4363d mtg. at 7, U.N. Doc. S/PV.4363 (Aug. 31, 2001); U.N. SCOR, Official Communiqué of the 4567th (Closed) Meeting of the Security Council, 56th Sess., 4567th mtg., U.N. Doc. S/PV.4567 (July 8, 2002).

<sup>187</sup> Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 INT’L AFF. 693, 706 (2002).

<sup>188</sup> *Id.*

<sup>189</sup> U.N. SCOR, 67th Sess., 6711th mtg. at 9, U.N. Doc. S/PV.6711 (Feb. 4, 2012).

hostilities in Syria.<sup>190</sup> The notion that these permanent members abused their rights rather than acting in pursuit of international security may be difficult to objectively ascertain.

A better approach is to find “failure” where a proposed Council resolution was vetoed in a given situation despite evidence of the risk or existence of serious human rights abuse. Using human rights abuse as a trigger for *UfP* is acceptable because while the Council has primary responsibility for peace and security, the Assembly enjoys primacy in the promotion of human rights under the U.N. Charter.<sup>191</sup> The Assembly’s central role in promoting human rights is reinforced by the ICJ’s *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* advisory opinion, which notes that while the “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.”<sup>192</sup> Indeed, it is apparent from many Assembly resolutions that there is an underlying concern about the human consequences of conflict.<sup>193</sup> This is generally in contrast to practice during the Cold War, where *UfP* was utilised in response to inter-state acts of aggression and occupation.<sup>194</sup> This narrower approach not only provides a suitable fit with the Assembly’s primary humanitarian functions, but may also carry greater political appeal to those states who contemplate spearheading a *UfP* resolution but who perceive it to be a “double-edged sword.”<sup>195</sup>

However, *UfP* contemplates the Assembly acting where there has been a “breach of the peace” in contrast to a “threat to the peace.” This is material, as on the few occasions that the Council characterised a situation as a “breach of the peace,” the situation involved inter-state hostilities or use of force by a *de facto* regime against a state.<sup>196</sup> As noted above, this definition thus excludes intra-state situations of the type that engage with the

<sup>190</sup> G.A. Res. 66/253B, *supra* note 8.

<sup>191</sup> See U.N. Charter art. 1; U.N. Charter art. 13, ¶ 1; U.N. Charter art. 55; U.N. Charter art. 60.

<sup>192</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, 150 (July 9) (emphasis added).

<sup>193</sup> See, e.g., G.A. Res. 1104 (Dec. 18, 1956) (noting that the “intervention of Soviet military forces in Hungary has resulted in grave loss of life and widespread bloodshed among the Hungarian people” and calling for cooperation in providing humanitarian aid).

<sup>194</sup> White, *Relationship Between*, *supra* note 49, at 309. See also U.N. Charter art. 13, ¶ 1(b); art. 55.

<sup>195</sup> See Carswell, *supra* note 16, at 455–56.

<sup>196</sup> S.C. Res. 502 (Apr. 3, 1982); S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 82 (June 25, 1950).

humanitarian intervention doctrine.<sup>197</sup> The view that this justifiably places limits on the Assembly's powers is misplaced. The term "breach of the peace" is broad enough to encompass internal situations.<sup>198</sup> The difference between these terms is one of degree, as a threat may mature into a breach. There must be evidence of a breach, as opposed to a reasonable belief that a given state of affairs threatens to become one. How this manifests itself in a situation of grave human rights abuse is open for interpretation, and as with Council determinations on such matters, the discretion to identify a breach must rest with the Assembly itself.<sup>199</sup>

There exists a great deal of convergence in the international community as to the types of human rights abuses that warrant intervention. The responsibility to protect (*RtoP*) doctrine supports measures to protect populations from genocide, war crimes, crimes against humanity, and ethnic cleansing.<sup>200</sup> Similarly, the British and French would justify intervention where there is evidence of "overwhelming human catastrophe" or "mass atrocity" respectively.<sup>201</sup> Of course, there could be some penumbra of doubt as to when a situation qualifies as a grave human rights abuse. Yet while problems of scope and intensity remain, *RtoP* offers sufficient criteria of seriousness to avoid or mitigate abusive invocation of human rights as justification for unlawful intervention.<sup>202</sup> The most important issue is whether the entity applying such standards is capable of doing so in an objective and principled way.

The problem is not with the principle, but with the application. The World Summit in 2005 endorsed *RtoP*, but in practice the doctrine has stumbled because of disagreement over the suitability of measures to address such crises. Ultimately, however, the shortcomings of *RtoP* have arisen because its locus of operation has been within the Council where the disagreement of a single permanent member could result in deadlock. While there may be merit in placing limits on the regulation of international peace

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<sup>197</sup> Christian Henderson, *Authority without Accountability? The UN Security Council's Authorization Method and Institutional Mechanisms of Accountability*, 19 J. CONFLICT & SECURITY L. 489, 507 (2014).

<sup>198</sup> Jochen A. Frowein, *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 605, 609 (Bruno Simma et al. eds., 1995).

<sup>199</sup> ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 139–40 (2004) (the Council has broad latitude under Article 39).

<sup>200</sup> See ICISS REPORT, *supra* note 5.

<sup>201</sup> *Id.* at 33; see also Johnson, *supra* note 23.

<sup>202</sup> Rodley, *Humanitarian Intervention*, *supra* note 38, at 777.

and security, the application of *UfP* to humanitarian crises would not necessarily mean an increase in U.N. enforcement action. The same arguments made by China and Russia to block further measures in Syria could equally resonate in a failed Assembly resolution.<sup>203</sup> Indeed, the political environment would have to be such that states contemplating a humanitarian intervention feel assured of wide support in the Assembly—a level of formal support that Council- or region-led operations, with their much smaller number of voting members, could never have. The notion that the U.N. would become involved in more enforcement actions with a liberal interpretation of powers under the U.N. Charter belies the political complexity in organising and securing a consensus, and also the exceptionality of using military force. But in instances of large-scale human rights abuse that shock the conscience of the international community, coupled with Council inaction, the *UfP* mechanism provides legal justification for the Assembly to make recommendations up to and including the use of force under a U.N. mandate.

### III. CONCLUSION

Through the lens of the humanitarian intervention doctrine, this article argued that Assembly resolutions may acquire certain legal effects, in turn presenting the Assembly as a viable alternative to the Council in augmenting collective responses to security crises. In particular, it was noted that Assembly resolutions serve as an aid in determining members’ general agreement as to the scope of this organ’s powers under the U.N. Charter. No U.N. organ has interpretive supremacy, it being incumbent on each organ, in the first instance at least, to define its own jurisdictional scope. When the Assembly passes a resolution, its members thus implicitly assert a legal claim as to the scope of the organ’s powers. The legal claim may be that such resolutions are purely hortatory, as is commonplace in practice. But equally, Assembly members have constitutional licence to interpret the organ’s powers more broadly, such as to recognise an implied power to authorise enforcement action, as the Assembly did in 1950 under the *UfP* mechanism. It may be that the members’ legal claim on the Assembly’s jurisdictional scope is not always clearly articulated within a resolution, thus necessitating recitation and affirmation in subsequent resolutions. But where the intention of a resolution is clear, and it obtains the support of a

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<sup>203</sup> See *Russia and China Veto Draft Security Council Resolution on Syria*, U.N. NEWS CENTRE (Oct. 4, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39935#.VpyIKPkrLIV>.

substantial majority of U.N. members via consensual procedures, it constitutes an accepted interpretation of the Assembly's powers under the U.N. Charter.

Furthermore, Assembly resolutions pursuant to *UfP* may delegate enforcement authority to willing states acting under a U.N. mandate. Here the legal effect of the resolution is primarily internal, by specifying the nature and extent of the authority that is subject to delegation, but there is also some extrinsic effect to the resolution, in that it provides a legal justification for action that would otherwise contravene international law. The "authorising" quality of a *UfP* resolution serves to bring the contributing state, now acting under a U.N. mandate, into a special legal regime, and not subject to specific obligations under Article 2(4) that would otherwise prevent it from using force.

Establishing that Assembly resolutions have such legal effect is necessary in order for the Assembly to effectively assume responsibility for international peace and security in the event of a Council deadlock. Whereas the Council expressly possesses mandatory and coercive powers that facilitate its regulation of international security, a more creative and teleological approach is necessary when fashioning the Assembly's implied powers. The U.N. Charter is sufficiently vague for varied interpretations as to the scope of powers and purposes. However, it has been argued here that these questions of interpretive disagreement are ultimately vested with the membership to resolve through consensual procedures. Through *UfP*, the membership has the capacity to assert its views in varying degrees where the Council has failed to maintain international peace and security.

This inevitably leads to the question of whether such a bold assertion of power will ever materialise again. This article focused on technical aspects of the acquired legal effects of Assembly resolutions, but in doing so it revealed that interpretation is itself underpinned by a normative commitment to a given conception of collective security. Engaging in a teleological interpretation of the U.N. Charter brings into sharp focus the question of not just what the organization was established to do but what it ought to do in response to contemporary security concerns. The U.N. Charter has proved remarkably adaptable to changing circumstances in international politics, from the growth of Assembly competencies during the Cold War to the reawakening of an extraordinarily powerful Council thereafter. From initially conceiving of collective security as a mechanism to repel acts of aggression, it is now safe to say that collective security is

also defined by its ability to ensure respect for and the protection of human rights. With a shift in paradigms, it is not inconceivable that the Assembly, realigning *UfP* to address humanitarian crises instead of Cold War acts of aggression, could obtain sufficient support to act on behalf of the collective security community to recommend measures up to and including the use of force.

The attainment of collective security continually raises questions of legality and legitimacy, sometimes in dichotomous terms. That the NATO humanitarian intervention in Kosovo was of doubtful legality was arguably excused because it was seen as legitimate. The clear legal basis of the arrest warrant for Al-Bashir, underpinned by a Council decision, did not prevent trenchant criticism from African states over the International Criminal Court’s legitimacy. The undoubted legal basis for China and Russia to veto a referral of Syrian atrocities to the ICC did not prevent widespread condemnation in the international community of the Council’s vote. But the *UfP* mechanism, when properly used and supported by a consensus of U.N. members, holds the promise of promoting both legality and legitimacy in the attainment of collective security objectives that would otherwise be unreachable due to Council deadlock.