

## COMMENT ON LARRY JOHNSON, “UNITING FOR PEACE”

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Larry Johnson’s essay<sup>1</sup> on the UN General Assembly’s Uniting for Peace resolution (UFP) is a useful general analysis of issues arising from UN Security Council Permanent Member veto-paralysis. His essay, which focuses on the text of the original Resolution, is directed at asking whether the UFP retains a current “useful purpose.” Relying on a text-centric interpretation of the presence or absence of subsequent invocations of the UFP, he concludes that no “useful purpose” remains, in part because evolved General Assembly authority has displaced the need to specifically invoke the UFP to make recommendations on certain issues of international peace and security. Johnson then asks whether, under the original UFP or subsequently, the Assembly may recommend to Member States “enforcement” uses of force, notwithstanding the prohibitions of Article 2(4)<sup>2</sup> of the Charter. He finds Article 2(4) to be an absolute barrier to Assembly authority to recommend those measures, but not for “innovative and inventive non-use-of force measures.”

Johnson’s analysis is informative, but at key junctures it is too narrow in its interpretations. I suggest that the UFP is not currently irrelevant but has evolved into a principle of standing Assembly authority that can be periodically invoked, which in this regard is subject to further Assembly innovation. Further, the UFP must be treated from the beginning as part of the intense issue of prescribing international legal remedies for Permanent Member vetoparalysis of the Security Council. Finally, Article 2(4) is not an insurmountable prohibition against UFP-related and carefully tailored Assembly recommendations to Member States that permit them to take military enforcement actions in reaction to an imminent human rights catastrophe within the latter’s territory.

### *Textuality and the UFP*

Two issues frame early difficulties with Johnson’s discussion. The first is his treatment of the original UFP as, in effect, a statute in both form and authority. While the precise interpretation of texts has its own importance, doing so here as a primary approach to understanding the resolution’s contemporary and subsequent authority strips away essential context. In particular, it hides the long-standing narrative on the authority of General Assembly resolutions under international law. That narrative has long held that the question must go beyond consulting the Charter provisions that confine the Assembly to making “recommendations.” The greater context includes the law-declaring intent of the Assembly majority and the contents of Assembly resolutions relating to emerging or existing customary international law. Defining the UFP primarily through textual parsing implies that the original text is binding on the Assembly as a source of its future authority, and binding on Member States as they subsequently approach the Assembly for action under

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<sup>1</sup> Larry D. Johnson, “*Uniting for Peace*”: *Does it Still Serve Any Useful Purpose?*, 108 *AJIL UNBOUND* 106 (2014).

<sup>2</sup> *UN Charter* art. 2, para. 4.

pertinent international facts. In the absence of any doctrine that limits the Assembly to its own prior precedents, as if it were bound by *stare decisis*, arguments that the UFP of 1950 prohibits the General Assembly from subsequently recommending enforcement actions to Member States are unconvincing; the Assembly has the power to act under the evolving interpretation of the Charter and international law that evolves over time.

Moreover, the question of the legal authority of General Assembly resolutions has long drawn highly inconsistent responses. Johnson here emphasizes the Assembly as a body limited to recommending competence and then discusses the further limits on the Assembly's authority to "recommend" measures involving threats to international peace and security vis-à-vis the Security Council. In interpreting the UFP as a kind of statute while characterizing it as only recommendatory in authority, Johnson's discussion elides the larger debate on the Assembly's authority.

### *The Security Council Veto Question*

The second difficult issue goes to the veto authority of Security Council Permanent Members under the Charter. Johnson presumes that "whenever a permanent member casts a veto it does so because it believes it must in light of its own national interests and in defence of the purposes and principles of the Organization. It is simply exercising a right given to it under the Charter precisely to prevent the adoption of a proposal." This presumption is, at best, misleading. The definition and scope of veto authority under the proposed Charter were intensely debated at the San Francisco Conference in 1945, including between small states and the powerful Permanent Member war victors who insisted the new Charter contain a veto provision.

As debated in Commission III<sup>3</sup> of the Conference, the smaller powers presciently feared that when one of the "Big Five" threatened the peace, the Security Council would be powerless to act, while the Big Five could act arbitrarily relative to a clash between two states not permanent members of the Council. The initial reason for the veto was to prevent the UN from acting against its founding members, and for the Council to act "swiftly and forcefully" to prevent another world war. The Commission stated that the Security Council should refrain from decisions that might affect the "territorial integrity" and "political independence" of Member States, and that the Council should act in accordance with both the purposes and principles of the Organization and with the UN Charter.

The San Francisco drafters assumed that the Security Council Permanent Members would decide on the use of force in good faith. Harold Stassen of the U.S. delegation stated that "any one of the major powers could destroy the Organization," implying that unreasonable use of the veto would be destructive to the Organization and should not be part of the interpreted Charter authority on the veto. Further, Senator Connally of the United States stated in Committee III that the Big Five should consider gravely their great responsibility, acting not as representatives of their own governments and ambitions, but as representatives of the Organization. Their duty was to maintain world peace and security because the power was vested in them by the fifty member states.

The UFP was an early response to this constitutive veto question. It was intended to respond to the Council's incapacity in the face of a clear threat to international peace and security. The drafters intended to limit that veto authority for use in good faith to uphold the welfare of the organization and its purposes and principles, to uphold the Charter (including the protection of Member States' territorial integrity and political independence), and to limit the use of the veto to instances in which it is needed to advance the purposes of

<sup>3</sup> United Nations Conference on International Organizations, San Francisco, California, April 25-June 26, 1945, Commission III: Security Council, Vol. XI (1945).

the organization and not each permanent member's national foreign policies. Based on this bargain, the privilege of the Permanent Member veto was agreed on pursuant to the Big Five's demands. The Charter's aims clearly excluded the casting of the veto to protect exclusive national foreign policy interests, much less the casting of a stream of such vetoes over time.

But these original limits on the use of privileged veto by the Permanent Members did not govern for many years beyond 1946. The Soviet Union first violated them in the course of the Korean War, and the United States followed suit. The latter happened, ironically, notwithstanding the United States' introduction of the UFP, where it invoked these limitations on the veto by criticizing the Soviets for their ultra vires and by proposing to transfer relevant Security Council authority to the General Assembly where these limits were violated. And now we have the current Permanent Members' veto practice well-described by Kenneth Roth,<sup>4</sup> speaking with regard to events in Syria: "[o]ne frustrating element of the Security Council's structure is that it permits the Five Permanent Members . . . to use their vetoes to block action for any reason, partisan or parochial, even in the case of mass atrocities." The tension between the historically understood limits on the veto and the historical violations by the Permanent Members raises a critical jurisprudential issue: which of the two should govern the controlling interpretation of Charter? Has the Permanent Member practice succeeded in authoritatively corrupting the original Charter intent, or should we accept as the better international legal policy that Permanent Members must exercise their veto in the global welfare interest?

Johnson, in presuming that Permanent Members simply have "a Charter right to block a proposal," presumes the answer to that critical question. He presumes that there are now no Charter (or international law) limits on Permanent Members' ability to exercise the veto. This argument bears on the continuing authority of the UFP by highlighting the veto as a Permanent Member foreign policy tool. It further underscores the urgency of wider interpretations of Assembly authority on international peace and security issues. Finally, it interrogates Assembly competence in acting under the UFP and its other Charter authority, where the Security Council has referred a threat to the Assembly for "appropriate action" because of the former's veto paralysis.

### *The UFP and International Peace and Security*

On the Assembly's competence to recommend under the UFP the use of force by Member States, Johnson, citing the UFP text, notes that the Assembly gives itself the authority to recommend armed force "when necessary . . . , including in the case of a breach of the peace or act of aggression" (emphasis added). He sees an operative distinction of Assembly competence between breach of the peace and a "mere" threat to the peace. Unfortunately, Johnson neglects to interpret "including," a word that clearly widens Assembly authority on this question by making "breach of the peace or act of aggression" examples of a wider operative category of Assembly recommendations on use of force. The Assembly has apparently granted itself the competence to recommend necessary armed force to Member States for legal facts lying beyond those two offenses, including, for example, "threats to international peace and security" where the Security Council is paralyzed by the veto on such questions. In addition, his textual interpretation neglects the practice (including by the Council) that has eroded legal expectations of a distinction between "breach of the peace" and a "threat to international peace and security."

The UFP was intended from the beginning to invoke and apply the widest interpretation of General Assembly authority to address the constitutive dislocation of a veto-paralyzed Security Council facing visible threats to international peace and security. It is thus a desirable policy to incorporate as much of the Council's

<sup>4</sup> Kenneth Roth, *Syria: What Chance to Stop the Slaughter?*, 60 N.Y. REV. Books 18 (Nov. 21, 2013).

practice and authority as possible into the UFP competence of the Assembly, since the Assembly is called upon to temporarily replace, as nearly as possible, the Council's authority to address such threats. Thus, to find as Johnson does, a limitation on Assembly UFP competence to recommend enforcement measures resting on the textual difference between "breach of the peace" and "threats to international peace and security" understates the evolution of international law, and otherwise confuses narrow textual parsing with actual requirements of contextual authoritative decision-making.

Lastly, Johnson's approach presumes that the General Assembly is inferior to the Security Council on matters of international peace and security and other global values. This ignores, *inter alia*, the importance of the Assembly in the United Nations' claim to represent the interests of the majority of sovereign states and the majority of the world's population.

### *The UFP and the General Assembly's Evolved Authority*

By relying heavily on the subsequent textual invocation by the Security Council or the General Assembly of the original UFP to determine the "useful purpose" of the UFP, Johnson draws a bright line between the UFP and other General Assembly authority regarding international peace and security. He finds that the latter has generally expanded, thereby obviating the need for the UFP. But the distinction between the Assembly's old and more recent actions is misplaced. Since 1950, the underlying principle of the UFP has evolved. Today, that principle—and not solely the UFP as such—is part of the Assembly's competence under the Charter. This is the case whether or not the UFP is textually invoked by either the Security Council or General Assembly whenever the Council has been incapacitated from its primary responsibility by a Permanent Member veto. At the same time, the UFP's content and principles shape the legal structure of relevant Security Council procedural referrals, and responding or initiated General Assembly resolutions where Security Council failure is specifically cited (compare UNSC Resolution 500,<sup>5</sup> January 28, 1982, with UNSC Resolution S/4526,<sup>6</sup> September 17, 1960).

Recently, UNGA Resolution 66/253B<sup>7</sup> (February 16, 2012) on Syria illustrated the UFP's authoritative influence within the evolved legal competence of the Assembly. Here the Assembly applied the general principle of the UFP without specifically invoking the formal resolution. Referring to ongoing massive violence by the Syrian government against its people, the Assembly, *inter alia*, expressed its "deep concern" at the lack of progress towards the implementation of the six-point plan, and "deplor[ed] the failure of the Security Council to agree on measures to ensure the compliance of Syrian authorities with its decisions" (referring to previous vetoes by Russia and China). The Assembly resolution further "encourages the Security Council to consider appropriate measures" of human rights accountability, "invites Member States to provide all support to the Syrian people," and "encourages Member States to contribute to the United Nations humanitarian response efforts."

Here, the Assembly framed its authority around invoking the failure of the Security Council through Permanent Member vetoes to ensure compliance with its previous decisions and to perform its primary responsibility. It thus assessed the human rights need, regarding a critical threat to international peace and security, for the Assembly to step in and act, *inter alia*, under its Article 10<sup>8</sup> authority. Part of the legal context here is that the violation of responsibility to protect (R2P) had previously<sup>9</sup> been interpreted by the Assembly

<sup>5</sup> SC Res. 500 (Jan. 28, 1982).

<sup>6</sup> SC Res. 4526 (Sept. 17, 1960).

<sup>7</sup> GA Res. 66/253 (Aug. 7, 2012).

<sup>8</sup> UN Charter art. 10.

<sup>9</sup> SC Res. 1970 (Feb. 26, 2011).

and the Council as a threat to international peace and security. The Assembly made several clear recommendations to Member States—with no need to use that exact term—to act under their sovereign authority to support human rights accountability; provide support to non-governmental Syrian people and, implicitly, their groups; and provide specific active humanitarian support to implement the transition plan. The Assembly thus recommended “inventive, non-coercive” measures to Member States, as Johnson supports, but also potentially coercive measures in inviting Member State support for Syrian resistance groups, which subsequently might cover unilateral arms transfers to those groups.

In that instance, the Assembly invoked the principles of the UFP as a now established narrative under its Charter competence, following Security Council veto-failure, and made recommendations to Member States to move as far as possible to fill the gap created by Council failure. This illustrates how attempting to show the expired “useful purpose” of Uniting for Peace by pointing to its textual invocation, or not, in subsequent Assembly resolutions is inadequate to understand its continuing influence and authority.

#### *Article 2(4) and UFP Enforcement Recommendations*

The interpretation of Article 2(4) is presently buffeted by intensifying expectations about its prohibitions, which increasingly challenge conventional doctrine. That doctrine generally interprets this provision as prohibiting all unconsented-to foreign unilateral military force from crossing a target state’s borders for any reason. But projected military and para-military counter-terrorism policies, justified under national security law, are only one of several current examples of large state practice claiming some legal permission to send military force absent target state consent across their borders.

These contending global expectations frame the Article’s interpretive issue of the prescriptive authority of “territorial integrity” and “political independence” as necessary conditions, respectively, to determine a violation. If these conditions govern the Article’s violation, any military force against the target state must be interrogated on its aims and facts relative to its threat to that state’s “territorial integrity” or its “political independence.” Military force that will, contextually, leave those two conditions intact presumptively will not, under current challenging interpretations, comprise a violation of Article 2(4). This will especially be the interpretation if the aims of the state so intervening are obligated by a separate binding international legal norm, such as R2P, which rests on state obligations towards individual persons under international human rights law.

The ICJ’s *Nicaragua*<sup>10</sup> decision upheld, under Article 2(4), the general prohibition of unilateral military intervention, in that instance by a hegemonic power into a regional small state. It is a salient issue whether that case bars a collectively authorized military intervention.

The conventional Article 2(4) doctrine has been challenged on R2P grounds of course,<sup>11</sup> but even long before R2P was announced as a putative doctrine there was a debate at San Francisco concerning the collective authority of the Security Council to authorize national military force against a Member State. The Framers faced strong arguments, including by U.S. representatives, for the Council to be prohibited from authorizing military force that would threaten the “territorial integrity” or “political independence” of a Member State.

<sup>10</sup> *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 ICJ REP. 392 (June 27).

<sup>11</sup> Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT’L L.J. 120 (1992); ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* (1987); Joelle Tanguy, *Redefining Sovereignty and Intervention*, 17 ETHICS & INT’L AFF. 141 (2003).

Under some understandings of Article 2(4), the Assembly under the UFP, whether or not the threat was formally referred there by the Council upon its own incapacity, would be unable to recommend to Member States non-self-defense enforcement actions that threatened the territorial integrity or political independence of a Member State. But the Assembly, in place of the Council, might recommend military action with more limited aims and projections if the enforcement action was obligated by a separate binding legal norm such as R2P or the obligation to respond to genocide. In so recommending, the Assembly would be exercising collective authority under international law: member States would not be bound by its recommendations to act, but they would likely be so obligated under R2P or other international law. If they did choose to act, they would not be doing so unilaterally but under the Assembly's permissive collective authority.

Johnson argues against weakening the Article 2(4) prohibition against military force during this time of international tension and conflict. But the history of discrepant state practice and parallel legal notions that have arisen to justify military intervention by Northern States against Southern States and peoples belie the proposition that Article 2(4) has been a bulwark against unilateral military force. The conventional doctrine of Article 2(4) has been of some use to smaller states in mobilizing international support in some cases of especially egregious unilateral military intervention (e.g., Desert Storm or U.S. actions in Nicaragua) and in establishing regional doctrines and cases of prohibition (as in Latin America).

However, a better policy of Article 2(4) protection could be maintained by following the ICJ's *Nicaragua* implied holding: that Article 2(4) bars any unilateral military intervention which has not been collectively authorized under international law in some substantive way. Adequate protection for small states can be maintained by interpreting Article 2(4) to bar unilateral interventions outright that do not rest on a substantive collective authorization of that action under international law linked to a binding legal norm, such as R2P. Obviously this reference to "collective authority" extends to Assembly recommendations under the principle underlying the UFP: that is, when the Council cannot exercise its primary responsibility.