“Uniting For Peace” and Humanitarian Intervention: The Authorising Function of the UN General Assembly

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Michael Ramsden*

Abstract:
Although the end of the Cold War has seen the functional expansion of the UN Security Council, concerns still remain over this organ’s 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 UN Charter framework, little attention has been paid to how the UN General Assembly may authorise such enforcement action under a UN 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 properly conceived, the General Assembly may authorise a humanitarian intervention where the Security Council is deadlocked and has failed in its primary responsibility to maintain 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.

Key words:
Humanitarian Intervention – Uniting for Peace Resolution – Powers of the UN General Assembly

I. INTRODUCTION

The United Nations Security Council (Council) is, by any legal measure, an extraordinary institution. Possessing a broad power to render mandatory decisions on members of the United Nations (UN), it may also authorise measures up to and including forcible coercive action where it determines there to be a “threat to the peace, breach of the peace or act of aggression.”1 In discharging its ‘primary responsibility’ for international peace and security, the Council has embraced a teleological interpretation of its mandatory and coercive powers under the UN Charter to address diverse security concerns, including to ease humanitarian crises, compel the seizure of financial assets, establish ad hoc tribunals, and to make referrals to the International Criminal Court (ICC).2

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1 See Arts 39-42, UN Charter.

Despite the impressive growth in the Council’s activities after the end of Cold War rivalries, its legitimacy remains in question. Although ‘legitimacy’ may be measured in different ways, one concern in particular continues to resonate: the perceived misuse of the veto in situations of serious human rights abuse. The failure of the Council to avert genocide in Rwanda, and to exert any meaningful role over the humanitarian intervention in Kosovo, prompted considerable reflection on whether the UN collective security framework was fit for its’ purpose in an era where human rights go beyond mere abstract moral claims to having an erga omnes character.

The Responsibility to Protect (RtoP) doctrine, set against this backdrop, attempted to inculcate within the UN a set of norms that would guide the Council’s exercise of discretion. The report noted that the Council “should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing.” Further, in light of this changing landscape there is also growing support for a French proposed code of conduct, which would require permanent members to voluntarily abstain from using the veto in cases ‘involving mass atrocity crimes’. Although RtoP has had some traction within the UN, the failure of the Council to agree on a resolution to ease the humanitarian crisis in Syria has provoked widespread condemnation, prompting the UN General Assembly (Assembly) to pass a strongly-worded resolution, by a large majority, “deploring the failure of the Security Council.”

In the field of international justice, the Council has also been criticised for condoning impunity given that it was deadlocked on a referral to the ICC to investigate the Syrian situation and also in the creation of an ad hoc tribunal for the MH17 airline disaster.

While some may contend that the Council’s deadlock in 2012 over Syria stemmed from reasonable disagreement among the permanent members on appropriate action, the prospect of the Council returning to the post-Cold War consensus that contributed towards its functional expansion remains far from certain. Recent tensions among the permanent members over Russia’s intervention in the Crimea have provoked casual references to a “new Cold War” and with it, a belief that such tensions “will affect nearly

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4 Barcelona Traction (Belgium v Spain) [1970] ICJ Rep 3, [33] (‘basic rights of the human person’ are erga omnes).
5 See generally ICISS, The Responsibility to Protect (International Development Research Centre 2001). RtoP enshrined two key principles: (1) that State sovereignty implies responsibility, with the primary responsibility for the protection of its people vests with the State itself; (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.
6 Ibid, 50.
every important dimension of the international system.”\textsuperscript{10} Rightly or wrongly, 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.\textsuperscript{11} Given the likelihood of Council deadlock in the future on serious human rights abuse, it is therefore 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 \textit{Uniting for Peace (UfP)} resolution.\textsuperscript{12} This resolution contemplates Assembly action where, due to an absence of unanimity, the Council failed in its primary responsibility to maintain international peace and security.\textsuperscript{13} The Assembly first invoked \textit{UfP} to recommend the continuation of UN action in Korea (1950), following the Soviet Union’s veto of this mandate. \textit{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.\textsuperscript{14} 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 veto.

Still, uncertainties remain as to the continued relevance of \textit{UfP} in a world that has moved on since the Cold War. According to this view, the \textit{UfP} bore political relevance then precisely because it was a device for the permanent members (mainly the United States) to enjoy collective legitimacy for its actions when it was assured of support within the Assembly. Changes in international politics and realignment of the balance of power would make \textit{UfP} something of an unpredictable mechanism, a “double-edged sword” for its sponsors.\textsuperscript{15} Furthermore, \textit{UfP} is premised on the claim that “something should be done,” but there remains the belief that international security should not be overregulated.

\textsuperscript{10} Legvold, ‘Managing the New Cold War’ (2014) 93(4) \textit{Foreign Affairs} 74.
\textsuperscript{11} Bellamy, ‘The Responsibility to Protect Turns Ten’ (2015) 29(2) \textit{Ethics \& International Affairs} 161, 175.
Non-permanent member votes are important, but permanent members are \textit{primus inter pares}, thus the most important focus for analysis on Council decision-making: Forsythe, ‘The UN Security Council and Response to Atrocities: The P-5 and International Criminal Law’, 34 \textit{Human Rights Quarterly} (2012) 840, at 841.
\textsuperscript{13} Ibid.
\textsuperscript{14} See Binder, ‘Uniting for Peace Resolution (1950)’, \textit{Max Planck Encyclopaedia of Public International Law} (OUP 2006); Petersen, ‘The Uses of the Uniting for Peace Resolution since 1950’, (1959) 13 \textit{International Organization} 219.
with the veto at least serving to ensure selective intervention in this respect.\(^{16}\) The Assembly of old was also differently composed than the one of today, with much larger states and with this stronger legitimacy to vote on matters of international peace and security. As it stands, China’s vote (circa 1.3bn population) is given equal weight to Tuvalu’s (circa 11,000 population) in the Assembly. The point here is that while the Council may suffer from a number of defects, at least it attributes greater weight to the choices of bigger states who have the political and material capabilities necessary to carry out the difficult role of managing international security.\(^{17}\)

These criticisms prompt close analysis of any proposal to alter the prevailing balance of power in the UN, but the purpose here will be to 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, it is hoped that 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 abuse. There are, admittedly, a number of obstacles that need to be overcome. Unlike the Council’s impressive powers, the Assembly is limited to making ‘recommendations’ which, as the phrase suggests, carries no direct legal effect.\(^{18}\) Many still question the legal significance of the UfP resolution and its contemporary impact on UN practice.\(^{19}\) More still challenge the notion that the Assembly’s resolutions are capable of producing legal effects in binding or authorising the membership to do that which would otherwise contravene international law.\(^{20}\) Given recent condemnations of veto use and general uncertainty as to the continued application of UfP, a fresh analysis of these legal issues that goes to the heart of the UN Charter’s division of powers in maintaining international peace and security, is warranted.

This paper will consider to what extent an Assembly resolution could augment a ‘humanitarian intervention’ pursuant to a UN mandate. The focus on humanitarian intervention, involving the use of coercive force to forestall a humanitarian crisis, has attracted controversy precisely because its involves intervention without consent of the host State.\(^{21}\) UfP practice on the deployment of forces, on the other hand, has generally

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\(^{18}\) See Arts 10-14, UN Charter.


\(^{21}\) Generally ‘humanitarian intervention’ is a concept used to describe the use of force outside of the UN Charter, although some also use the phrase to describe instances of UN action which serve a humanitarian purpose, of which see: Walling, Human Rights Norms, State Sovereignty, and Humanitarian Intervention, Human Rights Quarterly, 37(2) (2015)
concerned the recommendation to UN 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 taken under UfP. 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. 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. While there are serious doubts as to the basis for unilateral humanitarian intervention under custom, the question remains whether the Assembly may serve an authorising function for any such coercive intervention such as to qualify it as enforcement action under the UN Charter.

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

II. ‘UNITING FOR PEACE’ AND ‘HUMANITARIAN INTERVENTION’

The necessary starting point for analysis is Article 2(4) of the UN Charter, which prohibits members from using force against another state. If the state in which the humanitarian crises exists does not consent to outside intervention, then it is necessary to establish an exception to the use of force prohibition. While there is reasoned disagreement on the scope of Article 2(4), consensus exists on two Charter based

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22 As to the uses of UfP, see note 14 above and also the argument on ‘Weak UfP’ at II(A)(1) below.
25 For a thorough treatment on the scope of the use of force principle under Article 2(4), see generally: Weller (ed), The Oxford Handbook of the Use of Force in International Law (OUP 2015). See also Franck and Rodley, ‘After Bangladesh: The Law of Humanitarian Intervention by Military Force’ (1973) 67(2) AJIL 275, 285 (that there are only limited circumstances in which force can be used under the UN Charter).
26 For a analysis of the consent principle and the extent to which it is able to preclude international responsibility, see: Deeks, ‘Consent to the Use of Force and International Law Supremacy’, Harvard International Law Journal 54(1) Winter 2013.
exceptions. 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 on finding there to be a “threat to the peace, breach of the peace, or act of aggression.”

A humanitarian crisis does not qualify as an “armed attack” directed against a state; this term defined by the International Court of Justice (ICJ) as requiring a cross border incursion involving military force of a particular intensity. As Simma noted, humanitarian crises mostly occur within states rather than across them; a mass exodus of refugees also does not constitute an armed attack, given that such events do not involve the use of armed force which is capable of being attributed to a State. 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 determined that human rights abuse within a state constituted a “threat to the peace” and authorised enforcement action, then a “humanitarian intervention” is permitted. The Council has used its Chapter VII powers for humanitarian purposes, the imposition of no fly zones in Iraq (1991) a notable early example. Accordingly, a Council authorisation precludes what would otherwise be an unlawful use of force.

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27 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 which 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 preparatoires, 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 (“No State or group of States has the right to intervene, directly or indirectly, 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 further, Hall, Foundations of International Law (Lexis Nexis, 2012), 481-482.

28 Article 39, UN Charter.


30 Simma, 'NATO, The UN And The Use Of Force: Legal Aspects' (1999) 10 European Journal of International Law 1, 5. In Nicaragua (n26), at [195] in defining “armed attack” the ICJ drew from Article 3, paragraph (g) of the Definition of Aggression annexed to Assembly Resolution 3314 (XXII), (“...it 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’.”)


However, actual or anticipated Council deadlock on grave humanitarian situations has led states to assert a legal basis for intervention outside the Charter framework. The humanitarian intervention doctrine was most recently asserted in response to the use of chemical weapons against civilian populations in Syria in 2013, with the British arguing that intervention would be lawful provided that it was necessary, proportionate and supported with evidence. 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.” The legality of this proposition turns on whether Article 2(4) is a comprehensive prohibition on the use of force. Space precludes a detailed analysis here of the competing positions, but strong arguments militate against humanitarian intervention outside of the Charter framework.

Specifically, there is a paucity of evidence showing that the doctrine has matured into custom. 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. The interventions of India in East Pakistan (1971), Vietnam in Cambodia (1978), and Tanzania in Uganda (1979), brought an end to serious human rights abuse, but the basis for the interventions was hotly contested and the intervening states prevaricated in their legal justifications. Similarly, the NATO intervention in Kosovo (1999) did not precipitate a change in custom. Bethlehem recently argued that the acceptance of RtoP and international criminal law bolstered the case for unilateral humanitarian intervention as a customary norm. 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 abuse. But RtoP supports UN collective security rather than challenging it. The Assembly’s adoption of the World Summit Outcome Document (2005) affirms RtoP action through the Council: it recognises that the international community “are 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] and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” Similarly, the emergence of international criminal law only supports the case for post-conflict accountability. There is intellectual coherence in conceiving of

34 For analysis of state practice, see: Rodley, ‘Humanitarian Intervention’ in Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015), 775-796.
35 See n19.
36 Ibid.
39 Brownlie (n22), 904.
41 UNGA Res 60/1 (2005), [139] (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.”
accountability for atrocities as a multi-staged process, including humanitarian intervention and international criminal law, but the two have developed legally along quite different paths. Whereas international criminal law has advanced with the support of multilateral treaties (notably, the Rome Statute) and Chapter VII powers (notably, establishing the ICTY and ICTR), the humanitarian intervention doctrine is lacking in “extensive and virtually uniform” acceptance of its customary status.  

The principal concern with the doctrine, being its risk of abuse, may be alleviated were the Assembly, acting under \textit{UfP}, to assume an authorising function. 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 irrespective of forum, there is at least the prospect that a humanitarian intervention authorised by the UN’s general membership in a consensual process would confer not just legality on the operation, but legitimacy too. Indeed, it is indicative that the British and Americans chose to pursue action in Kosovo through NATO instead of invoking \textit{UfP}, perhaps because of the political risk of the resolution failing. Those states perhaps chose to maintain the intervention’s putative legitimacy, despite its questionable legality. Still, in the event of the veto being exercised, and provided the political will exists, it is submitted that the Assembly provides a suitable alternative multilateral forum in which to authorise humanitarian intervention.

The use of \textit{UfP} as a basis for a humanitarian intervention is unprecedented, but not without supporters. During Kosovo (1999), Canada considered using \textit{UfP} to gain authorisation for the NATO action. Brownlie also suggested that humanitarian intervention could apply under \textit{UfP}, in recognising the validity of the 1950 resolution as a basis for the Assembly to act where a Council resolution was blocked. The major issue, however, is whether the Assembly is able to assume the Council’s function in authorising forcible coercive measures. Some British officials during the Kosovo crisis appeared to doubt the use of \textit{UfP} to effectuate a humanitarian intervention, partly because an Assembly resolution cannot equate to a Chapter VII authorisation. It is therefore pivotal to determine whether the Assembly possesses the constitutional power to authorise such coercive action.

42 See the classic formulation for establishing custom in \textit{North Sea Continental Shelf Cases} (FRG/Dem; FRG/Neth) 1969 ICJ Rep 3, [77].


45 Heinbecker, ‘Kosovo’ in Malone (ed) \textit{The UN Security Council: From the Cold War to the 21st Century} (Lynne Reinner 2004), 543.

46 Brownlie (n24), 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 UN General Assembly (in a Special Emergency Session) on the basis of the Unitig for Peace Resolution of 1950. Presumably the NATO States had no hope of obtaining a two-thirds majority in the General Assembly.”).

47 See e.g. House of Commons Select Committee on Foreign Affairs, ‘Statement by Mr Emyr Jones Parry’ (18 November 1999), 63-64; House of Commons, 4th Report of the Select Committee on Foreign Affairs (23 May 2000), [128]
A. Coercive Measures and the Uniting for Peace Resolution

In the text of the UN Charter, only the Council is empowered to take forcible coercive measures.\(^{48}\) By contrast, the Assembly’s function is essentially deliberative: it may “discuss,” “promote” and “recommend.”\(^ {49}\) Unlike Council decisions, an Assembly recommendation does not bind the membership, unless pertaining to internal operational matters, such as admission of UN members, or budget apportionment.\(^ {50}\) Given the hortatory nature of the Assembly’s express powers, in stark contrast to the coercive powers attributed to the Council, it must be queried how the Assembly is able to authorise a humanitarian intervention. A starting point to this analysis is the relevant text from the UfP resolution:

*Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the *use of armed force* when necessary, to maintain or restore international peace and security.\(^ {51}\)

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 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” asserts that the Assembly may recommend members to take coercive action. While such recommendation is not binding on the membership, it serves to authorise states to use force in accordance with a UN mandate. In the following sections, the basic features of these two theories will be outlined. The claim will then be advanced that the constitutional structure of the UN is such that the Assembly assume enforcement powers, to authorise a humanitarian intervention under a UN 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 UN 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. As the ICJ in *Wall* observed, decades of practice had modified Article 12(1) to permit the

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\(^{48}\) Art 42, UN Charter.
\(^{49}\) Arts 11-17, 55, UN Charter.
\(^{50}\) *South West Africa* (Ethiopia v S Africa; Liberia v S Africa) (Second Phase) [1966] ICJ Rep 6, 50–51.
\(^{51}\) UNGA Res 377 (1950) (emphasis added).
Assembly to act concurrently with the Council, even where the Council was seized of a
matter. However, the constitutional significance of UfP should not be overstated. As
Fitzmaurice noted, that the Assembly may recommend the use of armed force should be
interpreted within the Charter framework and general international law. Article 2(4)
prohibits its members from using force, subject to the exceptions of self-defence and
Chapter VII authorisations, these rules constraining any supposed permissive effect of an
Assembly recommendation.

The taking of coercive action is exclusively vested in the Council. Pursuant to Article
11, if the Assembly forms a view on need to use force, they should convey a
recommendation to the Council for ‘enforcement action’. Moreover, the ICJ in Certain
Expenses distinguished an Assembly mandated peacekeeping operation (promised on
host state’s consent) from ‘enforcement action’ under Chapter VII, the latter being the
Council’s exclusive preserve. The text of UfP confirms the Assembly’s limited role, in
that it may only make a recommendation in the case of a ‘breach of the peace or act of
aggression’. Dinstein noted that in the context of weak UfP these terms are equated to an
armed attack by one state against another. An Assembly recommendation to use force is
thus simply declaratory of the right to self-defence. That the Assembly 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.

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, but some conclusions may be drawn nonetheless. Korea (1950) concerned an
attack by forces from the North on the South 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.” Following a Soviet veto on
the continuation of the UN mission, the Assembly passed Resolution 498(V), which
called on states to “lend every assistance to the United Nations action in Korea.” Here,
“every assistance” suggests a continuation of the Council’s recommendation, being to

52 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory
Opinion) [2004] ICJ Rep 136 149–50. 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’, see [49],
[51]–[54].
53 Fitzmaurice, ‘Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction,
Competence and Procedure’ (1958) 34 British Yearbook of International Law 1, 5.
54 See also UNGA Res 60/286 (2006), acknowledging the Council’s primary responsibility for peace and
security.
56 Dinstein, War, Aggression and Self-Defence (5th edn, CUP 2011), [341], [906].
General Assembly, And War: The Uniting for Peace Resolution’, in Lowe (n2), 170.
58 For example, the Assembly asked the Council to impose sanctions on South Africa for its continued
59 Binder (n13), [9].
60 UNSC Res 83 (1950).
assist South Korea repel an armed attack. 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.”

Resolutions under UfP have also been based on host state consent. The power of the Peace Observation Commission, established to report on a situation where tension exists, was dependent on the consent of the state into whose territory it would go. Similarly, the Assembly created various peacekeeping missions with a consensual foundation, for instance, recommending members to “assist” the Congo in upholding “law and order.”

On one reading, that UfP had a consensual foundation 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 opposed the force’s establishment.

2. ‘Strong UfP’

According to strong UfP, the purposes underpinning the UN 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 UN Charter is to maintain international peace and security through “collective measures.” Article 1(1) does not specify which entity is to engage in collective measures, peace and security underpinning the UN Charter writ large and not just the functions of the Council. Under Article 24, “Members confer on the Security Council primary responsibility for the maintenance of peace and security.” The term “primary responsibility” implies secondary responsibility for the Assembly given that it is the only organ within the UN that represents all members (and thus being the collective that conditionally “confer” power on the Council). As the ICJ in Certain Expenses observed, the Charter makes it “abundantly clear” that the Assembly is also concerned with international peace and security.

That the Assembly may recommend “measures” under Article 14 for the peaceful adjustment of any situation itself “implies some kind of action.” The overarching purpose of the UN thus provides the Assembly with the power to recommend enforcement measures where the Council is deadlocked.

61 Johnson (n17).
63 Report of the Secretary-General, Summary Study of the Experience Derived from the Establishment and Operation of the Force, UN Doc A/3943 (9 October 1958), [15], [70].
64 UNGA Res1474 (ES-IV) (1960), [2].
66 See e.g. UNGA Res ES7/7 (1980) (‘Deeply aware of the responsibility of the United Nations under its Charter for the maintenance of international peace’) (emphasis added).
67 Article 24, UN Charter (emphasis added).
68 Expenses (n46) 151, 163.
69 Expenses (n46) 163.
70 Furthermore, it was contemplated that the Council members would act, to use President Roosevelt’s phrase, as ‘trustees’ for the international community. Although this is not used as a term of legal art, the point was that Council decision-making was supposed to serve the international community rather than the
Still, Article 11(2) directs the Assembly to refer any question where “action” is necessary to the Council. The weak UfP theory uses Certain Expenses to show 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, being a decision binding on the UN membership, for instance to contribute forces.\(^{71}\) The ICJ stated that the Council may “order coercive action.”\(^{72}\) By contrast, where the Assembly recommends action, it does not bind UN members.\(^{73}\) Accordingly, the voluntary peacekeeping force in Certain Expenses did not constitute Council “action.”\(^{74}\) Crucially, then, the ICJ opinion envisages members contributing voluntarily to UN ‘action’ occurring outside of a Chapter VII mandate. Furthermore, this reading is also 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.\(^{75}\) While 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 UN Charter is also instructive. The Assembly is not subject to this prohibition, which binds “all Members” by contrast to the “Organization.” Article 2 distinguishes between Organization and Members, with subparagraph (4) only referring to “Members” when stating the prohibition.\(^{76}\) The salient issue therefore is whether acts of members pursuant to an Assembly resolution may be attributed to the UN so as to fall outside of Article 2(4). It is well recognised that UN organs may delegate their power to subsidiary bodies.\(^{77}\) 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.\(^{78}\) 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…(d) States should not be subjected to legal liabilities under treaties or other international agreements as a consequence of carrying out United Nations collective measures.”\(^{79}\) As a subsidiary organ tasked with giving effect to UfP, this statement represents strong evidence as to the legal nature of national interests of Council members, of which see: White, ‘From Korea to Kuwait: The Legal Basis of United Nations’ Military Action’ (1998) 20 International History Review 597, 603.

\(^{71}\) White, The Law of International Organisations (Manchester University Press 2005), 78.

\(^{72}\) Expenses (n46),163 (emphasis added).


\(^{74}\) Expenses (n46), 165.


\(^{76}\) Article 2(4) provides ‘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).

\(^{77}\) See further Bowett et al, United Nations Forces: A Legal Study (Lawbook Exchange 2008), 299-301.

\(^{78}\) Ibid; Expenses (n46), 165.

\(^{79}\) GAOR (VI), Supp 13, 33 [265]; cf Talmon (n18).
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 their own authority, expressly prescribe with specificity the power being delegated, retain “overall authority and control,” and have the ability to rescind the delegated power. 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 UN Charter is explored 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. There is now no disputing the Council’s ability to delegate enforcement action despite lacking textual support in the UN Charter. 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. In the absence of Article 43 agreements the Council may only recommend UN members to contribute towards a Chapter VII operation. As Saroooshi and Dinstein separately noted, whether the delegation takes place by a non-binding recommendation or by decision is of no legal consequence, such recommendations are sufficient to delegate Chapter VII authority to willing states.

**B. Constructing the Assembly’s powers under the UN 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 UN Charter, strong UfP has to rely more broadly on the teleological argument of ensuring effectiveness in the maintenance of international peace and security.

1. **Teleological Interpretation and Implied Powers in the UN Charter**

The attributed powers doctrine prescribes that an organ may only do that conferred on it by the members. Powers not expressly conferred are the result of intentional omissions,

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80 Saroooshi (n24), 20.
82 Expenses (n46), 167.
84 As to the differences between decisions and recommendations, see: Oberg, ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICI’, (2006) 16(5) EJIL 879.
85 Saroooshi (n24), 149; Dinstein (n47), [887].
86 For an analysis on the differences between attributed and implied powers doctrines, see: Engstrom, ‘Reasoning on powers of organizations’, in Klabbers and Wallendahl (eds), Research Handbook on the Law of International Organizations (Elgar 2011), 56-83.
which must be respected. By contrast, the implied powers doctrine, underpinned by teleological interpretation, permits an organ to assume powers that are essential to, or in furtherance of, the organisation’s functioning. 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.

Methods of treaty interpretation are therefore central to determining the scope of the Assembly’s powers. The UN 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 treaties to be interpreted in accordance “with the ordinary meaning…and in light of its object and purpose.” This provision reflects a compromise of sorts between a textual and teleological approach, although the primacy given to the text may limit the scope for a teleological interpretation where it undermines the ordinary meaning of a word. The VCLT provides a useful framework for “ordinary” treaties, but as Sands and Klein noted, treaties establishing international organisations warrant special treatment. This is so with the UN Charter, a treaty possessing a constitutional character: a universal and comprehensive mandate, representation of the international community and certain hierarchical elements. The UN Charter should therefore be subject to different rules of interpretation having regard to the “intrinsically evolutionary nature of a constitution.”

The adoption of a teleological approach is not only a normative claim, but is established in ICJ jurisprudence as central to the UN’s dynamic constitutional order. In 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 by necessary implication, as being essential to the performance of its duties.” From the ICJ’s point of view, the UN should be effective in achieving its objectives, further underpinned in Effect of Awards where the court found that the Assembly was competent to establish an employment tribunal despite lacking the express powers to do so. The doctrine of implied powers was broadly articulated in Certain Expenses, the ICJ stating 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.” The ICJ disavowed

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87 Klabbers, An Introduction to International Organizations Law (CUP 2015), 63.
89 The International Law Commission (ILC) noted the tension in Article 33, but observed that the majority of jurists preferred a primacy of the text approach: ILC, ‘Draft Articles on the Law of Treaties with Commentaries’ (1966) (UN Doc A/CN.4/191), 219.
90 Sands and Klein, Bowett’s Law of International Institutions (Sweet and Maxwell 2009), 454.
91 von Schorlemer, ‘The United Nations’ in Klabbers (n76), 474.
92 Jennings and Watts (eds), Oppenheim’s International Law (9th edn, OUP 1992), 1268; cf. Expenses (n46) 157.
95 Expenses (n46), 168.
a literal interpretation of the UN Charter where doing so leaves the UN “impotent in the face of an emergency situation.” What is remarkable here is the distinction drawn between purposes and powers: an asserted power that is rationally connected to a purpose of the UN will be lawful. The creation of a peacekeeping force, furthering international security, even without any textual support in the UN Charter, was thus *intra vires*.

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 principle of specialty is synonymous with the attribution principle. Accordingly, the WHO lacked the competence to consider the legality of nuclear weapons; this question being ‘immaterial’ to the WHO’s functioning. This reflects Judge Hackworth’s dissent in *Reparations*, that “powers not expressed cannot freely be implied [but must] flow from a grant of express powers.”

Although a narrow approach may be applied to specialised agencies like the WHO, such approach is not applicable to the UN’s principal organs. The reasoning in *Certain Expenses* shows a liberal approach with respect to powers that are used to further peace and security, of which the Assembly has broad competence under Articles 11 and 12 of the UN Charter. Indeed, the broad competencies and membership of the Assembly are incomparable to that of a specialised agency such as the WHO, which does not enjoy the same degree of popular member participation in its decision making processes. Therefore, it is apparent that the preponderance of judicial authority favours a broad approach to the implied powers of principal organs, where to do so furthers a purpose of the UN.

This broad approach is not only borne out in the courtroom, but also in the practice of other UN organs. Realisation of the UN Charter’s purposes has required the redistribution of powers between the UN’s principal organs and thus the imperfect observance of the formal power divisions in the Charter. This reflects the accepted position that the UN Charter is a “living” instrument, providing justification for procedural latitude in giving effect to subsequent practice. Accordingly, UN organs have assumed an increasingly broad array of powers to address new international security challenges. This has led the Council to assuming functions of the Assembly, and as evident from *UfP*, vice versa. The

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96 *Expenses* (n 46), 167.
100 WHO (n88), 76.
101 *Reparations* (n83), 198.
102 White (n25), 295.
104 *Reparations* (n83), 174.
105 von Schorlemer (n81), 467-470.
phenomena of “legislative” resolutions provides a good example of how the Council has assumed a standard setting function (traditionally the Assembly’s function), bypassing the slower processes of customary law formation to imbue broadly worded resolutions impacting the entire UN membership with binding force.\textsuperscript{106}

Such changes are possible because of the essentially “decentralised” nature of the UN.\textsuperscript{107} Questions as to permissible constitutional limits are most acute in orders where a supreme, impartial organ is able to render an authoritative decision on the division of powers within an international organisation. The UN, on the other hand, comprises of organs that are co-equals, with none formally possessing the power of authoritative interpretation.\textsuperscript{108} Further, the Council does not possess the legal authority to control acts of the Assembly.\textsuperscript{109} 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, as Tomuschat noted, 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.\textsuperscript{110}

Within such a decentralised order, as the ICJ noted, each organ must “in the first place at least, determine its own jurisdiction.”\textsuperscript{111} This suggests a residual role for judicial review, although this is limited. The ICJ cannot subject an Assembly resolution to the same form of review as found in domestic constitutional orders, as it does not possess the powers to generally invalidate a decision according to a hierarchy of norms.\textsuperscript{112} The ICJ’s advisory jurisdiction has no binding force and decisions taken in contentious cases would only produce legal effects for parties in those proceedings.\textsuperscript{113} This is not to deny the wider (de)legitimising force of an ICJ decision; if it were to hold an Assembly resolution to be \textit{ultra vires} states may voluntarily desist from placing reliance upon it as a legal basis for action.\textsuperscript{114} 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 was \textit{intra vires} 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 taken to implied powers. Such unlikelihood is further reinforced by the deferential standard of review adopted by the


\textsuperscript{107} von Schorlemer (n81), 467.

\textsuperscript{108} ‘UNICO Docs’, Volume 13 (1945) UN Doc. 843 (IV/2/37), 668, 709-10; Expenses (n46),168.

\textsuperscript{109} The reverse, on the other hand, is true: the Assembly has power under Article 17 of the UN Charter to control the budget and thus consider the validity of Council resolutions, at least insofar as determining the validity of expenditures.

\textsuperscript{110} Tomuschat (n48), 4.

\textsuperscript{111} Expenses (n46), 168.

\textsuperscript{112} Tzanakopoulos, \textit{Disobeying the Security Council: Countermeasures against Wrongful Sanctions} (OUP 2011), 59.

\textsuperscript{113} See Akande, ‘The International Court of Justice and the Security Council: Is there room for Judicial Control of the Political Organs of the United Nations’ (1997) 46(2) \textit{ICLQ} 309, 334. Only one third of members have accepted the optional clause of Article 36(2).

\textsuperscript{114} Franck, \textit{The Power of Legitimacy Among Nations} (OUP 1990), 26.
ICJ. A resolution would have to be “manifestly ultra vires.”\textsuperscript{115} 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.”\textsuperscript{116} A resolution that violated the \textit{jus cogens} is indicative of a fundamental defect.\textsuperscript{117} A resolution supporting strong UfP, duly certified by the Assembly as falling within the purposes of the UN, would not sustain a finding of manifest \textit{ultra vires} by the ICJ.

2. UN 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 UN Charter. Furthermore, any future resolution recommending coercive measures would also 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 UN Charter may develop, but as the VCLT provides, this must come with “subsequent practice.”\textsuperscript{118} The ICJ in \textit{Namibia} advised that this practice must be “established.”\textsuperscript{119} On this view, if the Assembly recommended coercive measures in the future it would thus lack the legal basis to do so. The assumption underpinning this argument is that if a power cannot be discerned from the text then it is necessary to establish that it has emerged as a “customary power” after a long gestation period.\textsuperscript{120}

Yet, the suggestion that there is no practice supporting strong UfP is misconceived. Although the Council’s resolution in Korea (1950) 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.\textsuperscript{121} This demonstrates that Council members regarded Resolution 83 as authorising UN enforcement action, otherwise any discussion on the authorising effect of its resolution would clearly be superfluous.\textsuperscript{122} Moreover, it is intriguing to note that once the Soviet Union resumed its seat in the Council and vetoed the continuation of enforcement

\begin{itemize}
\item \textsuperscript{115} See Osieke, ‘The Legal Validity of \textit{Ultra Vires} Decisions of International Organizations’, (1983) 77 \textit{AJIL} 239, 249; \textit{Expenses} (n46), 221 (Morelli J, concurring).
\item \textsuperscript{116} \textit{Expenses} (n46) 204–205. See also the ‘fundamental defect’ standard noted in \textit{WHO} (n88), 82.
\item \textsuperscript{117} See Franck, ‘The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?’ (1992) 86 \textit{AJIL} 519, 521-22.
\item \textsuperscript{118} Art 31(3)(b).
\item \textsuperscript{120} This reflects a distinction sometimes drawn in the literature (not one that the ICJ recognises) between ‘implied’ and ‘customary’ powers, the former being powers conferred at the time of the organisation’s creation, the latter postdating the constitutional instrument and arising from practice, see: Schermers (n89), 181-182.
\item \textsuperscript{121} UNSC, 476th meeting (7 July 1950) SCOR, 5th sess.
\item \textsuperscript{122} White (n61), 613.
\end{itemize}
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 principles. As White noted, there was a general recognition amongst states and other actors that Korea was a UN operation, not self-defence. 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 United Nations 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 to facilitate a process in which a new government could be elected. The Assembly’s endorsement of this mandate, albeit temporary, thus provides tacit support for this organ’s capacity to recommend voluntary enforcement action. Although there is only limited practice of strong UfP, this does not negate its probative value, given that UN 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, providing the strongest evidence as to the constitutionality of these measures.

Additionally, the notion that there must always be an established practice for an organ to exercise implied powers is open to question. 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.” In the final analysis, it falls upon the members themselves to interpret the scope of an organ’s powers under the UN Charter. This is based on the principle that an interpretation of the treaty is as binding on the parties as the treaty itself. During the drafting of the UN 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. Furthermore, the ICJ in Wall confirmed that the Assembly had the

123 UNGA Res 376 (1950); White (n35), 311.
124 White (n61), 614.
125 White, Keeping the Peace (Manchester University Press, 1990), 254-61.
126 The Council transferred the mandate of the ONUC to the Assembly in UNSC Res 157 (1960).
127 UNGA Res 376 was passed with 47 in favour, 5 against and 7 abstentions; UNGA Res 1474 (Congo) was adopted without a dissenting vote.
128 Emphasis added.
131 Report of the Rapporteur of Committee IV/2, (1945) 13 UNCIIO Doc. 933, IV/2/42(2), 710; Schachter (n119),187.
competence to interpret its own powers under Article 12 of the UN Charter. Therefore, while a debate may ensue about the scope of the Assembly’s powers and the legal method for determining this, 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, most likely because there remains interpretive disagreement amongst members. It may also be because the general membership is unable to directly manifest its will over the organ interpreting particular powers under the UN Charter. An example of this can be seen from the Council practice of reading down the requirement that its decisions require permanent member “concurring” votes to not include abstentions. In Namibia, 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.” The ICJ is acknowledging here the sovereignty of UN 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 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 the authority of interpreting the UN Charter and this may be manifested in different ways and, moreover, at differing rates of rapidity. Uniquely, the Assembly comprises the entire UN membership. It thus has the capacity to crystallise an accepted interpretation of the UN Charter in a much more direct form than the others organs, who rely on the more laborious process of showing acquiescence from the general membership. When members vote for an Assembly resolution they are necessarily asserting or implying a position relative to one or more legal propositions raised. 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 UN Charter, and do so with unusual rapidity. Where that 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.

Still, the basic objection to this argument is that the Assembly could, in just a single resolution such as UfP, authoritatively interpret the scope of its implied powers. To accept that a single resolution could generate a constitutional power would be akin to finding that the Assembly was a legislative body. Indeed, a proposal by the Philippine delegation conferring legislative powers on the Assembly was rejected during the

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132 Wall (n43), 136.
133 See n109, 22 (emphasis added).
134 But see Hailbronner (n64), 237 (original intention of the drafters to exclude the Assembly’s power of ‘authentic’ interpretation).
135 Schachter (n119), 180.
drafting of the UN Charter. Rather, as Bleicher noted, generally there is a need for significant persistent recitation of resolution to evince members’ intent. 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. Members should not be held to their vote on resolutions that they regarded as meaningless or subject to change: there should be no obstacle to a “change of heart” by members. On this reasoning, a single resolution by the Assembly authorising coercive action would be insufficient to ground a constitutional power.

Yet, 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. The issue is not whether an Assembly recommendation is binding, but whether it evinces clear enough evidence from the UN 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. The context of the deadlock over Korea (1950) constituted, to borrow a phrase, a “Grotian moment” which brought into focus the acute need for constitutional realignment, meaning that the Assembly resolution was to be taken as representing the members’ accepted interpretation as to the powers of the Assembly to recommend coercive measures. That the vote was overwhelmingly in favour of the resolution (52 to 5, with 2 abstentions) further supports its certification as an accepted interpretation of the Assembly’s powers under the UN 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, further showing 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 by the membership as to the powers of the Assembly under the UN Charter.

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

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137 UNCIO Docs, Volume 2 (1945), 70.
139 Ibid 457.
140 Ibid 453, 457
141 Ibid 446, 453.
142 Ibid 477.
143 The phrase ‘Grotian moment’ here is borrowed from a theory that customary international law may emerge rapidly where the context permits, of which see: Scharf, Customary International Law in Times of Fundamental Change: Recognizing Grotian Moment (CUP 2013).
principle of state consent is not “frontally assaulted but cunningly outflanked.” It is true that the Assembly could endorse a course of action that is *ultra vires*. As Lauterpacht noted, the validity of an act by an organ rests with the members themselves, with their assent having the effect of validating an act that is otherwise unconstitutional. 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 Assembly debate in 1950 on *UfP* represented a wide spectrum of viewpoints, with the ultimate justification for *UfP* not deriving from some crude argument of unfettered power, but based on a close teleological reading of the UN Charter and the adoption of an interpretation that fell within a spectrum of reasonable interpretive possibilities.

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 UN Charter explicitly departs from this principle. This was necessary because otherwise a single state would effectively have a veto on the UN’s constitutional development, problematic with a near universal membership. The inclusion of majoritarian decision-making is thus underpinned by the need for the UN 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. An amendment to the UN Charter can pass not with unanimity, but a two-thirds majority. By analogy, 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 also be supported with similar voting outcomes. Furthermore, the ICJ has never insisted upon unanimity when evaluating the relevance of subsequent practice to determining members’ agreement, it noting in *Namibia* that the practice at issue “has been generally accepted…” It is therefore reasonable to assume that UN members accepted the possibility that some subsequent interpretations would not be ones that they preferred.

That said, one potential hurdle to an Assembly resolution having constitutional effects

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146 For an analysis, see: Andrassy, ‘Uniting for Peace’ (1956) 50 *AJIL* 563.
148 Arts 18 and 27, UN Charter. Of course, there must also be permanent member unanimity for Council decisions.
149 Art 108, UN Charter.
151 *Namibia* (n109), 22 (emphasis added).
152 Bleicher (n128), 449. See also D’Amato, ‘On Consensus’ (1970) 8 *Canadian Yearbook of International Law* 106, 121.
concerns the actual size of the majority. The argument above is premised on the members expressing their will through the Assembly as to the scope of this organ’s powers. However, it 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 UN Charter an Assembly resolution only requires the affirmative votes of two thirds of those “present and voting,” and not the membership as a whole. As Talmon argues, the legal or legitimising value of a resolution that only has the support of a small number of members would “tend towards zero.” This is a valid point, in that an interpretation of the UN Charter would require the support of a significant enough number of members for it to be accepted. An actual two-thirds majority of UN members, rather than a technical majority, is therefore required.

C. Constitutional Controls on the Assembly’s UfP Powers

A good case may therefore be made for strong UfP, grounded in the doctrine of implied powers and a teleological interpretation of the UN’s foundational documents. However, questions still remain about the scope of UfP and the legal considerations that the Assembly should take into account when recommending coercive measures. As there is only limited UfP practice in this area, and none in the context of humanitarian intervention, a possible legal framework is outlined, which is partly *lex ferenda*.

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 the Assembly to convene an emergency special session. The resolution also triggers the Assembly’s consideration of a situation where a majority of UN 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 UN Charter in that the Council’s request would constitute a certification that it is no longer “exercising” its functions on a particular situation. This would provide the Assembly with a broad constitutional mandate to make appropriate recommendations. By respecting the Council’s right to trigger UfP, as Tomuschat noted, harmony will not be disturbed between the two organs. If the Council was to make such a request it would amount to a procedural vote, and thus not 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 (9 out of 15). That a Council request to the Assembly to convene a special

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153 Talmon (n18).
154 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, of which see further: Bleicher (n128), 449.
155 UNGA Res 377, [1].
156 Carswell (n14), 470.
157 Tomuschat (n48).
session is procedural is reinforced by Article 20 of the UN Charter, which appears under the section on “Procedure.”

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.” 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 many resolutions.\(^\text{158}\) But given that the Council is empowered to make a determination under Article 39 of the UN Charter, where it makes a request to the Assembly it is implicitly qualifying the situation as one in which coercive measures may be taken.\(^\text{159}\) 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).\(^\text{160}\) By contrast, the Assembly invoked UfP without a Council request only in non-conflict situations, such as with respect to the process of decolonisation and the question concerning Palestinian statehood.\(^\text{161}\) To provide a check on the Assembly, the established practice whereby the Council triggers the UfP procedure in conflict situations should continue to be observed. 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 and to assume jurisdiction it must assess whether the Council has failed to exercise its primary responsibility.\(^\text{162}\) 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.”\(^\text{163}\) There are two conditions: that the veto has been exercised, and that this results in the Council “failing” to exercise its primary responsibility.\(^\text{164}\) Not all negative decisions will therefore justify the invocation of UfP, the veto being a legitimate Charter technique to prevent the overregulation of international peace and security.\(^\text{165}\)

\(^\text{158}\) See e.g. UNGA Res 2107 (XX) (1965), [7].
\(^\text{159}\) Carswell (n14), 466.
\(^\text{160}\) Petersen (n13).
\(^\text{161}\) Zaum (n48), 166.
\(^\text{162}\) Andrassy (n136), 578.
\(^\text{163}\) UNGA Res 377, [1].
\(^\text{164}\) Carswell (n14), 17.
A narrow approach to determine Council “failure” is to apply the abuse of rights doctrine, which requires the right-holder (permanent members) to not use their veto in a manner that causes harm to the community. An abuse may be manifested where a decision is arbitrary, taken for an extraneous purpose, or in bad faith. The language of “abuse” captures the moral impetus and discourse of recent condemnations of Council vetoes. However, finding abuse is likely to prove elusive. To be sure, permanent members have vetoed resolutions for extraneous purposes. The US vetoed the extension of peacekeeping mandates in Bosnia and Herzegovina because it had not received a concession in the drafting of the ICC Statute. Similarly, China ended a peacekeeping operation in Macedonia, apparently because Yugoslavia recognised Taiwan’s statehood. As Weller noted, these decisions pursued purposes that were extraneous to that of collective peace and security. 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 UN action would be counterproductive. Similarly, in vetoing a referral to the ICC, Russia cautioned this measure would throw “oil to the fire” during on-going hostilities in Syria. 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 as a trigger for UfP is explicable because while the Council has primary responsibility for peace and security, the Assembly enjoys primacy in the promotion of human rights under the UN Charter. The Assembly’s central role in promoting human rights is reinforced by the ICJ’s Wall advisory opinion, noting 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.” Indeed, it is apparent from many Assembly resolutions that there is an underlying concern about the

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168 See n6.
169 UNSC, 4363rd meeting (31 August 2001); UNSC, ‘Official Communiqué of the 4567th (Closed) Meeting of the Security Council’ (8 July 2002).
171 Ibid.
172 UNSC, 6711th meeting (4 February 2012).
173 See n8.
174 See Arts 1, 13(1), 55, 60, UN Charter.
175 Wall (n43) [27] [28] (emphasis added).
human consequences of conflict. 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. 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.”

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”, they involved inter-state hostilities, or force used by a de facto regime against a state. As noted above, this definition thus excludes intra-state situations of the type that engage with the humanitarian intervention doctrine. The view that this justifiably places limits on the Assembly’s powers is misplaced. However, as Krisch noted, the term “breach of the peace” is broad enough to encompass internal situations. The difference between these terms is one of degree; 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 in identifying a breach must rest with the Assembly itself.

There exists a great deal of convergence in the international community as to the types of human rights abuses that warrant humanitarian intervention. The RtoP doctrine supports measures being taken to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing. Similarly, the British and French would justify intervention where there is evidence of “overwhelming human catastrophe” and “mass atrocity” respectively. It is acknowledged that there would be some penumbra of doubt as to when a situation qualified as a grave human rights abuse. Yet as Rodley notes, 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. The most important issue is whether the entity applying such standards is capable of doing so objectively and in a principled way.

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176 See e.g. UNGA 1104 (1956), that the ‘intervention of Soviet military forces in Hungary has resulted in grave loss of life and widespread bloodshed among the Hungarian people’, calling for cooperation in providing humanitarian aid.

177 White (n25), 306; Arts 13(1)(b) and 55, UN Charter.

178 See further Carswell (n14), 456.

179 UNSC 502 (1982); UNSC 660 (1990); UNSC 82 (1950).


181 Krisch, ‘Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 39’ in Simma (n64), 1293.

182 The Council has broad latitude under Article 39, see De Wet, The Chapter VII Powers of the United Nations Security Council (Hart 2004), 133-134.

183 ICISS (n5).

184 See n19 and n6.

185 Rodley (n25), 777.
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 just one permanent member could result in deadlock. While there may be merit in placing limits on the regulation of international peace and security, the application of UfP to humanitarian crises would not necessarily mean an increase in UN enforcement action. The same arguments made by China and Russia to block further measures in Syria could equally resonate in a failed Assembly resolution.\footnote{For their reasons, see: UN, ‘Russia and China veto draft Security Council resolution on Syria’ (UN News Centre, 4 October 2011) <http://www.un.org/apps/news/story.asp?NewsID=39935#.VY7hz155cpE> accessed 21 October 2015.}

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 regional led operations, with their much smaller number of voting members, could never have. The notion that the UN would become involved in more enforcement action with a liberal interpretation of powers under the UN 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 UN mandate.

III. Conclusion

Through the lens of the humanitarian intervention doctrine this paper has revealed 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 to determining members’ general agreement as to the scope of this organ’s powers under the UN Charter. No UN 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 are thus implicitly asserting 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 it 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 substantial majority of UN members, via consensual procedures, it constitutes an accepted interpretation of the Assembly’s powers under the UN Charter.
Furthermore, Assembly resolutions pursuant to \textit{UfP} may delegate enforcement authority to willing states acting under a UN 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 an \textit{UfP} resolution serves to bring the contributing state, now acting under a UN 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 effects is necessary in order for the Assembly to effectively assume responsibility for international peace and security in the event of 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 UN Charter is sufficiently open textured for varied interpretations as to the scope of powers and purposes. But it has been argued here that these questions of interpretive disagreement ultimately vest with the membership to resolve through consensual procedures, and through \textit{UfP}, it has the capacity to assert itself in varying degrees where the Council has failed to maintain international peace and security.

This inevitably leads on to the question of whether such a bold assertion of power will ever materialise again. This paper has focused on technical aspects of the acquired legal effects of Assembly resolutions, but in doing so it has revealed that interpretation is itself underpinned by a normative commitment to a given conception of collective security. Engaging in a teleological interpretation of the UN Charter brings into sharp focus the question of not just what the Organisation was established to do but what it ought to do in response to contemporary security concerns. The UN 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 \textit{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 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 ICC’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 properly used, the \textit{UfP} mechanism, supported by a consensus of UN 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.