

EVALUATING THE PERSISTING RELEVANCE OF THE UNITING FOR PEACE RESOLUTION FOR THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY: RUSSIA'S INVASION OF UKRAINE AND SECURITY COUNCIL RESOLUTION 2623 (2022)

Graham Melling

Northumbria Law School, United Kingdom

graham.melling@northumbria.ac.uk

MELLING, Graham. Legal Evaluating the persisting relevance of the Uniting for Peace resolution for the maintenance of international peace and security: Russia's invasion of Ukraine and Security Council Resolution 2623 (2022). *International and Comparative Law Review*, 2023, vol. 23, no. 1, pp. 256–272. DOI: 10.2478/iclr-2023-0011

Summary: This article will evaluate the question of the persisting relevance of the Uniting for Peace resolution (General Assembly resolution 377 A (V) (3 November 1950)) (henceforth U4P) to facilitating the United Nations' role in the maintenance of international peace and security and responding to Russia's invasion of Ukraine, February 2022. The United Nations' principal organ tasked with primary responsibility for the maintenance of international peace and security is the United Nations Security Council. Where the Security is unable to fulfil this responsibility due to the exercise of the veto by one of its permanent members it may have recourse to the U4P resolution. In effect U4P enables the Security Council to side-step the restriction of the veto and, through a procedural mechanism, refer the matter to the General Assembly to convene an Emergency Special Session for its consideration. Alternatively, the General Assembly can initiate the procedure under the U4P resolution where the Security Council fails to take action. The Security Council's utilisation of the U4P procedure in Security Council resolution 2623 (2022) in response to Russia's invasion of Ukraine was only the eighth occasion since U4P's conception in 1950 by the General Assembly. Moreover, the last time the SC resorted to U4P was in 1982. The General Assembly has invoked U4P on at least four occasions since 1997. Under U4P the General Assembly has the power to recommend measures that can be taken for the purposes of the maintenance of international peace and security. However, the power of recommendation that the General Assembly can exercise under U4P are powers derived from the United Nation's Charter and not from the U4P resolution. Other than introducing the concept of 'emergency special sessions', the U4P resolution does not establish a procedural mechanism not already provided for in the UN Charter. Therefore, in responding to Russia's invasion of Ukraine the General Assembly has the power to make recommendations with or without reference to the U4P resolution. In this article it will be argued that U4P does not give the General Assembly powers it does not already have under the Charter. It is clear from Resolution

377A (V) that a key premise for the resort to U4P is to empower the General Assembly to take 'collective measures' for the maintenance of international peace and security in lieu of the Security Council being able to do so due to the casting of the veto by one of the permanent members. However, U4P is not an independent source of the Assembly's powers, it is merely an aspect of its practice and the General Assembly has the power to make such a recommendation for 'collective measures' in response to Russia's invasion of Ukraine by virtue of the UN Charter, with or without reference to the U4P resolution.

Keywords: uniting for peace, international peace and security, use of force, Russian invasion, war in Ukraine, Security Council.

On 24 February 2022, Russia launched its large-scale invasion of Ukraine. This was the culmination of weeks of mounting tension throughout which Russia had been amassing tens of thousands of its troops along the Russia-Ukraine border.¹ At the time of writing, we are over 6 months into this devastating and grinding conflict.

Russia's invasion of Ukraine and occupation of its territory constitutes a *prima facie* breach of the prohibition of the use of force, as enshrined in Article 2(4) of the United Nations Charter, along with a range of other Charter norms. Under the UN Charter, the United Nations Security Council is charged with the 'primary responsibility for the maintenance of international peace and security'.² However, not unsurprisingly the Security Council has not been able to act to fulfil its responsibility in the way it and the rest of the international community would like; due to Russia's use of its veto to block a draft resolution aimed at ending the crisis in Ukraine.³

This is only the most recent example of Russia using its veto to block a Security Council resolution concerning Ukraine; notably, on March 15, 2014 Russia also vetoed a draft resolution concerning Ukraine, declaring the referendum to be held in Crimea at that time invalid and urging countries not to recognize its result.⁴ This situation, a veto holding member of the Security Council employing the veto to prevent the Security Council from taking action despite the support of the overwhelming majority of the Security Council members, is not new and

1 For a timeline of events leading up to Russia's invasion of Ukraine see, <https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/> (Accessed 30 July 2022).

2 Art. 24, Charter of the United Nations (adopted 26 June 1945) (UN Charter).

3 Draft UN Security Council Resolution UN Doc S/2022/155 (25 February 2022) vetoed by Russian Federation 11-1-3, 25 February 2022; 'Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto', <https://press.un.org/en/2022/sc14808.doc.htm> (accessed 30 July 2022).

4 Draft UN Security Council Resolution UN Doc S/2014/189 (15 March 2014) vetoed by Russian Federation 13-1-1, 15 March 2014; 'UN Security Council action on Crimea referendum blocked', <https://news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked> (last accessed 30 July 2022).

gives rise to the same frequently endured dilemma about what to do when the Security Council cannot act.

Under the UN Charter the answer to this dilemma lies with the General Assembly, which is the one truly representative organ within the United Nations system and the comparatively open nature of which has given rise to its characterisation as the 'town meeting place of the world'.⁵ The Charter empowers the General Assembly to respond to and make recommendations about any situation it deems 'likely to impair' international peace and security.⁶ And it has the added advantage of not being impeded by the possibility of any single member state casting a veto over its decision-making. However, a persisting feature of this recognition of the importance of the General Assembly in responding to the failings of the Security Council due to the exercise of the veto, is the allusion to the General Assembly's resolution 377A(V) of November 3, 1950, also known as the 'Uniting for Peace' resolution (U4P).⁷ This is typified by Security Council resolution 2623 (2022) in response to Russia's invasion of Ukraine and referring the matter to the General Assembly, due to the exercise of the veto by Russia.⁸ The referral of the matter to the General Assembly was done through the Uniting for Peace resolution procedure. Which in effect enables the Security Council to side-step the restriction of the veto and,⁹ through a procedural mechanism, refer the matter to the General Assembly to convene an Emergency Special Session for its consideration.¹⁰

Under U4P the General Assembly has the power to recommend measures that can be taken for the purposes of the maintenance of international peace and security. However, the power of recommendation that the General Assembly can exercise under U4P are powers derived from the UN Charter and not from the U4P resolution. Other than introducing the concept of 'emergency special sessions', the U4P resolution does not establish a procedural mechanism not already provided for in the UN Charter; see for example Articles 10, 11, 13, 14 UN Charter. Therefore, in responding to Russia's invasion of Ukraine the General Assembly has the power to make recommendations with or without reference to the U4P resolution. By way of illustration, following a Russian veto in the Security Council in March 2014 of a draft resolution on Ukraine declaring the 16 March 2014 referendum in Crimea illegal,¹¹ the Security Council did not vote on a U4P resolution referring the matter to the General Assembly. Rather, the General Assembly responded

5 KELSEN, Hans. *The Law of the United Nations*, New York: Praeger, 1951, pp. 198.

6 See Arts 11, 14, UN Charter.

7 UN General Assembly Resolution 377A(V) 'Uniting for Peace' UN Doc 377A(V) (3 November 1950).

8 UN Security Council Resolution 2623 (2022), UN Doc S/RES/2623 (27 February 2022).

9 MAMLYUK, Boris N. 'Uniting for Peace' in the Second Cold War: A Response to Larry Johnson. *American Journal of International Law Unbound*, 2014–2015, vol. 108, pp. 129.

10 UN General Assembly Resolution 377A(V) 'Uniting for Peace' UN Doc 377A(V) (3 November 1950).

11 Draft UN Security Council Resolution UN Doc S/2014/189 (15 March 2014).

independently to the situation by adopting a resolution on 27 March 2014, entitled “Territorial integrity of Ukraine”,¹² which received 100 votes in favour, 11 against and 58 abstentions (24 member states were either absent or were present and did not vote). This begs the question, therefore, if the U4P resolution provides for no more powers than the General Assembly can already utilise under the Charter, what is the value of the U4P resolution? What is its persisting relevance? The purpose of this article is to critically evaluate the question of the persisting relevance of the U4P to facilitating the United Nations’ role in the maintenance of international peace and security and responding to Russia’s invasion of Ukraine, February 2022. It will begin with an examination of the ‘U4P’ resolution.

The U4P resolution

The U4P resolution was initiated by the United States with the support of other western powers as a means of circumventing the use of the veto by the Soviet Union on its return to the Security Council during the Korean War. At the time of the outbreak of hostilities the Soviet Union had been boycotting the Security Council as it took a stance against the UN refusal to recognise the Peoples Republic of China as the legitimate representatives of China. During its absence the US and its allies had been able to agree two resolutions in the Security Council, resolution 83,¹³ 27 June 1950, and resolution 84,¹⁴ 7 July 1950. These resolutions had enabled the allied powers to establish a UN-authorised force for South Korea to ‘repel the armed attack’ of the North. Had the Soviet Union been present at the Security Council during their presentation as draft resolutions they would certainly have been vetoed. The Soviet representative returned to the Security Council on 1 August 1950 and blocked any further action by the Council. In response to the stalemate in the Council, the United States led the way in the General Assembly in initiating the U4P resolution,¹⁵ with a view to strengthening the General Assembly to be able to act when a future expected Soviet veto prevented the Security Council from acting.¹⁶ According to White, the reasons for the U4P resolution went beyond the conflict in Korea and in reality reflected the view of the majority western-influenced states in the General Assembly at the time that ‘the frequent use of the Soviet veto during the period 1946–50 was an abuse of that right, and the ideal of great power unanimity at San Francisco was no longer attainable.’¹⁷ Consequently, it has been suggested by Zaum that U4P

12 UN General Assembly Resolution 68/262, UN Doc A/RES/68/262 (27 March 2014).

13 UN Security Council Resolution 83 (1950), UN Doc S/1511 (27 June 1950).

14 UN Security Council Resolution 84 (1950), UN Doc S/1588 (7 July 1950).

15 MURPHY, John. F. *The Evolving Dimensions of International Law: Hard Choices for the World Community*, Cambridge, 2010, pp. 111.

16 ZAUM, Dominik. The Security Council, the General Assembly, and War: the Uniting for Peace Resolution. In LOWE, Vaugh, ROBERTS, Adam, WELSH, Jennifer, ZAUM, Dominik (eds). *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford University Press, 2008, pp. 158.

17 WHITE, Nigel D. The Relationship between the UN Security and the General Assembly in

was 'envisaged as the main pathway for the General Assembly' to provide for 'collective measures' in response to war and conflict.¹⁸

The U4P resolution was adopted by the General Assembly at its 302[nd] plenary meeting, 3 November 1950, by an overwhelming majority; by a non-recorded vote, fifty-two in support, five against and two abstentions.¹⁹ Its original purpose was to address the failings of the Security Council to meet its responsibility to maintain international peace and security when faced with a veto by one of its permanent members,²⁰ and to provide a procedure that empowered the General Assembly to provide for necessary 'collective measures' in its stead.²¹ The key provision is Part A which states that the General Assembly:

*Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.*²²

Under the terms of the U4P procedure several conditions must be satisfied. First, it is necessary that the Security Council has failed to take action to fulfil its responsibility for the maintenance of international peace and security due to the exercise of the veto by one of the permanent members.²³ The resolution describes this as, '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'; secondly, there must appear to have been a 'threat to the peace, breach of the peace, or act of aggression.'²⁴ A determination that Johnson notes would be

Matters of International Peace and Security. In WELLER, Marc (ed). *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, 2015, pp. 309.

18 ZAUM (n 17) pp. 155.

19 JOHNSON, Larry D. "Uniting for Peace": Does it Still Serve any Useful Purpose? *American Journal of International Law Unbound*, 2014, vol. 108, pp. 106.

20 WHITE (n 18) pp. 310.

21 *Ibid* pp. 311.

22 UN General Assembly Resolution 377A(V) 'Uniting for Peace' UN Doc 377A(V) (3 November 1950).

23 ZAUM (n 17) pp. 158.

24 *Ibid* pp. 158.

made by the General Assembly under U4P, rather than the Security Council.²⁵ If both of these conditions have been satisfied then 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.’ (Emphasis added.) To achieve this the Security Council will call for an Emergency Special Session of the General Assembly, if the General Assembly is not sitting at the time.

In summary, the resolution establishes a procedure whereby, if a veto is cast by a permanent member that prevents the Security Council from fulfilling its primary responsibility for maintaining international peace and security, the responsibility to act can be passed to the General Assembly, thereby putting the General Assembly in a position to take a more active role in responding to threats to international peace and security. To some commentators U4P is seen as one of the most important developments in the practice of the UN to ‘change the institutional balance of power between the Security Council and the General Assembly’²⁶ in the maintenance of international peace and security. There is no doubt that U4P has attained a powerful hold over the imaginations of its advocates, borne out of a sense of helplessness in the face of what are considered iniquitous uses of the veto by Security Council permanent members, in the face of often catastrophic human suffering. However, in practice U4P is not often utilised. Therefore, today, is the beneficial impact/effect of U4P on the power of the General Assembly to act more perceived than real? The first thing to acknowledge is that the substance of the powers of the General Assembly to be exercised under U4P is the UN Charter, meaning that with or without U4P the General Assembly can exercise the powers articulated within the resolution.

Other than the innovations introduced at its conception, namely, the establishment of a Peace Observation Commission, a Collective Measure Committee and the establishment of ‘Emergency Special Sessions’ by request, practically speaking, the U4P resolution does not establish anything beyond a procedural mechanism with the powers to be exercised by the General Assembly provided for in the UN Charter. To illustrate this point, let us take the situation of the Security Council’s inability to take action in response to Russia’s invasion of Ukraine due to Russia’s exercise of its veto as our example. In responding to this use of the veto, the Security Council and the General Assembly have the power under the UN Charter to call a special meeting of the General Assembly,²⁷ and furthermore the General Assembly has the power to make recommendations for collective measures.²⁸ Moreover, both of these actions by the General Assembly can

25 JOHNSON (n 20) pp. 107.

26 ZAUM (n 17) pp. 155.

27 Art. 20, UN Charter.

28 See Arts 10, 11(2), UN Charter.

be taken with or without reference to the U4P resolution.²⁹ It could be argued, therefore, that U4P could amount to little more than 'smoke and mirrors'; an artifice that obscures the powers of the General Assembly inherent within the UN Charter. Key to understanding this claim requires a detailed examination of the powers of the General Assembly under the Charter, in particular, Articles 10, 11 and 12, to which we shall now turn.

General Assembly UN Charter powers

To begin with, Article 10 of the UN Charter states, 'The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations, the Security Council or both on any such questions or matters.' Due its broad scope Article 10 empowers the General Assembly to discuss any question or matter of international concern that comes within the scope of the Charter, except as provided for by reference to Article 12,³⁰ thereby making it clear that the General Assembly has a secondary competence in matters of peace and security.³¹ The General Assembly's broad competence under Article 10 is further emphasised by Article 14. According to Article 14, 'Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.' Article 14 appears to give the General Assembly access to a wide range of situations in the area of international peace and security; with the suggestion that this is wider than that enjoyed by the Security Council.³² According to White, under Article 10 and 14 the General Assembly can 'discuss situations covered by Article 34 and 39. But to prevent any clash between the work of the Security Council, which is primarily concerned with such situations, and the General Assembly, Article 14, as well as Article 10, are subject to the limitation contained in Article 12'.³³ On the contrary, it has been suggested by Klein & Schmahl that the authority of the General Assembly to hold discussions is not affected by Article 12,³⁴ and the General Assembly's power of recommendation runs in concert with its power of discussion. Moreover, it is well-established that the General Assembly

29 BARBER, Rebecca. The Powers of the UN General Assembly to Prevent and Respond to Atrocity Crimes: A Guidance Document' (April 2021) *Asia-Pacific Centre for the Responsibility to Protect* pp. 14.

30 KLEIN, Eckart, SCHMAHL, Stefanie. Article 10. In SIMMA, Bruno et al (eds). *The Charter of the United Nations: A Commentary*, Oxford University Press, 2012, 3rd ed, pp. 463.

31 WHITE (n 18) pp. 294.

32 Ibid pp. 303.

33 Ibid pp. 303.

34 KLEIN and SCHMAHL (n 31) pp. 469.

has the power to make recommendations, which are not dependent upon a referral from another body. That said, Article 10 does make it clear that the General Assembly's power of recommendation is subject to the reservation of Article 12. We will discuss the effect of Article 12 in detail, in due course.

Article 11 provides a more explicit description of the General Assembly's powers with respect to the international peace and security. According to Article 11(2), the General Assembly is empowered to 'discuss any questions relating to the maintenance of international peace and security' brought before it by a state or by the Security Council, and to 'make recommendations with regards to any such questions to the state or states concerned or to the Security Council or both'. Additionally, Article 11(3) empowers the the General Assembly to 'call the attention of the Security Council to situations which are likely to endanger international peace and security'. Crucially, Article 11(2) also provides that 'any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion'. It is generally agreed that Article 11(2) provides the General Assembly with a general competence to act with respect matters of international peace and security. It enables the General Assembly to determine a 'threat to the peace', 'breach of the peace', and 'act of aggression' and 'to make recommendations thereon to restore international peace, a power concurrent with that of the Security Council under Article 39 of the UN Charter'.³⁵ By Article 11(2), therefore, the General Assembly has a clearly articulated secondary responsibility to make *recommendations* to restore international peace and security, i.e. the General Assembly is only empowered to make *recommendations* to states to act and is not empowered to pass mandatory resolutions requiring states to act.

That the General Assembly has a clearly articulated secondary responsibility under the UN Charter is no longer controversial; being clearly confirmed by the International Court of Justice in the *Certain Expenses* case.³⁶ The Court stated definitively that whilst Article 24 of the Charter confers upon the Security Council the primary responsibility for the maintenance of international peace and security, this does not translate as 'exclusive' responsibility; leaving the General Assembly with secondary responsibility.³⁷ As Johnson notes, 'States would

35 WHITE (n 18) pp. 304.

36 *Certain Expenses of the United Nations* (Article 17, Paragraph 2 of the Charter) (Advisory Opinion) [1962] ICJ Rep 151.

37 Ibid 163; see also *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, *South West Africa* (Ethiopia v. South Africa) (Preliminary Objections) [1962] ICJ Rep 319; See also QUIGLEY, John. The United Nations Security Council: Promethean Protector or Helpless Hostage? *Texas International Law Journal*, 2000, vol. 35, pp. 129, 165; and KIRGIS, Frederic L. The Security Council's First Fifty Years. *American Journal of International Law*, 1995, vol. 89, no. 3, pp. 506, 532; for a more recent examination of the constitutionality of U4P see the detailed analysis of Carswell in CARSWELL, Andrew J. Unblocking the UN Security Council: The Uniting for Peace Resolution. *Journal of Conflict and Security Law*, 2013, vol. 18, no. 3, pp. 453.

be free to follow those recommendations or not. There is no encroaching on the Council's exclusive power to impose coercive measures on a State or States or to decide that Governments are required to take certain measures under Chapter VII.' But, is the General Assembly empowered to recommend coercive measures such as sanctions or military measures? This question still remains controversial. On balance it would seem that the General Assembly does have the power to *recommend* such measures.³⁸ A non-binding recommendation is not considered 'action' under Article 11(2) so the General Assembly is not prevented from recommending *prima facie* coercive measures.³⁹ What is not permitted is the taking of enforcement measures that are binding upon states.⁴⁰ This view is supported by the practice of the General Assembly and the jurisprudence of the International Court of Justice.⁴¹ In the *Certain Expenses* case the Court, when interpreting Article 24 of the Charter, was of the view that 'while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory.'⁴² It is also noted that in its U4P resolution the General Assembly interpreted its power under the UN Charter to 'recommend' the 'use of armed force when necessary' where there has been a 'breach of the peace or act of aggression.' Accordingly, the General Assembly is free to make non-binding recommendations for enforcement action where there has been 'a breach of the peace or act of aggression.' It is generally understood, however, that under Article 11(2) of the Charter, where enforcement *action* is deemed necessary in a *binding* sense, the General Assembly is required to refer the matter to the Security Council.⁴³ The word action as used in Article 11(2) was interpreted by the ICJ in *Certain Expenses* to mean 'coercive or enforcement action' exclusively within the competence of the Security Council, i.e. binding action.⁴⁴

38 WHITE (n 18) pp. 305.

39 KLEIN and SCHMAHL (n 31) pp. 473; WHITE (n 18) pp. 305; CARSWELL (n 38) pp. 477.

40 KLEIN and SCHMAHL (n 31) pp. 473; ANDRASSY, Juraj. Uniting for Peace. *American Journal of International Law*, 1956, vol. 50, pp. 563–82.

41 KLEIN and SCHMAHL (n 31) pp. 473.

42 *Certain Expenses of the United Nations* (Article 17, Paragraph 2 of the Charter) (Advisory Opinion) [1962] ICJ Rep 151, 163; the ICJ further supported this view with respect to the competences of the General Assembly in its later Advisory Opinions on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) (Advisory Opinion) [2004] ICJ Rep 136, 148, para 26, and on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [22 July 2010] para 40.

43 KLEIN, Eckart, and SCHMAHL, Stefanie. Article 11. In SIMMA, Bruno, et al (eds), *The Charter of the United Nations: A Commentary*, Oxford University Press, 2012, pp. 501; WHITE (n 18) pp. 305.

44 *Certain Expenses of the United Nations* (Article 17, Paragraph 2 of the Charter) (Advisory Opinion) [1962] ICJ Rep 151, 163–165; see also KLEIN and SCHMAHL (n 31) pp. 473; KLEIN and SCHMAHL (n 44) pp. 501.

That the General Assembly is only able to make non-binding recommendations is a significant limitation on its powers. However, this does not mean its resolutions have no legal effect. Although not binding, resolutions passed by the General Assembly may have an effect on the development of international law. In the *Nicaragua Case*, in relation to the Friendly Relations Declaration,⁴⁵ the ICJ held that:⁴⁶

The effect of consent to the text of such resolution cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment undertaken in the Charter. On the contrary it may be understood as an acceptance of the validity of the rule or set of rules declared by themselves... It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be henceforth treated separately from the provisions, especially those of institutional kind, to which it is subject on the treaty-law plane of the Charter.

This suggests the ICJ is of the view that General Assembly resolutions, especially in the form of the Friendly Relations Declaration, can be seen as articulations of emerging rules of international law, *at least in part*.⁴⁷ This is because ‘*opinio juris*’ is one component part to the identification of customary international law.⁴⁸ For a General Assembly resolution to form a rule of customary international law it would also be necessary to demonstrate ‘the existence of a rule in the *opinio juris* of States’ which is ‘confirmed by practice’.⁴⁹

Article 12 limitation to the General Assembly’s powers

As previously noted, Article 12(1) of the Charter imposes an explicit limitation on the General Assembly’s competence under Article 10. According to Article 10 the General Assembly can exercise its broad powers, ‘except as provided in Article 12’. According to Article 12(1), ‘While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.’ The interpretation of Article 12 has given rise to some controversy, especially with respect to

45 UN General Assembly Resolution, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN Doc A/RES/2625(XXV) (24 October 1970).

46 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) [1968] ICJ Rep 14, 99.

47 KLEIN and SCHMAHL (n 31) pp. 480.

48 *Continental Shelf (Libya v. Malta)* [1985] ICJ Rep 13, 29.

49 *Continental Shelf (Libya v. Malta)* [1985] ICJ Rep 13, 29; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) [1968] ICJ Rep 14, 97; See also the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons [1996] ICJ Reports 226, 253.

the question of whether the General Assembly can make a recommendation for collective measures when the Security Council remains seized of a dispute.

In the early years Article 12(1) was interpreted to mean that the General Assembly was not able to consider any matter on the agenda of the Security Council.⁵⁰ Johnson notes, 'This was a matter of such concern in the early years that items were removed from the Council's agenda when the Assembly wished to discuss them.'⁵¹ However, it has been argued that this restriction is merely procedural and temporal, meaning that the General Assembly is not stopped from exercising its power to make recommendations, so long as the Security Council is not dealing with that matter concurrently.⁵²

In 1968 the UN Legal Counsel submitted an opinion to the General Assembly, expressing the view that the General Assembly has consistently interpreted the words 'is exercising' to mean 'is exercising at this moment'.⁵³ Moreover, according to the *Construction of the Wall* Advisory Opinion,⁵⁴ the development of the practice of the UN had evolved with Article 12(1) interpreted to make it permissible for the General Assembly to deal with a matter at the same time as the Security Council. The Court observed 'that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and Somalia)'.⁵⁵ It went on to conclude, 'The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter'.⁵⁶ In practice, the General Assembly has regularly adopted resolutions on a matter at the same time the Security Council is actively dealing with it.⁵⁷ For example, the General Assembly has adopted recommendations with regard to 'the racial policies of South Africa (apartheid), the situation in Angola, the territories under Portuguese administration, and in Southern Rhodesia, as well as the Tunisian case and the question of Cyprus...the Middle East, Namibia, East Timor, the Western Sahara, Kosovo, Afghanistan, the occupied Palestinian territory, and measures to eliminate international terrorism'.⁵⁸ What we see is that the General Assembly's powers inherent in the Charter provide it with the basis to

50 BARBER (n 30) pp. 9.

51 JOHNSON (n 20) pp. 109.

52 KLEIN and SCHMAHL (n 31) pp. 470.

53 General Assembly, Twenty-third Session, Third Committee, 1637th meeting, A/C.3/LSR. 1637, para. 9.

54 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) (Advisory Opinion) [2004] ICJ Rep 136, 149.

55 Ibid 149–150.

56 Ibid 150.

57 WHITE (n 18) 303.

58 KLEIN, Eckart, and SCHMAHL, Stefani. Article 12. In SIMMA, Bruno, et al (eds). *The Charter of the United Nations: A Commentary*, Oxford University Press, 2012, pp. 511.

recommend collective measures in response to any matter which falls within its competence. In the exercise of its secondary responsibility for the maintenance of international peace and security, the General Assembly's competence, 'as the open conscience of humanity',⁵⁹ is broad; extending to any matter that falls within the scope of the Charter; in particular, with respect to matters of peace and security. Moreover, the General Assembly's power of recommendation was not given to it by the Uniting for Peace resolution, rather it belongs to the General Assembly 'by virtue of the spirit of the Charter itself'.⁶⁰

U4P procedural innovation

The U4P resolution did establish a few early procedural innovations; the establishment of a Peace Observation Commission; a Collective Measure Committee and the establishment of 'Emergency Special Session' (ESS) by request. The first two of these innovations quickly fell by the wayside. The ESS procedure has endured; its use has not been extensive but it does continue to this day. To date there have been 11 ESS since the adoption of the U4P resolution in 1950.⁶¹ In addition, in 1971 the U4P resolution was used to bring the issue of Bangladesh (East Pakistan) to the attention of the General Assembly, but at the time the Twenty-Sixth Regular Session of the General Assembly was in session, so no ESS was necessary and the issue was dealt with under the agenda item "UN Assistance to East Pakistan Refugees".⁶² It is also interesting to note that the Tenth ESS was first convened in 1997 and technically has been in session since then with a series of adjournments; the most recent meeting being in 2018. Of the twelve sessions (including the non-ESS for Bangladesh) since 1950 to date, it is worth noting that seven ESS plus the one non-ESS have been requested by the Security Council and four ESS have been requested by the General Assembly.⁶³

The apparent innovation of the ESS procedure is somewhat diminished by Articles 11(2) and 20 of the Charter. Article 11(2) allows the Security Coun-

59 KELSEN, Hans. *The law of the United Nations*, New York: Praeger, 1951, pp. 198.

60 KLEIN and SCHMAHL (n 31) 475.

61 Korea (1950); Middle East (1956); Hungary (1956); Middle East (1958); Congo (1960); Middle East (1967); Palestine (1980); Afghanistan (1980); Namibia (1981); Middle East (1982); Palestine (1997).

62 USSR had vetoed two Security Council resolutions on the matter – UN. Doc. S/10416 & UN. Doc S/10423. The Security Council passed resolution 303 (1971) requesting the General Assembly to take up the matter; ZAUM (n 17) pp. 161.

63 With respect to Security Council requests: Middle East (1956), UN Security Council Resolution 119 (1956); Hungary (1956), UN Security Council Resolution 120 (1956); Middle East (1958), UN Security Council Resolution 129 (1958); Congo (1960), UN Security Council Resolution 157 (1960); Afghanistan (1980), UN Security Council Resolution 462 (1980); Middle East (1982, UN Security Council Resolution 500 (1982), Ukraine (2022), UN Security Council Resolution 2623 (2022). With respect to General Assembly requests: Middle East (1967), UN Doc (A/6717); Palestine (1980), UN Doc (A/ES-7/1); Namibia (1981), UN Doc (A/ES-8/1); Palestine (1997), UN Doc (A/ES/10/1).

cil to bring before the General Assembly any question it believes the General Assembly can deal with more effectively, for instance, where a veto has been cast by a permanent member that prevents the Security Council from taking action.⁶⁴ In addition, by Article 20, the General Assembly is empowered to meet not only in regular session but also in 'such special sessions as may require' at the request of 'the Security Council or of a majority of the Members of the United Nations.' Moreover, for the last thirty years or so the EES mechanism has been superseded by the practice of the General Assembly, which nowadays sits continually throughout the year.⁶⁵ At the time the EES procedure was innovated in 1950, things were different, with the General Assembly meeting in regular session annually, therefore, the concept of having a procedure to convene an ESS on request was of practical significance. Today that practical significance is much diminished. That said, the request for an ESS endures, as noted with the most recent ESS request by the Security Council on 27 February 2022.⁶⁶

U4P & Ukraine 2022

24 February 2022 saw Russia launch its large-scale invasion of Ukraine. Russia's aggression against Ukraine was met by worldwide condemnation and revulsion. In a statement that same day, the UN Secretary General Antonio Guterres branded the invasion 'unacceptable' and a violation of the UN Charter. In response to Russia's attack, the UN Security Council met again on 25 February to vote on a resolution prepared by the US and Albania, with the support of several other Member States. As a sign of the international outrage at Russia's actions, in addition to the Security Council member states, a further seventy-five states requested to attend the meeting of the Council.⁶⁷ The draft resolution condemned 'Russia's aggression' as a violation of Article 2(4) of the UN Charter, and called on Moscow to pull back all its troops.⁶⁸ Acting under its Chapter VII UN Charter powers the draft resolution determined that the situation in Ukraine constituted a breach of international peace and security, and that Russia had committed acts of aggression against Ukraine. The draft resolution also reaffirmed the Council's commitment to Ukraine's sovereignty, independence and territorial integrity and condemns Russia's military operation. The resolution decided that Russia shall immediately end its use of force against Ukraine and completely withdraw its military forces from within Ukraine's internationally recognised borders. The text of the resolution also deplored Russia's decision to recognise the indepen-

64 E Klein and S Schmahl, (n 44) 499.

65 Since its 44th session (1989–90), the General Assembly has been formally regarded as being "in session" for the entire year, see 'The GA Handbook A practical guide to the United Nations General Assembly', Published by the Permanent Mission of Switzerland to the United Nations (2017) 14, https://www.unitar.org/sites/default/files/media/publication/doc/un_pga_new_handbook_0.pdf (Accessed 16 November 2022).

66 UN Security Council Resolution 2623 (2022), UN Doc S/RES/2623 (27 February 2022).

67 Security Council Meeting Record UN Doc S/PV.8979 (25 February 2022).

68 Draft UN Security Council Resolution UN Doc S/2022/155 (25 February 2022).

dence of the so-called Donetsk and Luhansk People's Republics and decided that Russia should unconditionally reverse its decision and work towards the full implementation of the Minsk agreements. Eleven members voted in favour of the resolution, and three (China, India, and United Arab Emirates) abstained.⁶⁹ Russia, which was at that time holding the Security Council's presidency for the month, vetoed the text. The views expressed by the Council members supporting the resolution followed a similar theme and expressed similar views:⁷⁰ deploring Russia's aggression and imploring the Security Council to take action to fulfil its 'primary responsibility for the maintenance of international peace and security'.

Security Council Resolution 2623 (2022)

On 27 February 2022, the Security Council adopted resolution 2623. The resolution states:

'Taking into account that the lack of unanimity of its permanent members at the 8979th meeting has prevented it from exercising its primary responsibility for the maintenance of international peace and security,
Decides to call an emergency special session of the General Assembly;⁷¹

In its form and content this resolution amounts to a 'Uniting for Peace' resolution. The language is a clear reflection of General Assembly Resolution 377A (V) in that it provides that an emergency special session of the General Assembly is to be called on the affirmative vote of nine members of the Security Council, due to lack of unanimity of its permanent members.⁷² Historically, Security Council resolutions referring a matter to the General Assembly have been adopted even where a negative vote from a permanent member has been cast. Such resolutions are viewed as procedural matters and therefore not subject to a veto. According to Article 27(2) of the UN Charter, decisions of a procedural matter shall be made by an affirmative vote of nine Security Council members.⁷³ Therefore, the fact Russia voted against the adoption of Resolution 2623 made no difference to the outcome.⁷⁴ It should be noted that this was the first such

69 Security Council Meeting Record UN Doc S/PV.8979 (25 February 2022).

70 Security Council Meeting Record UN Doc S/PV.8979 (25 February 2022) for the views expressed by the representatives of the United States, United Kingdom, Norway, Ireland, France, Ghana, Brazil and Kenya.

71 UN Security Council Resolution 2623 (2022), UN Doc S/RES/2623 (27 February 2022).

72 See earlier.

73 See also UN Security Council Provisional Rules or Procedure and Repertoire of Security Council Practice, <https://www.un.org/securitycouncil/content/repertoire/provisional-rules-procedure#rule8>.

74 UN Security Council Resolution 2623 (2022), UN Doc S/RES/2623 (27 February 2022) received eleven votes in favour (Albania, Brazil, France, Gabon, Ghana, Ireland, Kenya, Mexico, Norway, United Kingdom and the United States), one against (Russia) and three abstentions (China, India, United Arab Emirates). See Security Council Meeting Record UN Doc S/PV.8980 (27 February 2022).

form of a resolution, referring a matter from the Security Council to the General Assembly, since 1982.

Eleventh Emergency Special Session & General Assembly Resolution A/ES-11/L.1 (1 March 2022)

On 28 February 2022 the General Assembly convened its Eleventh Emergency Special Session to address the matter of Russia's aggression against Ukraine.⁷⁵ After three days of debate, on 2 March, the General Assembly overwhelmingly adopted a resolution demanding Russia's immediate end to its unlawful invasion and aggression against Ukraine.⁷⁶ By a vote of 141 in favour to 5 against and 35 abstentions the international community reaffirmed its commitment to 'Ukraine's sovereignty, independence, unity and territorial integrity.'⁷⁷ At the outset the text of the resolution made explicit reference to the Uniting for Peace resolution 377 A (V) of 3 November 1950 and noted the lack of unanimity of the permanent members of the Security Council at its 8979th meeting, preventing it from exercising its primary responsibility for the maintenance of international peace and security, as a condition precedent. The resolution then went on to, *inter alia*, deplore Russia's aggression against Ukraine and demand the immediate end to Russia's unlawful use of force against Ukraine and to refrain from any further threats or use of force against any United Nations member. It further demanded Russia's immediate and unconditional withdrawal of all its military forces from the territory of Ukraine within its internationally recognised borders, and the reversal of its 21 February decision related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine, urging the immediate peaceful resolution of the conflict. The General Assembly's resolution sent a powerful and resounding message to Russia about the international communities' overwhelming revulsion and rejection of its actions and its claims.

What useful purpose does U4P serve?

To conclude, the resolution passed by the General Assembly on 2 March was an unequivocal and powerful condemnation of Russia's behaviour. It clearly deplored Russian actions and demanded Russia bring its aggression and invasion to an immediate end; and required both Russia and Ukraine to abide by the norms of international humanitarian law, the laws of armed conflict and international human rights norms in their respective conduct. However, what useful purpose did the invocation of U4P serve? As we have discussed, U4P does not

75 Since being requested this session has had nine meetings, the most recent being 24 March, and remains in session.

76 See General Assembly Resolution UN Doc A/ES-11/L.1 (1 March 2022).

77 'General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops', UN Press Release GA/12407 (2 March 2022) <https://press.un.org/en/2022/ga12407.doc.htm> (last accessed 10 July 2022).

give the General Assembly powers it does not already have under the Charter. It is clear from Resolution 377A (V) that a key premise for the resort to U4P is to empower the General Assembly to take 'collective measures' for the maintenance of international peace and security in lieu of the Security Council being able to do so due to the casting of the veto by one of the permanent members. However, U4P is not an independent source of the Assembly's powers, it is merely an aspect of its practice and, as we have noted previously, the General Assembly has the power to make such a recommendation for 'collective measures' by virtue of the UN Charter, with or without reference to the U4P resolution. A good illustration of this is what happened following a Russian veto in the Security Council in March 2014 of a draft resolution on Ukraine declaring the 16 March 2014 referendum in Crimea illegal.⁷⁸ In response to the veto by Russia the Security Council did not vote on a U4P resolution referring the matter to the General Assembly. However, the General Assembly did act. Rather than acting upon a referral from the Security Council, the General Assembly responded independently to the situation by adopting a resolution on 27 March 2014, entitled "Territorial integrity of Ukraine",⁷⁹ which received 100 votes in favour, 11 against and 58 abstentions (24 member states were either absent or were present and did not vote).

Still, the resort to U4P does persist. A part its persisting appeal, if rather intermittent usage, is the political purpose it can serve. In circumstances where the Security Council is unable to act due to the veto, requesting an ESS could be,⁸⁰ as Johnson suggests, 'a desire to make a political point that the issue should not be treated as if it were business as usual, but as a particularly alarming or dangerous situation which merits separate treatment by the Assembly.'⁸¹ That was clearly the case with respect to Security Council Resolution 2623 (2022).⁸²

But maybe its useful purpose is not so much a question of what it provides as a procedural mechanism but is more what it has contributed to the development of the General Assembly's competence under the Charter. It could be argued that the U4P resolutions persisting relevance is borne out of its historical significance in the development of the General Assembly's competence with respect to the maintenance of international peace and security. The U4P resolution is a persisting narrative that underpins the development of the General Assembly's Charter competence.⁸³

78 Draft UN Security Council Resolution UN Doc S/2014/189 (16 March 2014).

79 UN General Assembly Resolution 68/262, UN Doc A/RES/68/262 (27 March 2014).

80 This is notwithstanding the fact a special session of the General Assembly can be called under Article 20, UN Charter.

81 JOHNSON (n 20) pp. 108.

82 See for example the opinions expressed by member states who voted in support of resolution 2623 (2022), <https://press.un.org/en/2022/sc14809.doc.htm> (last accessed 1 August 2022).

83 RICHARDSON, Henry. Comment on Larry Johnson, 'Uniting for Peace'. *American Journal of International Law*, 2014–2015, vol. 108, pp. 138.

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