

# The Security Council veto and Syria: responding to mass atrocities through the “Uniting for Peace” resolution

Graham Melling  · Anne Dennett

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**Abstract** The Syrian conflict has brought into sharp focus the exercise of the veto by some permanent members of the Security Council, highlighting significant shortcomings in the Council’s ability to respond effectively to grave humanitarian situations, particularly those involving mass atrocity crimes. It has also raised issues of legitimacy and credibility in Security Council decision-making, yet a growing clamour within the General Assembly for veto reform has, to date, not resulted in tangible change. The purpose of this article is to examine how the Security Council can improve the effectiveness of its response to humanitarian concerns but still maintain its position at the centre of the response to threats to international peace and security. We explore whether the Uniting for Peace Resolution can provide a constitutional response to negating the exigencies of the veto and enhance legitimacy in Security Council decision-making whilst keeping the Security Council at the centre of the solution. As a practical remedy to unblocking the Security Council in limited circumstances, we advocate an approach which maintains the constitutional balance of power under the United Nations Charter by placing the Security Council, as the body tasked with primary responsibility for the maintenance of international peace and security, at the centre of the operation of the Uniting for Peace Resolution by determining when its use is appropriate and what measures will be adopted as a consequence. We propose the use of independent monitoring and verification bodies to carry out fact-finding and objective evaluation to strengthen the legitimacy of Uniting for Peace.

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Graham Melling (✉) · Anne Dennett

Senior Lecturer in Law, Lincoln Law School, University of Lincoln, Lincoln, UK  
e-mail: gmelling@lincoln.ac.uk

Anne Dennett

e-mail: adennett@lincoln.ac.uk

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## 1 Introduction

On 12 April 2017, Russia, as a permanent member of the United Nations Security Council, vetoed a draft resolution condemning the deadly chemical attack in Syria.<sup>1</sup> It was the eighth time since the beginning of Syria's six-year-old war civil war that Moscow had used its veto power to block Security Council action in response to the ongoing conflict.<sup>2</sup> On 28 February 2017, for instance, Russia, along with China, vetoed a draft Security Council resolution that sought to impose sanctions against parties using chemical weapons in Syria during the civil war.<sup>3</sup> And, on 22 May 2014, Russia and China vetoed a draft resolution condemning 'the widespread violations of human rights and international humanitarian law by the Syrian authorities and pro-government militias, as well as the human rights abuses and violations of international humanitarian law by non-State armed groups' and referring the situation in Syria to the prosecutor of the International Criminal Court.<sup>4</sup>

These are just three examples of Russia, along with China at times, blocking the Security Council from responding to the grave violations of humanitarian law and human rights law in the Syrian civil war with its use of the veto. There is much to deplore about the use of the veto by Russia and China since the beginning of the conflict in Syria. Whilst the use of the veto to prevent the passing of each resolution was legal, it is certainly arguable that such use is inimical to the drafters of the United Nations Charter (hereinafter the Charter) who expected the use of the veto to be responsible and for the purpose of

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<sup>1</sup> Security Council Resolution 315, UN Doc S/2017/315 (12 April 2017); see also Security Council meeting 7922, UN Doc S/PV.7922 (12 April 2017).

<sup>2</sup> Michelle Nichols, Russia Blocks U.N. Security Council Condemnation of Syria Attack (Reuters, 13 April 2017) <<http://www.reuters.com/article/us-mideast-crisis-syria-un-vote-idUSKBN17E2LK>> accessed 15 April 2017.

<sup>3</sup> Security Council Resolution 172, UN Doc S/2017/172 (28 February 2017); see also Russia, China Block Security Council Action on Use of Chemical Weapons in Syria (UN News Centre, 28 February 2017) <<http://www.un.org/apps/news/story.asp?NewsID=56260#.Wlbc7IHjIU>> accessed 28 February 2017.

<sup>4</sup> Security Council Resolution 348, UN Doc S/2014/348 (22 May 2014); this resolution was supported by sixty-four member states of the United Nations.

ensuring international peace and security,<sup>5</sup> and that it constitutes an “abuse” of the veto power.<sup>6</sup>

The issue of veto “abuse” has been the subject of much debate and discussion within the United Nations organisation, member states and civil society internationally.<sup>7</sup> This has led to a range of proposals for reform of the Security Council, be it structural reform, including the Council’s composition, or reform of its decision-making procedures.<sup>8</sup> However, while veto reform initiatives have gained momentum in the last five years,<sup>9</sup> they have not yet gained sufficient traction to guarantee universal acceptance and assured implementation, particularly between the permanent member states, amongst whom both Russia and the US have expressed clear opposition to ‘tampering with the veto power.’<sup>10</sup> The Security Council, therefore, due in large part to the veto power, continues to reveal itself to be dysfunctional on important matters and increasingly, states are despairing at its lack of response to the gravest of situations.<sup>11</sup> With the prospect of wholesale structural reform of the Security Council being, at best, some time off and, more particularly, change to Security Council voting procedure being unlikely, one is

<sup>5</sup> The 1945 Joint Statement of the Four Sponsoring Governments envisaged that the veto would be sparingly used and only on matters of importance and stated: ‘It is not to be assumed, however, that the permanent members, any more than the non-permanent members, would use their “veto” power wilfully to obstruct the operation of the Council.’ Statement of the Four Sponsoring Governments on Voting Procedure in the Security Council, UNCIO Document 852, III/1/37(1) [8]/ UN Doc A/578 (7 June 1945).

<sup>6</sup> However, notorious uses of the veto by Russia in recent years are not confined to Syria. In July 2015 Russia twice cast such vetoes: one which prevented the Security Council from adopting a resolution that would have commemorated the 20th anniversary of the genocide at Srebrenica and a second that would have established an international criminal tribunal to prosecute those responsible for the downing of Malaysian Airlines Flight MH17. Security Council Report, The Veto (Research Report, 19 October 2015) <<http://www.securitycouncilreport.org/special-research-report/the-veto.php>> accessed 16 August 2017, 1.

<sup>7</sup> See, for example, UN Security Council Action on Crimea Referendum Blocked (UN News Centre, 15 March 2014) <<https://www.un.org/apps/news/story.asp?NewsID=47362#.WZlmsa2ZPR1>> accessed 20 August 2017; Amnesty International Annual Report 2014-2015 (Amnesty International, 2015) <<https://www.amnesty.org/en/latest/research/2015/02/annual-report-201415/>> accessed 20 August 2017; UN: Russia and China’s Abusive Use of Veto “Shameful” (Amnesty International, 28 February 2017) <<https://www.amnesty.org/en/latest/news/2017/02/un-russia-and-chinas-abusive-use-of-veto-shameful/>> accessed 20 August 2017; Julian Borger and Bastien Inzaurrealde, Russian Vetoes Are Putting UN Security Council’s Legitimacy at Risk, Says US (The Guardian, 23 September 2015) <<https://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us>> accessed 20 August 2017.

<sup>8</sup> See Section 4. For a brief discussion of reform proposals, see the New York University Center on International Cooperation policy paper, Pathways to Security Council Reform (May 2014) <<http://cic.nyu.edu/publications/pathways-security-council-reform>> accessed 20 April 2017; Security Council Report, *supra* note 6.

<sup>9</sup> See, for example, the strong support for veto reform in the report of Security Council meeting 7389 (23 February 2015) S/PV.7389.

<sup>10</sup> Borger and Inzaurrealde, *supra* note 7.

<sup>11</sup> *Ibid.*

prompted to look beyond the totem of Security Council reform, which has become something of a “will-o-wisp.”

In this article we shall examine whether the UN General Assembly’s 1950 resolution 377a(V): “Uniting for Peace” resolution (U4P) can be used to unblock the Security Council in the face of the use of the veto by a permanent member. We will examine whether U4P can provide a legitimate framework to overcome Security Council veto-paralysis in responding to mass atrocities today, importantly, ensuring Council centrality in both responding to the veto through U4P and controlling over the decision for any proposed action. This article will argue that it is important, if resorting to Uniting for Peace, that any interpretation of it must correctly reflect the constitutional balance of the Charter between the Security Council and the General Assembly. It will be argued that by adopting a particular reading of the Uniting for Peace resolution, rather than being seen as a means of diminishing the standing of the Security Council and its “primary” responsibility for international peace and security, can be a mechanism for enhancing the Security Council’s effectiveness in its response to mass atrocities, such as have been and continue to be perpetrated in Syria.

Section 2 of this article outlines the creation of the veto power, its purpose and scope. Section 3 examines examples of the use and “abuse” of the veto. Section 4 outlines current initiatives for reform of the veto while Section 5 moves on to analyse the potential role for the “Uniting for Peace” resolution, addressing in particular the question of its constitutionality. We will examine whether the use of Uniting for Peace can provide a constitutional response to negating the exigencies of the veto, whilst keeping the Security Council at the centre of the solution, thereby contributing towards repairing its already damaged legitimacy.<sup>12</sup> Section 6 addresses the legitimate concern about the potential abuse of the “Uniting for Peace” resolution and identifies an instrumental role for both the Independent International Commission of Inquiry on the Syrian Arab Republic<sup>13</sup> and the Organisation for the Prohibition of Chemical Weapons (OPCW)-United Nations Joint Investigative Mechanism<sup>14</sup> to address such concerns. Section 7 contains some concluding thoughts.

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<sup>12</sup> Ibid.

<sup>13</sup> Established by OHCHR Res S-17/1, UN Doc S-17/1 (22 August 2011).

<sup>14</sup> Established by Security Council Resolution 2235, UN Doc S/Res/2235 (7 August 2015).

## 2 The creation of the veto, purpose and scope of the veto power

The first point to note is that there is no express reference to the veto power of the Security Council permanent members in the Charter. Instead, Article 27(1) allocates each member of the Security Council one vote; Article 27(2) provides that procedural decisions of the Security Council are to be made by an affirmative vote of nine members (i.e., they are not subject to the veto). By Article 27(3), decisions of the Security Council on all non-procedural matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members. The unanimous vote of permanent members plus the agreement of four (originally two) non-permanent members is needed and a negative vote by a permanent member on a substantive matter will defeat the adoption of a resolution (although an abstention by a permanent member is deemed a concurring vote<sup>15</sup>). The Charter makes no constraints on how often or for what reason the veto power may be used; nor does it create a framework of checks and balances or require accountability. Hans Kelsen identifies the drafters' missed opportunity to restrict the negative effect of the veto: under Article 27 the voting procedure fails to distinguish between the "quasi-obligatory and discretionary functions" of the Security Council in the Charter, and Kelsen argues that the functions which the body "shall" perform could have required a simple majority and only those which it "may" perform could have required a qualified majority, so that the veto would only apply to the latter.<sup>16</sup> In contrast, the Charter clearly affords all decision-making by the Security Council the greatest discretion and the permanent members near complete control as a central plank of maintaining international security, with the notorious downside that, as Brierly notes, it 'has resulted in a system that can be jammed by the opposition' of a single permanent member.<sup>17</sup>

The incorporation of the veto was clearly predicated on preserving the wartime alliance of the great powers and maintaining their post-war

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<sup>15</sup> Following Security Council Resolution 4, UN Doc S/Res/4 (29 April 1946); see Constantin A Stavropoulos, *The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, Paragraph 3, of the Charter of the United Nations*, 61(3) *AJIL* (1967) 737, 742.

<sup>16</sup> Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59(7) *Harvard L R* (1946) 1087, 1111; Kelsen also records how the French delegate at the San Francisco Conference unsuccessfully proposed an amendment to the draft UN Charter borrowed from the League of Nations Covenant, reserving to members of the UN the right to take such action as they considered necessary 'in the interests of peace, right and justice' if the Security Council was unable to reach a decision. *Ibid.*, 1115 fn 39).

<sup>17</sup> J L Brierly, *The Covenant and the Charter*, 23 *British Yrbk Intl L* (1946) 83, 91.

co-operation to produce unity and agreement, but this was one of the flaws of the voting formula; it overlooked the potential for the veto to be used for national interests, and fractures soon appeared in the anticipated collegiality.<sup>18</sup> With the implementation of the Charter, three important unintended consequences became clear very early on: the first was that the Security Council could be paralysed by inaction through the veto. It soon became apparent that the exercise of the veto by the permanent members was a problematic feature of Security Council operation in achieving its primary aim of maintaining international peace and security. In July 1946, Cuba proposed a general conference to consider amending the Charter to remove the veto power<sup>19</sup> and Norman J Padelford, a member of the US delegation at Dumbarton Oaks, wrote in 1948:

Both formal voting and the veto have been employed too often for the good of the organization. The continual use of the veto has disheartened many who hoped that the [Security] Council would be able to function more efficiently than it has to date. It has prompted widespread desire to revise the Charter or find other means of curtailing the veto ....<sup>20</sup>

The second consequence was that the support of a permanent member for smaller States could lead to a “patron-and-client attitude,”<sup>21</sup> thus providing an umbrella of protection and potential impunity to less powerful States such as we see with Syria. Third, Security Council inaction could lead states to turn elsewhere for decisions to be taken or to resort to self-help<sup>22</sup> with the potential to undermine the Council’s primary function.

However, a more recent issue has arisen that was not fully apparent in the 1940s. The prime focus of the nascent Security Council was the prevention of further inter-state wars but by the late twentieth and early twenty-first centuries, the field of operation of the Security Council saw an expansion in scale and emphasis beyond the original range of expectation of traditionally understood threats to international peace and security to include humanitarian protection and human rights

<sup>18</sup> As David Caron has pointed out, ‘Sometimes – and I would assert this is the case with the veto - the potential to betray the promise is built directly and tragically into the organization.’ David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87(4) *Am J Intl L* (1993) 552, 560.

<sup>19</sup> See *Yearbook of the United Nations 1946-47*, 131 <<https://unyearbook.un.org/>> accessed 4 September 2017.

<sup>20</sup> Norman J Padelford, *The Use of the Veto*, 2(2) *Intl Org* (1948) 227, 246.

<sup>21</sup> B A Wortley, *The Veto and the Security Provisions of the Charter* 23 *British Yrbk Intl L* (1946) 95, 105.

<sup>22</sup> *Ibid*; see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre 2001) XIII [F].

abuses in internal conflicts.<sup>23</sup> This development of emphasis on responding to “human tragedy” caused by conflict ushered in the potential for greater interventionism, which in turn raised a more complex mesh of interlinking and, at times, conflicting norms and principles. Whilst being expected to do more to respond to the unfolding international crisis and human tragedy, due in large measure to the exercise of the veto by the permanent members, the Security Council can seem to be doing less, or at best, not enough.

### 3 A “prisoner of the veto”?

At a meeting of the Security Council in 2010, the representative of Venezuela referred to the Security Council as ‘a prisoner of the right of the veto,’ calling for the right of the veto to be eliminated and binding force given to decisions of the General Assembly.<sup>24</sup> Looking at the veto records, it is not difficult to see why. Between 1946 and February 2017, 240 vetoes were cast by the permanent members.<sup>25</sup> The most prolific casting of the veto has come from Russia (combined with the USSR) with a total of 107 vetoes cast; followed by the US with 79; the UK with 29; France with 16 and China with 11. Despite a substantial decrease in the overall number of vetoes cast by the permanent members from 2000 to 2017<sup>26</sup> (the total is fewer than half those cast in the previous 54 years, a trend noted by Wouters and Ruys as being ‘all the more remarkable as the number of resolutions adopted by the Council has increased dramatically’<sup>27</sup>), the veto has still remained a substantial difficulty in the functioning of the Security Council. At a Security Council session in 2015, the representative of New Zealand stated:

... the use of the veto or the threat of the veto is the single largest cause of the Security Council being rendered impotent in the face of too many serious international conflicts. Whether we are talking about Syria or the Middle East peace process, the veto’s impact today far exceeds what was envisaged in the United Nations Charter — to the huge detriment of the Council’s effectiveness and credibility.<sup>28</sup>

<sup>23</sup> For example, see Security Council Resolution 794, UN Doc S/Res/974 (1992); Caron, *supra* note 18, 552 fn 3.

<sup>24</sup> Security Council meeting 6404, UN Doc S/PV.6404 (18 October 2010) (Resumption 1) 22.

<sup>25</sup> Veto List (Dag Hammarskjöld Library) <<http://research.un.org/en/docs/sc/quick>> accessed 16 August 2017.

<sup>26</sup> The number of vetoes cast by the permanent members between 2000 and 2107 is: Russia, 15; US, 11; China, 8; UK and France, 0.

<sup>27</sup> Jan Wouters and Tom Ruys, *Security Council Reform: A New Veto for a New Century?* Egmont Papers Academia Press for the Royal Institute for International Relations (2005) 9.

<sup>28</sup> Security Council meeting 7389, S/PV.7389 (23 February 2015), 9.

The threat of the use of the veto and the “hidden veto” has been particularly problematic in the context of Security Council responses to international humanitarian crisis.<sup>29</sup> For example, when the Security Council considered acting in response to the developing Rwandan crisis and eventual genocide, both France and the US threatened the use of the veto. Moreover both countries used their influence through the “hidden veto” to influence the definition of the crisis to avoid the use of the term “genocide.”<sup>30</sup> With regard to the conflict and unfolding humanitarian crisis in Kosovo, it was Russia and China that threatened the use of the veto when the Security Council began deliberating what actions to take. Russia committed itself to vetoing any possible enforcement action against its ally, Serbia, and China was unwilling to extend the limits of the Charter on the use of force, thus impelling NATO to take unilateral action with a bombing campaign in Kosovo which was not authorised by the Security Council.<sup>31</sup>

With respect to the Syrian conflict, Russia has exercised its veto eight times, blocking the following draft resolutions: in October 2011, demanding an end to human rights violations;<sup>32</sup> in February 2012, a draft resolution holding the Syrian Government to account for human rights violations;<sup>33</sup> in July 2012, demanding Syria’s urgent implementation of the Joint Envoy’s six-point peace plan (including a ceasefire), renewing the mandate of the United Nations Supervision Mission in Syria (UNSMIS) and threatening sanctions;<sup>34</sup> in May 2014, a draft resolution referring the situation in Syria to the International Criminal Court (supported by all other members of the Security Council);<sup>35</sup> in October 2016, demanding cessation of air strikes on Aleppo;<sup>36</sup> in December 2016, demanding a seven day cessation of hostilities

<sup>29</sup> The “hidden veto” involves a permanent member, most often behind closed doors, threatening to use the veto if a particular issue is brought before the Security Council. Due to the clandestine nature of the exercise of the hidden veto, it is difficult to assess with accuracy the effect the veto has had on the decisions the Security Council has made, or has not made. See Wouters and Ruys, *supra* note 27, 9.

<sup>30</sup> Wouters and Ruys, *supra* note 27, 17; Chelsea Koester, Looking beyond R2P for an Answer to Inaction in the Security Council, 27(3) *Florida J Intl L* (2015) 377, 382; for a detailed criticism of the Security Council response to the Rwandan genocide see: Security Council Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, UN Doc S/1999/1257 (16 December 1999).

<sup>31</sup> Wouters and Ruys, *supra* note 27, 9.

<sup>32</sup> Security Council Resolution (draft), UN Doc S/2011/612 (4 October 2011).

<sup>33</sup> Security Council Resolution (draft), (UN Doc S/2012/77 (4 February 2012).

<sup>34</sup> Security Council Resolution (draft), UN Doc S/2012/538 (19 July 2012).

<sup>35</sup> Security Council Resolution (draft), UN Doc S/2014/348 (22 May 2014); Russia, China Block Security Council Referral of Syria to International Criminal Court (UN News Centre, 22 May 2014) <<http://www.un.org/apps/news/story.asp?NewsID=47860#>> accessed 19 August 2016.

<sup>36</sup> Security Council Resolution (draft), UN Doc S/2016/846 (8 October 2016).



in Aleppo;<sup>37</sup> in February 2017, a draft resolution seeking to impose sanctions on any party to the civil war involved in the use of chemical weapons;<sup>38</sup> and most recently, in April 2017, a draft resolution requesting full support be given to an investigation into the reported use of chemical weapons on 4 April 2017.<sup>39</sup> China exercised its veto on six of those occasions, abstaining on the October 2016 and April 2017 drafts.<sup>40</sup> However, inaction at these junctures has its consequences. As Ruth Wedgwood points out, ‘Council action influences what our perception of the law is.’<sup>41</sup> There is evidence of escalations in the conflict after exercises of the veto on Syria<sup>42</sup> and, according to the International Commission of Inquiry on Syria, there has been “a growing culture of impunity.”<sup>43</sup> The use

<sup>37</sup> Security Council Resolution (draft), UN Doc S/2016/1026 (5 December 2016).

<sup>38</sup> Security Council Resolution (draft), UN Doc S/2017/172 (28 February 2017); Russia, China Block Security Council Action on Use of Chemical Weapons in Syria (UN News Centre, 28 February 2017) <<http://www.un.org/apps/news/story.asp?NewsID=56260#.WZR2MaZZPR0>> accessed 28 February 2017.

<sup>39</sup> Security Council Resolution (draft), UN Doc S/2017/315 (12 April 2017).

<sup>40</sup> It must be noted that there has not been a total absence of unanimity in the Security Council in relation to Syria. The Security Council has unanimously supported a ceasefire, see Security Council Resolution 2042, UN Doc S/Res/2042 (14 April 2012); established a framework for eliminating chemical weapons in Syria, see Security Council Resolution 2118, UN Doc S/Res/2118 (27 September 2013); allowed humanitarian access, see Security Council Resolution 2139, UN Doc S/Res/2139 (22 February 2014); called on states to prevent the transfer of arms and funds to IS, see Security Council Resolutions 2199, UN Doc S/Res/2199 (12 February 2015); condemned the use of chlorine gas, see Security Council Resolution 2209, UN Doc S/Res/2209 (6 March 2015); established a Joint Investigative Mechanism to identify responsibility for the use of chemical weapons in Syria, see Security Council Resolution 2235, S/Res/2235 (7 August 2015); unanimously endorsed the Geneva Communiqué and Vienna Process urging negotiation of a Syrian-led, political transition to end the conflict, see Security Council Resolution 2254, S/Res/2254 (18 December 2015); endorsed the cessation of hostilities agreement announced by the International Syria Support Group (ISSG), see Security Council Resolution 2268, S/Res/2268 (26 February 2016); the International Syria Support Group (ISSG) was set up in 2015; and condemned attacks on medical facilities, see Security Council Resolutions 2286, S/Res/2286 (3 May 2016); demanded UN access to monitor evacuations from Aleppo, see Security Council Resolutions 2328, S/Res/2328 (19 December 2016); welcomed efforts by Russia and Turkey to end violence, see Security Council Resolution 2336, S/Res.2336 (31 December 2016); following the Munich talks in February 2016, the US and Russia as co-chairs of the ISSG announced a ceasefire task force, and cessation of hostilities commenced on 27 February 2016. Rigorous diplomatic efforts continue to operate and intra-Syrian talks were held in Geneva in April 2016 facilitated by the UN Special Envoy for Syria, Staffan de Mistura, with some agreement on the need for transition, see Transcript of Press Remarks by Staffan de Mistura, UN Special Envoy for Syria Geneva (United Nations Office at Geneva, 27 April 2016) <[http://www.unog.ch/unog/website/news\\_media.nsf/\(httpPages\)/000D36A774282696C1257FA3002BA4E4?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpPages)/000D36A774282696C1257FA3002BA4E4?OpenDocument)> accessed 16 August 2017; further intra-Syrian negotiations were held in Geneva on 3 March 2017 where the Security Council called on the Syrian parties to fully implement a ceasefire and end ceasefire violations and ensure humanitarian access, see Security Council Press Statement on Syria (United Nations, 10 March 2017) <<https://www.un.org/press/en/2017/sc12749.doc.htm>> accessed 20 August 2017.

<sup>41</sup> Ruth Wedgwood, *Unilateral Action in the UN System*, 11(2) EJIL (2000) 349, 356.

<sup>42</sup> See Dr Simon Adams, *Failure to Protect: Syria and the UN Security Council*, (Global Centre for the Responsibility to Protect Occasional Paper Series No. 5 (March 2015) <[http://www.globalr2p.org/media/files/syriapaper\\_final.pdf](http://www.globalr2p.org/media/files/syriapaper_final.pdf)> accessed 16 August 2017.

<sup>43</sup> HRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc A/HRC/22/59 (5 February 2013), 2; see also HRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc A/HRC/31/68 (11 February 2016), 20–21 [148]; see also generally HRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc A/HRC/33/55 (11 August 2016).

of the veto in such grave humanitarian crisis leaves the Security Council inert in the face of terrible suffering inside Syria and the broader threat to international peace and security. With its continued dysfunction, the Security Council has an ever increasing deficit of credibility that is urgent for it to address. As Mohammed Bedjaoui observed in 1994, the Security Council ‘will not gain in credibility, authority and efficiency unless the conviction takes root that it acts not as an institution above the Charter and international law but as their servant.’<sup>44</sup>

## 4 Veto reform initiatives

There are a number of current initiatives calling for restraint in the use of the veto in mass atrocity situations – the French Initiative, the Accountability, Coherence and Transparency Group (ACT) Code of Conduct and the Elders’ Proposal.<sup>45</sup> These initiatives are all motivated by desire to improve the effectiveness of the Security Council in preventing and halting mass crimes and their development has been fuelled by Security Council’s inability to take effective action in Syria.

### 4.1 French initiative

In 2013 the French initiative was proposed which consists of the permanent members adopting a “code of conduct” with respect to the use of the veto.<sup>46</sup> The code of conduct requires the permanent members from refraining from using the veto when the Security Council needs to make a decision with regard to mass atrocity crimes. This restriction in the use of the veto, however, is caveated by the question of whether the decision impacts upon the “vital interests” of a permanent member. A key feature of the “code of conduct” is that it would be triggered by the United Nations Secretary-General. This would involve the Secretary-General making a determination regarding the occurrence of a mass crime at the request of at least 50 member states of the United Nations.

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<sup>44</sup> M Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (M. Nijhoff, Leiden/Boston, 1995) 7.

<sup>45</sup> See generally, Security Council Report, *The Veto* (No 3, 19 October 2015) <<http://www.securitycouncilreport.org/special-research-report/the-veto.php>> accessed 23 August 2017.

<sup>46</sup> See generally, Security Council Report, *The Veto* (No 3, 19 October 2015) <<http://www.securitycouncilreport.org/special-research-report/the-veto.php>> accessed 23 August 2017.

During 2015, France, along with Mexico, launched a ‘Political Declaration on suspension of veto powers in cases of mass atrocity,’ open to all member states to support. As with the 2013 proposal the political declaration is focused only on the five permanent members of the Security Council and calls for voluntary restraint of the use of the veto in cases of mass atrocities.<sup>47</sup> The declaration asserts that ‘the Security Council should not be prevented by the use of veto from taking action with the aim of preventing or bringing an end to situations involving the commission of mass atrocities,’ going on to, ‘welcome and support the initiative by France, jointly presented with Mexico, to propose a collective and voluntary agreement among the permanent members of the Security Council to the effect that the permanent members would refrain from using the veto in case of mass atrocities.’<sup>48</sup>

#### 4.2 Accountability, Coherence and Transparency Group (ACT) Code of Conduct

The ‘Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes,’<sup>49</sup> (hereinafter the “code of conduct”) calls on member states to make a series of pledges to support the Security Council taking “timely and decisive” action to prevent or end the perpetration of the core international crimes of genocide, crimes against humanity and war crimes, in particular calling upon Security Council members to refrain from voting ‘against credible draft Security Council resolutions that are aimed at preventing or ending those crimes, which are all well defined in international law.’<sup>50</sup> Distinct from the French initiative, the ACT pledges are directed to the UN membership at large and are not confined to the permanent members, as all member states are eligible to serve on the Security Council as elected members. Also in contrast to the French initiative, there is no explicit procedure for triggering the code of conduct.

<sup>47</sup> France and the UN Reform (Permanent mission of France to the United Nations in New York, 27 April 2017) <<https://onu.delegfrance.org/France-and-UN-Reform>> accessed 12 July 2017.

<sup>48</sup> Political Statement on the Suspension of the Veto in Case of Mass Atrocities <[https://onu.delegfrance.org/IMG/pdf/2015\\_08\\_07\\_veto\\_political\\_declaration\\_en.pdf](https://onu.delegfrance.org/IMG/pdf/2015_08_07_veto_political_declaration_en.pdf)> accessed 12 July 2017; As of 27 June 2017, the Political Declaration is supported by 93 member states. See UN Security Council Code of Conduct (Global Centre for the Responsibility to Protect) <[http://www.globalr2p.org/our\\_work/un\\_security\\_council\\_code\\_of\\_conduct](http://www.globalr2p.org/our_work/un_security_council_code_of_conduct)> accessed 12 July 2017.

<sup>49</sup> General Assembly and Security Council 70th Session Strengthening of the United Nations System UN Doc A/70/621-S/2015/978 (14 December 2015), agenda item 122; see generally, Security Council Report, The Veto (No 3, 19 October 2015) <<http://www.securitycouncilreport.org/special-research-report/the-veto.php>> accessed 23 August 2017.

<sup>50</sup> Ibid., A/70/621-S/2015/978, agenda item 122.

Instead, '[t]he application of the code of conduct would be triggered by any situation involving those crimes — in other words, when the facts on the ground lead to Security Council action, following an assessment of relevant information by a State committed to the code of conduct.'<sup>51</sup> However, the Secretary-General would serve as an important authority, using the capacities and expertise of the UN system, to bring such situations to the attention of the Security Council, with his or her assessment of the situation carrying great weight.<sup>52</sup>

### 4.3 Elders' proposal

The Elders consist of a diverse and independent group of global leaders working to promote peace and human rights, currently chaired by former Secretary General Kofi Annan. In its proposals it called for the permanent members to commit to not use, or threaten to use, their veto where a decision is needed for the Security Council to respond to the perpetration or threat of mass atrocities.<sup>53</sup> Under the Elders' proposal, where a permanent member does cast a veto in such cases then it is incumbent upon the member to explain, clearly and publicly, what alternative course of action they propose as a credible and efficient way to protect the populations in question. This explanation, the Elders assert, 'must refer to international peace and security, and not to the national interest of the state casting the veto, since any state casting a veto simply to protect its national interests is abusing the privilege of permanent membership.'<sup>54</sup> Moreover, when one or more permanent members do feel obliged to cast a veto, and do provide such an explanation, the others must undertake not to abandon the search for common ground but to make even greater efforts to agree on an effective course of action.<sup>55</sup>

A key feature of each of these initiatives is the reliance upon a political commitment from the permanent members addressing the manner and circumstance in which the veto is to be employed. However, a lingering question remains: what can be done when, as is

<sup>51</sup> Ibid.

<sup>52</sup> As of June 22 2017, the Code of Conduct is signed by 111 member states and 2 observers; see UN Security Council Code of Conduct, *supra* note 48.

<sup>53</sup> See generally, Security Council Report, The Veto (No 3, 19 October 2015) <<http://www.securitycouncilreport.org/special-research-report/the-veto.php>> accessed 23 August 2017.

<sup>54</sup> Strengthening the United Nations (Statement by the Elders, 7 February 2015) <[http://theelders.org/sites/default/files/2015-04-22\\_elders-statement-strengthening-the-un.pdf](http://theelders.org/sites/default/files/2015-04-22_elders-statement-strengthening-the-un.pdf)> accessed 12 July 2017.

<sup>55</sup> Ibid, 54.

the case currently, these sensible, reasonable proposals fall upon deaf ears among some permanent members? As we noted at the outset of this article, these and other attempts either to engage in structural reform of the Security Council or to influence the permanent members' use of the veto power have come to naught, as exemplified by the Security Council's ineffectiveness in dealing with the catastrophe that is Syria. Moreover, some permanent members have made clear their opposition to reform of their veto power. Notably, in November 2016 in the General Assembly debate on Security Council reform, the then US Ambassador to the UN stated that the United States opposed 'an expansion or alteration of the veto'; similarly the Russian Ambassador asserted that any reform proposals 'infringing on the rights of the current five permanent members — including their historic right to the veto — were unacceptable.'<sup>56</sup>

The Security Council needs to address the ineffectiveness and deadlock caused by permanent member use or "abuse" of the veto. As Samantha Power, the US Permanent Representative to the UN, stated in 2015 in relation to Russia's use of its veto against Security Council resolutions on Syria: 'It's a Darwinian universe here. If a particular body reveals itself to be dysfunctional, then people are going to go elsewhere'<sup>57</sup> and there is recent evidence of an impetus towards more robust General Assembly involvement. In 2016, Canada, on behalf of sixty-nine member states, wrote to the President of the General Assembly referring to the Security Council's "troubling" failure to implement its responsibilities and requesting a plenary session on the situation in Syria.<sup>58</sup> In December 2016, the General Assembly adopted a resolution demanding an immediate end to all attacks on civilians and to all sieges in Syria, the immediate cessation of hostilities and unconditional humanitarian access, and 'expressing alarm that the responsibility of the Security Council to ensure prompt and effective action has not been further discharged,' urging the Security Council to further exercise its responsibility by addressing the crisis, and giving the

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<sup>56</sup> General Assembly Seventy-First Session, 42nd & 43rd meetings, UN Doc GA/11854 (7 November 2016) <<https://www.un.org/press/en/2016/ga11854.doc.htm>> accessed 20 April 2017.

<sup>57</sup> Borger and Inzaurre, *supra* note 7.

<sup>58</sup> Letter to the President of the General Assembly (14 October 2016) <<http://www.un.org/pga/71/wp-content/uploads/sites/40/2015/08/Informal-briefing-on-the-situation-of-Syria.pdf>> accessed 15 March 2017; Canada's approach was endorsed by 223 organisations calling on UN member states to request an Emergency Special Session of the General Assembly, Uniting for Peace in Syria: Global Civil Society Appeal to UN Member States (Human Rights Watch, 1 December 2016) <<https://www.hrw.org/news/2016/12/01/uniting-peace-syria-global-civil-society-appeal-un-member-states>> accessed 15 March 2017.

Secretary-General 45 days to report on the implementation of the resolution.<sup>59</sup> In this next section we will turn to consider whether as an augmentation of the initiatives and proposals just discussed, the 1950 “Uniting for Peace” Resolution can provide a viable practical solution to enabling the effectiveness of the Security Council. We argue below that the use of Uniting for Peace could provide a constitutional response to negating the exigencies of the “abuse” of the veto, whilst keeping the Security Council at the centre of the solution, thereby contributing towards repairing its already damaged legitimacy.<sup>60</sup>

## 5 A role for “Uniting for Peace”?

The Uniting for Peace Resolution’s original purpose was to address the failings of the Security Council in meeting its responsibility to maintain international peace and security when faced with a veto by one of its permanent members. More particularly, the resolution provided a means of circumventing Security Council paralysis due to the “use” or, as viewed by the wider international community, the “abuse” of the veto power by the Soviet Union with respect to the conflict in Korea. The General Assembly passed Resolution 377A(V), the Uniting for Peace Resolution on 3 November 1950. 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.*<sup>61</sup>

U4P granted the UN General Assembly a key subsidiary role for the maintenance of international peace and security when the Security Council failed to exercise its primary responsibility. That the General Assembly has a clearly articulated secondary responsibility upon which U4P can ground its constitutional base is no longer controversial, as confirmed by the

<sup>59</sup> General Assembly Resolution 71/30, UN Doc A/RES/71/130 (9 December 2016). By a vote of 122 in favour to 13 against with 36 abstentions.

<sup>60</sup> Borger and Inzaurrealde, *supra* note 7.

<sup>61</sup> General Assembly Resolution 377A(V) ‘Uniting for Peace,’ UN Doc 377A(V) (3 November 1950).

International Court of Justice in the *Certain Expenses* case.<sup>62</sup> 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.<sup>63</sup>

Under the Charter, where a matter is referred by the Security Council to the General Assembly, under article 11(2) of the Charter the General Assembly ‘may discuss any questions relating to the maintenance of international peace and security’ brought before it by the Security Council and make recommendations regarding any such questions. Importantly however where “action” is necessary, article 11(2) states that a matter shall be referred to the Security Council. It has been a source of controversy whether this means a resolution of the General Assembly recommending enforcement action falls within the definition of “action,” thereby making such a recommendation from the General Assembly *ultra vires*. Some guidance of what the word “action” means was provided in the *Certain Expenses* case but this did not go as far as addressing whether forceful enforcement action fell within this meaning.<sup>64</sup>

On its face U4P clearly authorises the General Assembly to take action with respect to matters that under the Charter’s constitutional balance are considered to be the preserve of the Security Council.<sup>65</sup> In particular where there has been a breach of the peace or act of aggression, U4P grants to the General Assembly the power to recommend the use of armed force.<sup>66</sup> According to Carswell,

<sup>62</sup> *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)*, Advisory Opinion [1962] ICJ Rep 151.

<sup>63</sup> *Ibid*; 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 John Quigley, UN Security Council: Promethean Protector or Helpless Hostage? 35 *Tex Intl L J* (2000) 129, 165; Frederic L Kirgis Jr, The Security Council’s First Fifty Years, 89(3) *Am J Intl L* (1995) 506, 532; for a more recent examination of the constitutionality of U4P, see the detailed analysis of Carswell in Andrew J Carswell, Unblocking the UN Security Council: The Uniting for Peace Resolution, 18(3) *J Conflict and Security L* (2013) 453.

<sup>64</sup> Carswell, *ibid.*, 477.

<sup>65</sup> The key provisions of the Charter for understanding the constitutional balance between the two bodies are articles 10, 11 and 12 and 24. These provisions set out the functions and powers of both bodies. According to J Quigley, for example, under U4P, ‘The U.N. General Assembly involved itself in dealing with threats to the peace to a much greater extent than was contemplated by the drafters of the Charter.’ Quigley, *supra* note 63, 164.

<sup>66</sup> It is generally understood however that under article 11(2) of the Charter, where enforcement action is deemed necessary in a binding sense, that the General Assembly is required to refer the matter to the Security Council. Otherwise the General Assembly is free to make non-binding recommendations for enforcement action in fulfilment of its secondary responsibility; Carswell, *supra* note 63, 474.

[a]lthough the Charter subjects the Assembly to specific limitations regarding matters that would tend to trespass upon the primary constitutional domain of the Council, it places no arbitrary limits on the Assembly's ability to recommend a full range of measures – including force – in cases where the Council is unable to fulfil its primary responsibility.<sup>67</sup>

Others disagree with this interpretation, however. Johnson argues, for example, that the use of force recommended by the General Assembly against the independence and territorial integrity of another state would breach Article 2(4) of the Charter prohibiting the use of force.<sup>68</sup> According to Johnson, this would be the case even if the purpose of the recommendation was 'to stop a genocidal State from murdering parts of its own population.' He continues, '... outside the self-defense context and absent a Security Council Chapter VII use of force authorisation, it is difficult to see how an Assembly recommendation that states use force squares with the norm reflected in Article 2(4).'<sup>69</sup>

### 5.1 Ensuring the centrality of the Security Council

It's clear that a principal objection to the use of U4P is that it upsets the "delicate balance of powers" between the General Assembly and the Security Council under articles 11(2), 12 and 24 of the Charter whereby the General Assembly becomes involved in a usurpation of Security Council power. A possible answer is to re-envision U4P as a mechanism of the Security Council to enable the realisation of its responsibility, rather than a usurpation of the power of the Security Council by the General Assembly.<sup>70</sup> Through this lens, rather than the General Assembly making recommendations including for the use of force, to member states, General Assembly recommendations would be limited to legitimating the Security Council to take action in spite of the use of a veto by a permanent member. It would be for the member states of the Security Council therefore to determine what action should be taken. Such an approach seeks to respect the Charter's balance of power between

<sup>67</sup> Carswell, *supra* note 63, 477.

<sup>68</sup> Larry D Johnson, *Uniting for Peace: Does It Still Serve Any Useful Purpose?* (American Society of International Law, 15 July 2014) <[https://www.asil.org/blogs/"uniting-peace"-does-it-still-serve-any-useful-purpose](https://www.asil.org/blogs/)> accessed 28 February 2017.

<sup>69</sup> *Ibid.*

<sup>70</sup> The Council of American Ambassadors has suggested revising the Uniting for Peace Resolution to enable the Security Council to invoke Responsibility to Protect by a two-thirds majority procedural vote (with no veto) to 'empower the General Assembly to: (1) establish a team to negotiate a political settlement, and (2) encourage the use of sanctions and collective military force if needed to incentivize a resolution of the conflict.' Donald T Bliss, *Strengthening the United Nations' Peace and Security Mandate* (The Ambassadors Review, 2016) <<http://www.americanambassadors.org/publications/ambassadors-review/fall-2016/strengthening-the-united-nations-peace-and-security-mandate>> accessed 15 March 2017.



the General Assembly and the Security Council and would promote the Security Council as the primary body for the maintenance of international peace and security.

There are a number of ways in which this could be achieved. To begin with, in order to avoid any charge of acting *ultra vires*, it is important that the power of the General Assembly to make recommendations under U4P should be interpreted in line with the clear delineation of powers between the General Assembly and the Security Council in the Charter. This would mean that only when the Security Council has stopped “exercising” its primary responsibility should the General Assembly take on its secondary responsibility.<sup>71</sup> This clearly begs the question: When has the Security Council stopped “exercising” its primary responsibility and more particularly, whether the use of the veto means the Security Council is no longer exercising its primary responsibility? To this question, Carswell argues that despite the claim that once the veto is cast the Security Council automatically stops exercising its primary responsibility, it is not possible to discount that the veto is a valid and legitimate procedure of the Security Council under article 27(3) of the Charter. Moreover, the veto is ‘contemplated as an essential mechanism for the fulfilment of the Security Council’s Chapter VII mandate,’<sup>72</sup> therefore in itself the casting of the veto does not equate to the Security Council no longer “exercising” its responsibility. Rather, Carswell argues, the casting of the veto alone is a ‘necessary but not sufficient prerequisite’ for the exercise of the General Assembly’s secondary responsibility under Uniting for Peace.<sup>73</sup> In addition, he suggests, it is necessary to determine that a permanent member’s use of the veto was a failure to exercise its responsibility.<sup>74</sup> Therefore, it is the casting of the veto *and* the determination that the veto constitutes the Security Council failing to exercise its primary responsibility that provides the constitutional basis for the General Assembly asserting its secondary responsibility under Uniting for Peace. If this is correct, then a key question

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<sup>71</sup> This is not to ignore the 2004 Wall Advisory Opinion (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136) in which the ICJ confirmed that the practice of the United Nations had led to a modification of Article 12(1) permitting the General Assembly to deal with a situation at the same time as the Security Council; see Carswell, *supra* note 63 [469]. Noteworthy is that in the debate on General Assembly resolution 71/130 of 9 December 2016, the Syrian representative argued that article 12 of the Charter precluded the Assembly from making recommendations on a matter still being considered by the Security Council unless the Security Council makes an explicit request. See General Assembly Seventy First Session, UN Doc A/71/PV.58, 3 (9 December 2016).

<sup>72</sup> Carswell, *supra* note 63, 469.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*; Michael Ramsden, “Uniting for Peace” in the Age of International Justice, 42 *Yale J Int L online* (2016) 1.

becomes: Who then decides whether the Security Council has failed to exercise its primary responsibility, due to an “illegitimate” use of the veto that then triggers the resort to U4P?

The use of the veto presents a tension between the ideas of the lawfulness of the use of the veto and its legitimacy.<sup>75</sup> That the veto is constitutional under the terms of the Charter is not questioned. Equally, the view that the veto was intended as an integral part of the functioning of the Security Council and its primacy is not controversial.<sup>76</sup> But a multitude of controversies and criticisms regarding the illegitimacy of the veto’s use by permanent members has been ever present. It is this idea of illegitimacy that is often characterised as veto abuse and the manner in which a permanent member interprets how to exercise veto power gives rise to multiple overlapping ideas of legitimacy: whether the use of the veto is politically legitimate, morally legitimate or strategically legitimate. Often when a use of the veto is damned for being illegitimate, it reflects the view that there is something questionable politically, morally or strategically with the decision taken.

Moreover, the question of legitimacy is a transmutable concept. Our idea of what constitutes a legitimate use of the veto has changed with the changing emphasis of the values of the international system more acutely focussed today upon human rights and humanitarian protection as a priority.<sup>77</sup> For example, within the current socio-cultural context, a use of the veto that hinders the pursuit of humanitarian goals is considered an illegitimate use of the veto.<sup>78</sup> In this regard, the General Assembly has been particularly critical of the Security Council and its inability to respond adequately to the Syrian crisis. While not legally binding, such criticism can have trenchant moral and political force. At the meeting of the 70th UN General Assembly in 2015, a number of States condemned Russia’s use of the veto (including in relation to Syria).<sup>79</sup> The Assembly’s Resolution 71/130 expressed ‘outrage at the

<sup>75</sup> For a scholarly analysis of the relationship between legality and legitimacy, see Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP, Cambridge, 2010).

<sup>76</sup> Carswell, *supra* note 63, 469; Ramsden, *supra* note 74, 5; Philippa Webb, *Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria* 19(3) *J Conflict & Security L.* (2014) 471.

<sup>77</sup> The veto traditionally conceived, however, prioritises the pragmatics of power relationships within the international system. *Ibid.*, 76?

<sup>78</sup> Ramsden, *supra* note 74, 6; see also, for example, <https://www.un.org/press/en/2016/sc12545.doc.htm>.

<sup>79</sup> Meeting of the 70th UN General Assembly in September 2015, General Debate of the 70th Session (United Nations, 2015) <<https://gadebate.un.org/en/sessions-archive>> accessed 20 August 2017; Jessica Kroenert, *UN Reform at the 70th Session of the UN General Assembly* (Center for UN Reform Education, 29 October 2015) <<http://www.centerforunreform.org/?q=node/680>> accessed 20 August 2017.

escalation of violence' in Syria, urging the Security Council to take additional measures to address the "devastating humanitarian crisis" and expressly stressing article 11 of the Charter.<sup>80</sup>

What constitutes a legitimate use of the veto by a permanent member should, appropriately, be made by the Security Council. As Carswell notes, for example: '[B]y virtue of the primacy bestowed by articles 12 and 24, and the very construction of the Charter around the nucleus of the Security Council... the appropriate forum to determine that question [of legitimacy] must be the Council itself.'<sup>81</sup> Moreover the view of the legitimacy of the use of the veto can be expressed through the Security Council's use of U4P. It has long been decided that under the Charter the 'submission to the General Assembly of any question relating to the maintenance of international peace and security'<sup>82</sup> and a 'request that the General Assembly make a recommendation on a dispute or situation in respect of which the Security Council is exercising the functions assigned to it in the Charter'<sup>83</sup> are procedural decisions, which can be made on the basis of a two-thirds majority vote (9 out of 15 members); and importantly, they are not subject to the veto under Article 27(2). Moreover, U4P makes explicit the obligation of a two-thirds majority for any referral of a matter to the General Assembly.<sup>84</sup> It can be argued therefore that in deciding to trigger U4P and refer the matter to the General Assembly and in achieving a two-thirds majority to do so, the Security Council is implicitly expressing its view on the legitimacy of the use of the veto by a permanent member.<sup>85</sup>

## 6 Fear of abuse

A legitimate concern about the Security Council's resort to the Uniting for Peace resolution is that it could lead to abuse by powerful states. U4P could be a vehicle for increased military adventurism associated with the 2003 US-led invasion of Iraq. Already there exists concern and some evidence that Security Council-authorized enforcement actions for humanitarian purposes have been used as a pretext for wider political

<sup>80</sup> General Assembly Resolution 71/130, UN Doc A/71/L.39 (7 December 2016).

<sup>81</sup> Carswell, *supra* note 63, 472.

<sup>82</sup> General Assembly Resolution 267(III), UN Doc A/Res/267(III) ANNEX Decisions deemed procedural (14 April 1949).

<sup>83</sup> *Ibid.*

<sup>84</sup> Uniting for Peace Resolution, *supra* note 61, part A.

<sup>85</sup> Carswell, *supra* note 63, 472.

and strategic goals by the intervening states. A recent example of this was the Security Council resolution authorising intervention in Libya in 2011 for humanitarian purposes;<sup>86</sup> its use of the phrase 'to take all necessary measures' was interpreted by the intervening states not only as giving power to alleviate humanitarian suffering but also more extensively to include the ultimate outcome of regime change within Libya. The fall-out from this has been considerable. Russia and China, who at the passing of Security Council resolution 1973 abstained, have subsequently cited the potential for abuse of any resolution by intervening states along the lines of the Libyan intervention when vetoing or threatening to veto resolutions calling for Security Council enforcement actions or any other meaningful response to the humanitarian crisis in Syria. By negating the effect of the veto, it can be argued that where Uniting for Peace is involved, the likelihood for abuse is greater.

What is more, it could be said that any action taken in opposition to a veto could cause serious political tensions between states and in particular between permanent member states.<sup>87</sup> This is even more the case if military action is deemed necessary. It has been suggested that when action is taken by some permanent members in direct opposition to a veto of fellow permanent members, this weakens authority of the Security Council as the 'sole body capable of authorising use of force.'<sup>88</sup> The unintended consequence of this could be to undermine the pre-eminence of the Security Council as permanent members are 'less likely to view it as the ultimate authority if, upon failing to get its resolution passed, other [permanent member] states will ignore that veto and choose to act anyway.'<sup>89</sup>

Where legitimate fears of abuse of U4P exist, a possible answer to such concerns could lie in the role to be played by an independent monitoring and verification body. It is worth noting that in the original U4P resolution there was a call for the establishment of a Peace Observation Commission (the Commission). In its original guise under U4P, the Commission 'could observe and report on the situation in any area where there exists international tension the continuance of which is likely to endanger the maintenance of international peace and

<sup>86</sup> Security Council Resolution 1973, UN Doc S/Res/1973 (17 March 2011).

<sup>87</sup> Koester, *supra* note 30, 395.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

security.<sup>90</sup> Ultimately the Commission quickly fell away and beyond its initial establishment was not subsequently reconstituted. However, that does not negate the rationale for the role that such a body could have in the scheme of things. The involvement of such an independent body could play an important role in legitimating the resort to U4P by the Security Council because it could militate against the potential abuse of U4P by powerful states. It could be the case that where U4P is resorted to, this decision must be based upon and supported by the evidence provided by the reporting of such an independent body. Such reporting would then feed into the decision to resort to U4P, which would require a two-thirds majority of the Security Council to agree. Clearly, it would be important for the body to be independent, non-political and with the expertise, experienced and competent to make legal analysis.<sup>91</sup>

With respect to Syria, there already exist such bodies that have been incredibly important for the purpose of collecting information and data to document the many violations of international law and to support future accountability efforts. Both the Independent International Commission of Inquiry on the Syrian Arab Republic<sup>92</sup> and the Organisation for the Prohibition of Chemical Weapons (OPCW)-United Nations Joint Investigative Mechanism<sup>93</sup> have been investigating alleged violations of international human rights law and international humanitarian law and to establish the facts and circumstances to such violations and of the crimes perpetrated. However, despite both bodies producing evidence of a large catalogue of violations of international law, including the documented use of chemical weapons by the Syrian government, the Security Council has been unable to take meaningful action due to the use of the veto by Russia.<sup>94</sup> Nevertheless, such independent fact-finding and evaluation is seen as a key feature to safeguarding the use of U4P. The important role of the monitoring body would be to provide objective and neutral analysis of the facts, establishing legal outcomes upon which political decisions could be made, one of which may be the resort of the Security Council to the

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<sup>90</sup> Uniting for Peace Resolution, *supra* note 61, part B.

<sup>91</sup> There have been a number of proposals reflecting similar ideas. As noted by Wouter et al, see, for example, the European Union Parliament Proposal, Resolution on the relations between the European Union and the United Nations, 2003/2049 (INI), 29 January 2004, O.J. (21 April 2004), C-96/79 [20].

<sup>92</sup> Established on 22 August 2011 by OHCHR Res S-17/1, *supra* note 13.

<sup>93</sup> Established by Security Council Resolution 2235, *supra* note 14.

<sup>94</sup> See vetoes relating to chemical weapons in Section 3.

Uniting for Peace resolution. This would confer added legitimacy upon the decision by the Security Council to employ U4P.

## 7 Conclusion

In August 2012, then Secretary-General of the United Nations Ban Ki Moon said of the conflict in Syria that it is ‘a test of everything this Organization stands for, I do not want the United Nations to fail that test.’<sup>95</sup> To date, the record of the United Nations’ Security Council and its response to the ongoing humanitarian conflict in Syria has been lamentable; due in large measure to the use or “abuse” of the veto power by one or more permanent members of the Security Council, namely Russia and China. This has included preventing the Security Council from responding to a range of war crimes and crimes against humanity, including the confirmed use of chemical weapons by the Syrian government against civilian targets.<sup>96</sup>

As a result there has been much hand-wringing about the role of the Security Council and its effectiveness as the primary guardian of international peace and security. The veto carries the lion’s share of the blame for the ineffectiveness of the Security Council, giving rise to understandable frustration. It is too often used, as Cox suggests, for protecting countries with which the permanent members have close political, economic or cultural ties and ‘most notoriously in the situations of mass ... killings.’<sup>97</sup> In spite of this, one must concede though that the veto does have a purpose. As discussed earlier, the veto was always intended as a mechanism to safeguard the vital interests of the permanent members, as the most important states, by guaranteeing peaceful relations between them.<sup>98</sup> Nevertheless, the veto was not intended to be a tool to obstruct and frustrate the functioning of the Security Council in realising its purpose to ‘maintain international peace and security.’<sup>99</sup> This view, according to Cox, is ‘consistent with the intentions of the original drafters that the permanent members keep their power of the veto to protect their

<sup>95</sup> As Syria Fighting Continues, General Assembly Urges Immediate Halt to Violence (UN News Centre, 3 August 2012) <<https://www.un.org/apps/news/story.asp?NewsID=42624&Cr=Syria&Cr1=#.WMkpdfXXJdg>> accessed 18 August 2017.

<sup>96</sup> See examples of vetoes in Section 3.

<sup>97</sup> Brian Cox, *United Nations Security Council Reform: Collected Proposals and Possible Consequences*, 6(1) *South Carolina J Intl Business L* (2009) 89, 119.

<sup>98</sup> *Ibid.*, 120.

<sup>99</sup> UN Charter 1 UNTS XVI (1945), article 1 [1] (Entry into force 24 October 1945).

national interests while adhering to the principles of saving 'succeeding generations from the scourge of war'.<sup>100</sup>

There have been sustained calls for structural reform of the Security Council and more limited plans for reform of the way in which the permanent members should exercise their veto power. To date, no plan for Security Council or veto reform has progressed beyond the discussion stage and in the meantime the Security Council is obstructed from responding effectively to grave humanitarian situations and in particular those involving the perpetration of war crimes and crimes against humanity. Most of the veto reform proposals that have been discussed here call for some form of restraint in the use of the veto.<sup>101</sup> Voluntary restriction of the veto would be welcome. However, where the restraint in the use of the veto does not occur, the purpose of this article has been to examine the possibility of enhancing the effectiveness of the Security Council in responding to grave humanitarian situations, in particular involving the perpetration of war crimes and crimes against humanity, through the use of U4P. Importantly, the approach advocated here places the Security Council, as the body tasked under the UN Charter with primary responsibility for the maintenance of international peace and security, at the centre of its operation. Ensuring Security Council centrality in determining both when it is appropriate for U4P's use and what measures will be adopted as a consequence guarantees proper regard for the constitutional balance of the Charter. The use of U4P is not the complete solution to these calls, and the need, for Security Council reform, but, in the interim, it can be a practical solution to unblocking the Security Council in some limited circumstances.

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<sup>100</sup> Cox, *supra* note 97, 121.

<sup>101</sup> See Section 4.