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CRISIS AND CHANGE AT THE UNITED NATIONS: NON-AMENDMENT REFORM AND INSTITUTIONAL EVOLUTION

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ABSTRACT

The Security Council's inaction in response to the wars in Gaza and Ukraine has once again put a spotlight on structural problems at the United Nations ("U.N."). Security Council paralysis—particularly the (mis)use of the veto power afforded to the permanent five ("P5") members of the Council—has long prompted calls for reform. Yet the same veto power prevents nearly all efforts to reform the organization through the formal amendment process provided in the U.N. Charter.

This article argues that there is an alternative way forward: what we call "non-amendment reform." Rather than seek formal amendments that are unlikely to survive the veto of the P5 members, advocates of change should support change through evolving interpretations of the Charter. Non-amendment reform can provide a way for the United Nations to act in the face of a veto threat. Indeed, thanks to an earlier non-amendment reform, the Uniting for Peace Resolution, paralysis of the Security Council during the wars in Gaza and Ukraine has not prevented the United Nations from acting.

Although non-amendment reform has been overlooked by scholars, it has long been critical to the capacity of the United Nations to respond to crises. This article demonstrates that a four-stage process—trigger, proposal, contestation leading to a new interpretation, and consolidation—has led to non-amendment reform at key moments throughout the United Nations' history. Learning a lesson from the past, today's advocates of change should channel their efforts towards non-amendment reform to enable the United Nations to meet the challenges of the moment. This article outlines four current opportunities to do just that.

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I. Introduction

In February 2022, Russian President Vladimir Putin ordered the invasion of Ukraine, launching the largest ground war in Europe since the end of World War II. At the United Nations ("U.N."), Russia used its permanent seat on the Security Council to veto a proposed Security Council Resolution denouncing its invasion and calling for an end to the illegal war.[1] During the first six months of the war in Gaza that began with the Hamas attacks on Israel on October 7, 2023, another permanent member of the Security Council, the United States, vetoed three ceasefire resolutions.[2]

These wars are only the latest in a long line of crises that have demonstrated that the Security Council, as currently structured, is too often not able to fulfill its mandate under the U.N. Charter to secure international peace and security. Security Council paralysis—usually the result of the (mis)use of the veto power afforded to Russia, the United States, the United Kingdom, France, and China, as the five permanent ("P5") members of the Security Council—has long prompted calls for reform.[3] Indeed, the P5 veto is recognized as one of the "most notorious problems of the U.N. Charter's architecture."[4]

Despite the calls for reform, formal amendment has proven nearly impossible for most of the organization's history. This is by design: the U.N. Charter provides that an amendment requires a favorable vote of two-thirds of the members of the General Assembly and *all* of the P5 members.[5] Reform-by-amendment efforts are thus caught in a vise: the P5 veto of the Security Council paralyzes the organization and necessitates reform, but the same P5 countries can prevent the United Nations from making the changes needed to address that paralysis. Nonetheless, there have been many efforts at such reform, all of which have failed. In 2003, for example, Secretary-General Kofi Annan appointed a High-Level Panel on Threats, Challenges and Change charged with engaging in an in-depth study on "global threats and . . . analysis

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1. Vanessa Romo, *Russia Vetoes UN Security Council Resolution that Denounces its Invasion of Ukraine*, NPR (Feb. 25, 2022), https://www.npr.org/2022/02/25/1083252456/russia-vetoes-un-security-council-resolution-that-denounces-its-invasion-of-ukra.

2. Farnaz Fassihi, Michael Crowley, Mike Ives & Thomas Fuller, *U.N. Passes Gaza Cease-Fire Resolution as Blinken Presses Israel and Hamas*, N.Y. Times (June 10, 2024), https://www.nytimes.com/2024/06/10/world/middleeast/security-council-gaza-ceasefire-blinken.html.

3. *See, e.g.*, *Called to Account? The Permanent Five and the Veto*, Inst. Int'l & Eur. Aff. (May 23, 2022), https://www.iiea.com/blog/called-to-account-the-permanent-five-and-the-veto.

4. Raphael Schäfer, *The Echo of Quiet Voices: Liechtenstein's Veto Initiative and the American Six Principles*, EJIL: Talk! (Oct. 10, 2022), https://www.ejiltalk.org/the-echo-of-quiet-voices-liechtensteins-veto-initiative-and-the-american-six-principles.

5. *See* U.N. Charter art. 108 ¶ 1 ("Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.").

of future challenges to international peace and security."[6] Although the panel made a range of recommendations, little changed. More recently, in November 2022, the President of the General Assembly, Csaba Kőrösi, declared that "interlocking crises" had exposed the Security Council's inability to "fully carry out its mandate."[7] As a result, "[g]rowing numbers are now demanding its reform."[8] At stake, he warned, is the "credibility and relevance of the United Nations."[9] And yet, formal reform to the Security Council remains as challenging as ever.

This article argues that what we call "non-amendment reform" provides a more promising way forward. Rather than seeking formal amendments to the U.N. Charter, advocates of change should support change through evolving interpretations and understandings of the Charter. Although it has been the primary way in which the United Nations has changed and evolved in the face of crises, non-amendment reform at the United Nations has been largely ignored by scholars.[10] This article seeks to correct this omission, bringing new attention to this form of change for scholars and legal advocates seeking change at the United Nations. Shedding light on non-amendment reform is significant because this form of change has the potential to provide a legal basis for collective action to respond to crises even when the Security Council is unable to act.

The United Nations' response to the wars in Ukraine and Gaza demonstrates the power of non-amendment reform. After Russia vetoed the Security Council resolution condemning its assault on Ukraine, States used the Uniting for Peace Resolution to call for an emergency special session of the General Assembly. This resolution is itself a non-amendment reform, adopted in 1950 as a procedural mechanism under which the General Assembly can step in when the Security Council fails to act. Russia's veto of the Security Council Resolution thus created the opportunity for the General Assembly, the United Nations' chief and most representative deliberative organ, to consider the matter. In its first resolution adopted through the emergency session convened in the wake of Russia's veto, the General Assembly decided to

6. U.N. Secretary-General, Follow-up to the outcome of the Millennium Summit, U.N. Doc. A/59/565, at 94 (Dec. 2, 2004), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CPR%20A%2059%20565.pdf.

7. *"Credibility and Relevance" of UN on the Line Over Security Council Reform, Warns Assembly President*, U.N. NEWS (Nov. 17, 2022), https://news.un.org/en/story/2022/11/1130767.

8. *Id.*

9. *Id.*

10. An exception is Maurice Bertrand, who describes three common forms of modest organizational reform that do not rely on Charter amendment. Maurice Bertrand, *The Historical Development of Efforts to Reform the U.N.*, *in* UNITED NATIONS, DIVIDED WORLD 420, 420–21 (Adam Roberts & Benedict Kingsbury eds., 1993).

condemn the war in an overwhelming vote of 141 to 5.[11] The General Assembly has since voted six more times on issues relating to Ukraine, including a resolution determining that Russia must make reparations to Ukraine for its internationally unlawful acts and recommending the establishment of an international registry of damages and claims commission.[12] Together, these resolutions have provided the foundation for a massive program of sanctions against Russia and global support for Ukraine.[13]

A similar process has taken place in response to the war in Gaza. After the United States vetoed a proposed Security Council resolution, the General Assembly resumed an emergency special session under the Uniting for Peace Resolution and adopted Resolution ES-10/21 calling for "an immediate, durable and sustained humanitarian truce leading to a cessation of hostilities."[14] When this had little effect, U.N. Secretary-General Antonio Guterres increased the pressure on the Security Council by invoking his authority to place the matter on the Security Council's agenda.[15] Nonetheless, the Security Council again failed to pass a resolution calling for a humanitarian ceasefire due to a U.S. veto.[16] The General Assembly then adopted a second resolution, again acting under the Uniting for Peace Resolution, "demanding an 'immediate humanitarian ceasefire.'"[17] Ten days later, the Security Council finally adopted a resolution demanding that the parties to the conflict allow, facilitate, and enable the

11. *See* Press Release, General Assembly, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, U.N. Press Release GA/12407 (Mar. 2, 2022).

12. G.A. Res., 11/1 (Mar. 2, 2022); G.A. Res., 11/2 (Mar. 24, 2022); G.A. Res., 11/4 (Oct. 13, 2022); G.A. Res., 11/L.6 (Nov. 7, 2022); G.A. Res., 11/L.7 (Feb. 16, 2023); G.A. Res., 11/6 (Mar. 2, 2023).

13. *See* Chad P. Bown, *Russia's War on Ukraine: A Sanctions Timeline*, PIERSON INST. FOR INT'L ECON. (Nov. 6, 2023), https://www.piie.com/blogs/realtime-economics/russias-war-ukraine-sanctions-timeline (providing a timeline of the events in Russia and Ukraine and detailing the subsequent sanctions against Russia).

14. G.A. Res. 10/21 (Oct. 27, 2023); *see Gaza Crisis: General Assembly Adopts Resolution Calling for 'Humanitarian Truce', Civilian Protections*, U.N. NEWS (Oct. 27, 2023), https://news.un.org/en/story/2023/10/1142932.

15. U.N. Charter art. 99 ¶ 1 (authorizing the Secretary-General to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security"); U.N. Secretary-General, Letter Dated 6 December 2023 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2023/962 (Dec. 6, 2023).

16. Letter Dated 6 December 2023, *supra* note 15; Meetings Coverage, Security Council, Security Council Fails to Adopt Resolution Demanding Immediate Humanitarian Ceasefire in Gaza on Account of Veto by United States, SC/15519 (Dec. 8, 2023).

17. G.A. Res. ES-10/22, U.N. Doc. A/RES/ES-10/22 (Dec. 12, 2023); *UN General Assembly Votes by Large Majority for Immediate Humanitarian Ceasefire During Emergency Session*, UN NEWS (Dec. 12, 2023), https://news.un.org/en/story/2023/12/1144717?_gl=1*5ldj6v*_ga*MTUxODE0ODc4Ni4xNjk2NzY3OTAz*_ga_TK9BQL5X7Z*MTcwNDcwMDc0My4yOS4xLjE3MDQ3.MDMzNzUuMC4wLjA; *see generally* General Assembly of the United Nations, Tenth Emergency Special Session, https://www.un.org/en/ga/sessions/emergency10th.shtml.

immediate, safe, and unhindered delivery of humanitarian assistance to the civilian populations in need throughout the Gaza Strip.[18] Because the United States had vetoed an amendment to the resolution that would have called for a ceasefire, it triggered a new procedure, also established by non-amendment reform, known as the "Veto Initiative."[19] Under that initiative, the General Assembly automatically convened a plenary meeting at which the United States was forced to explain its veto to the world.[20] That procedure meant that the veto did not end discussion of the matter. Indeed, thanks to continued pressure, the Security Council eventually approved two separate ceasefire resolutions.[21]

The United Nations' responses to these wars are the latest examples of how non-amendment reform has enabled the United Nations to escape total paralysis and utter irrelevance. Unlike their formal counterparts, non-amendment reforms are not hostage to the P5 veto, and thus can be used to respond to global crises when the Security Council fails to act.

This article proceeds in Part II by outlining the formal reform process for the U.N. Charter and its history, demonstrating that formal reform has been rarely used and is unlikely to be an effective tool for significant reform because of the P5 veto. Part III then shows that non-amendment reform is not only a more promising route to reform, it is grounded in the history of the United Nations. This Part outlines a four-stage process—trigger, proposal, contestation leading to a new interpretation, and consolidation—that has led to non-amendment reform at the United Nations throughout its history.

Part IV draws together the lessons learned from history and proposes a new approach to Charter reform that focuses on non-amendment reform. While it has largely escaped scholarly notice, non-amendment reform has not been the exception at the United Nations, it has been the rule. Most important, non-amendment reform has expanded the authority of the General Assembly, the body at the United Nations in which every nation in the world has one vote. This is an essential development for the organization, allowing more States to have a say, and their actions to have greater consequence. Building on this past success, this Part outlines four current opportunities for non-amendment reform: passing a framework resolution for automatic consequences for grave Charter violations; strengthening Chapter VI; creating a Special Tribunal to try the Crime of Aggression; and supporting a new system of war reparations. These reforms, if adopted, would offer an important response to conflicts in Ukraine and Gaza and continue to build the capacity of the General Assembly to act in the face of Security Council paralysis.

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18. *Security Council Adopts Key Resolution on Gaza Crisis; Russia, US Abstain*, UN NEWS (Dec. 22, 2023), https://news.un.org/en/story/2023/12/1145022.

19. *See infra* Subsection III.B.8.

20. *General Assembly meets over Gaza veto by US in Security Council*, UN NEWS (Jan. 9, 2024), https://news.un.org/en/story/2024/01/1145352.

21. In March 2024, the U.S. allowed a resolution to pass with an abstention, and in June 2024, it sponsored a successful resolution of its own. Fassihi, Crowley, Ives & Fuller, *supra* note 2.

This article concludes by considering the transformative potential of viewing the United Nations through the lens of non-amendment reform. If formal Charter reform were the only path to fundamental change at the United Nations, the organization would remain trapped in amber, unable to respond to new global challenges. Excavating the underappreciated history of non-amendment reform shows that the United Nations has not been static; it has grown and changed throughout its history. Viewed in this light, the United Nations is not a prisoner of the past. It has the capacity to evolve to meet the challenges of the future.

II. Formal Reform

There have been calls for reform to the United Nations as long as there has been a United Nations. The U. N. Charter includes a formal process for amendment, but, as this Part will show, the hurdles to formal reform are significant. As a result, the Charter has only been amended three times, and never in a way that addresses the fundamental flaw of the organization's architecture. This Part begins by explaining the formal rules for amendment reform to the Charter. It then reviews the few formal reforms that have succeeded—and the far more numerous calls for formal reform that have failed. It ends by concluding that formal reform is unlikely to solve to the problems that currently face the organization.

A. *U.N. Charter Rules Regarding Reform to the Charter*

The decision to allow each of the P5 members of the U.N. Security Council to veto enforcement decisions was fiercely contested throughout the process of negotiating the U.N. Charter. At their final conference at Yalta, U.K. Prime Minister Winston Churchill and U.S. President Franklin Delano Roosevelt acceded to Soviet Union leader Joseph Stalin's insistence on the veto as the price of Soviet participation in the new United Nations.[22] At the 1945 San Francisco Conference, delegates criticized the veto power in the draft Charter and expressed hope that the Charter might later be modified to remove it.[23] The New Zealand delegate warned: "The veto which can be

22. *See* Oona A. Hathaway & Scott J. Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World 199–214 (2017).

23. *See, e.g.*, U.N. Conference on International Organization ("U.N.I.O"), San Francisco, 1945, Vol. 1, 2d Plenary Session, at 182 (recording the statement of the Delegate from France: "It would be a mistake to pretend that the Dumbarton Oaks and Yalta proposals have brought us all that we wished . . . . But my compatriots and myself are not of the kind that can be discouraged if the goal is not reached at the first try . . . . [P]rogress is made in successive stages and of repeated efforts."); Comments of the Delegate from Australia, U.N.I.O., Vol. 1, 2d Plenary Session, at 189–90 (Apr. 27, 1945) (critiquing the veto); Comments of the Delegate from France, *id.* at 182 (same); Comments of the Delegate from Egypt, U.N.I.O., Vol. 1, 3d Plenary Session, at 250 (Apr. 28, 1945) (same); Comments of the Delegate from Uruguay, U.N.I.O., Vol. 1, 4th Plenary Session, at 312 (Apr. 28, 1945) (same); Comments of the Delegate from New Zealand, U.N.I.O., Vol. 1, 7th Plenary Session, at 510–11 (May 1, 1945) (same).

exercised by one of the great powers, both in regard to itself and other nations, is unfair and indefensible and may, if retained and exercised, be destructive not only to the main purposes of the International Organization but to the Organization itself." He prophesied: "Under the existing provisions one of the five permanent members, which may clearly be an aggressor, can use its power of veto to prevent its own condemnation, or even its designation as an aggressor."[24] His warnings went unheeded and the veto remained.

The Charter includes two mechanisms for amendment: Article 108 provides for individual amendments, whereas Article 109 contemplates a "General Conference" to comprehensively review the Charter. Though the two methods differ procedurally, both raise similar, often insurmountable, barriers due to the level of consent required.

In the individual amendment process under Article 108, the adoption of proposed amendments must be approved by "a vote of two thirds of the members of the General Assembly."[25] It then must be "ratified" by two thirds of the members of the United Nations, "including all of the permanent members of the Security Council."[26] Hence any permanent member of the Security Council may single-handedly defeat a formal amendment. Article 109 lays out a procedure to initiate a General Conference to review the Charter.[27] The Conference may be initiated by a two-thirds vote of the members of the United Nations and any nine members of the Security Council.[28] An amendment must be recommended by two-thirds of the members of the United Nations, and it must be ratified by two thirds "including all the permanent members of the Security Council."[29] Under both procedures, then, amendment is impossible without unanimous consent of the P5.

The Charter includes a provision that required a conference be held if one had not yet been called before the tenth annual session of the General Assembly.[30] The founding parties thought that an interim period of ten years would allow the instability of the post-war period to pass and the organization to "progressively [modify the Charter] to fit the normal conditions of international relations after the period of post-war rehabilitation."[31] As the ten-year mark approached, however, international conditions had not improved, but had instead deteriorated further. Despite support for comprehensive Charter

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24. U.N. Conference on International Organization, San Francisco, 1945, Vol. 1, 7th Plenary Session, 510–11 (May 1, 1945).

25. U.N. Charter art. 108.

26. *Id.*

27. *Id.* at art. 109(1).

28. *Id.*

29. *Id.* at art. 109(2); *see* LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 295 (1969).

30. U.N. Charter art. 109(3).

31. U.N. Conference on International Organization, San Francisco, 1945, Vol. 1, 2d Plenary Sess., at 179 (Apr. 27, 1945) (remark by the delegate from Australia).

review from the United States,[32] the General Assembly decided to postpone the conference until "an appropriate time," recognizing that "such a review should [only] be conducted under auspicious international circumstances."[33]

In 1974, the General Assembly established an ad hoc committee to review the Charter.[34] However, as described in more detail in the next Section, amendment reforms did not result from that Conference, nor have any reform efforts effectively addressed the P5 veto.

B. *Past Formal Reform*

There have been enormous changes in the international community since the Charter was adopted, not the least of which is the tripling of U.N. membership due in large part to the global decolonization movement. Yet, the Charter remains largely unchanged. This dissonance has prompted regular calls for reform.

Despite early recognition of the need for changes in the Charter, the Charter's amendment procedures created a formula that locked-in P5 control.[35] The permanent members' commitment to maintaining their power produced deadlock on U.N. reform: P5 members, unwilling to limit or concede power, have prevented formal reform efforts that might challenge the veto. As a result, the Charter has been amended just three times.[36] The first reform, adopted in 1963, instituted important changes in the Security Council, but it did not challenge the P5's veto power. General Assembly Resolution 1991 expanded the Security Council to fifteen members, increasing the number of non-permanent members from six to ten, and increasing the required number of votes for Security Council decisions from seven to nine.[37] The 1963 amendment also enlarged the membership of the Economic and Social Council from eighteen to twenty-seven.[38] Then, in 1965, the General Assembly made modest changes to Article 109 to provide that convening a General Conference for Charter amendment required the vote of any nine members (formerly seven) of the Security Council.[39] The third and last

32. Statement by Secretary of State John Foster Dulles Before the Charter Review Subcommittee of the Senate Foreign Relations Committee 189 (Jan. 18, 1954) ("The United States has already indicated that it expects to favor the holding of a review conference.").

33. G.A. Res. 992 (Nov. 21, 1955).

34. G.A. Res. 3349, ¶ 1 (Dec. 17, 1974).

35. Mariana Pimenta Oliveira Baccarini, *Informal Reform of the United Nations Security Council*, 40 Contexto Internacional, 103–04 (2018).

36. *See* United Nations Charter, *United Nations: About Us*, https://www.un.org/en/about-us/un-charter.

37. G.A. Res. 1991 (XVIII), Question of Equitable Representation on the Security Council and the Economic and Social Council, ¶ 1 (Dec. 17, 1963) (amending arts. 23, 27, and 61).

38. *Id.*

39. G.A. Res. 2101 (XX), Amendment to Article 109 of the Charter of the United Nations (Dec. 20, 1965) (The General Assembly adopted the amendment to Article 109 on December 20, 1965, and it came into force on June 12, 1968).

amendment adopted in 1971 further expanded membership in the Economic and Social Council from twenty-seven to fifty-four.[40]

These amendments were the result of pressure for broader representation in the principle U.N. organs, fueled by the rapid increase in the number of U.N. member States between 1945 and 1970, largely as a result of decolonization.[41] The changes did not shift the balance of power between permanent and elected members of the Security Council and thus did not threaten the P5 members' power. In fact, the addition of non-permanent members to the Security Council actually *reduced* the relative power of elected members' individual votes—a larger pool of voting members made the permanent members less reliant on any single non-permanent member's vote.[42]

What is perhaps most notable about this history of formal reform is how few formal reforms there have been. The few that have succeeded have been modest, and none have challenged the control of the P5 members.

C. *The Limits of Formal Reform*

The small number of formal reforms is not for lack of trying. After the Cold War, the pressures for expanded representation and participation in the Security Council continued to mount. In 1993, in response to continued pressure from post-colonial countries, as well as Japan and Germany, for greater participation in Security Council decision-making, the General Assembly established the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council.[43] In addition, there were efforts to advance the debate about enlarging the Security Council, including by the President of the General Assembly Razali Ismail, Secretary-General Kofi Annan, and a variety of country groupings that formed during this period. In 2003, the Iraq war prompted serious questions about the United Nations and renewed demands for reform of the Security Council, yet opposition from the United States, China, and Russia prevented any progress.[44] In 2005, Kofi Annan called on the United Nations to reach a consensus on Council reform.[45]

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40. G.A. Res. 2847 (XXVI), Enlargement of the Economic and Social Council at ¶ 1, 3 (Dec. 20, 1971) (The General Assembly amended Article 61 on December 20, 1971, and it came into force on September 24, 1973).

41. Baccarini, *supra* note 35, at 98.

42. *Id.*

43. G.A. Res. 48/26 (Dec. 3, 1993); *see also* Baccarini, *supra* note 35, at 98.

44. *Id.* at 98–101; Richard Gowan, *The Ukraine War and UN Reform, International Crisis Group* (May 6, 2022), https://www.crisisgroup.org/global/ukraine-war-and-un-reform.

45. Kofi Annan, *The Secretary-General Statement to the General Assembly on his Report "In Larger Freedom"* (Mar. 21, 2005), https://www.un.org/sg/en/content/sg/statement/2005-03-21/secretary-generals-statement-the-general-assembly-his-report-larger-freedom. In this period, David Scheffer proposed activating Article 43, among other reforms to the Security

What ensued was the most promising, and thus the most disappointing, reform attempt to date. Two reform camps formed—the "G-4" (referring to aspiring permanent Council members Japan, Brazil, Germany, and India) and the "Uniting for Consensus" group (representing countries of various regions, sometimes termed the "Coffee Club"). Both groups proposed resolutions to expand the Security Council from 15 to 25 members—the G-4 supported adding six permanent seats to the Council, while the Uniting for Consensus group proposed adding ten non-permanent elected members.[46] But momentum for reform crumbled under pressure from the P5. The United States opposed both proposals, ostensibly out of concern for the Security Council's continued effectiveness, explaining that "an intake of nine or ten countries [was] not easily digestible by the United Nations Security Council."[47] The summit ended with a toothless pledge by the Assembly to continue efforts to achieve a collective decision on reform.[48] A 2009 General Assembly report detailed no progress toward a specific proposal, and it, too, simply recommended further intergovernmental negotiations.[49] In short, nothing came of four years of concerted efforts at reform.

Deadlock in the Security Council over the Syrian war led to renewed proposals to challenge and limit the veto power of the P5.[50] In 2015, France and Mexico collaborated to launch the "Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocity," which recognized that the veto was a responsibility, not a privilege, and aimed to induce the P5 to voluntarily agree to not use the veto in cases of genocide, crimes against humanity, or

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Council. *See* David Scheffer, *Blueprint for Legal Reforms at the United Nations and the International Criminal Court*, 36 GEO. J. INT'L L. 683 (2005).

46. *See* U.N. Gen. Assembly Draft Resolution, Security Council Reform, U.N. Doc. A/59/L.64 (July 6, 2005) (G-4 proposal); Press Release, General Assembly, General Assembly opens debate on 'group of four'-sponsored draft resolution, U.N. Press Release GA/10367 (July 11, 2005), https://press.un.org/en/2005/ga10367.doc.htm (announcing G-4 proposal); Draft Resolution, Reform of the Security Council, U.N. Doc. A/59/L.68 (July 21, 2005) (Uniting for Consensus Proposal); Press Release, General Assembly, 'Uniting for Consensus' Group of States Introduces Text on Security Council Reform to General Assembly, U.N. Press Release GA/10371 (July 26, 2005), https://press.un.org/en/2005/ga10371.doc.htm (announcing Uniting for Consensus Proposal).

47. R. Nicholas Burns, Under Secretary for Political Affairs, *On the-T-Record Briefing on UN Reform* (June 16, 2005, 10:10 AM), https://2001-2009.state.gov/p/us/rm/2005/48186.htm.

48. Press Release, General Assembly, World Leaders Pledge Wide-Ranging Steps on Poverty, Terrorism, Human Rights, UN Reform, as 2005 Summit Concludes in New York, U.N. Press Release GA/10385 (Sept. 16, 2005), https://press.un.org/en/2005/ga10385.doc.htm.

49. U.N. Gen. Assembly Rep., Report of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council, General Assembly, U.N. Doc. A/63/47 (2009), https://digitallibrary.un.org/record/664570?ln=en.

50. In Hindsight: Challenging the Power of the Veto, SEC. COUNCIL REP. (Apr. 29, 2022), https://www.securitycouncilreport.org/monthly-forecast/2022-05/in-hindsight-challenging-the-power-of-the-veto.php [hereinafter In Hindsight].

other mass atrocities.[51] One hundred and four member States and two U.N. observers signed the declaration, but only two were veto-wielding P5 members, France and the United Kingdom. [52] In a similar effort the same year, the Accountability, Coherence, and Transparency ("ACT") group, comprised of 27 small- and medium-sized States, developed a code of conduct for member States meant to encourage "timely and decisive action" by the Security Council in response to serious atrocities.[53] The ACT code of conduct was signed by 123 U.N. member States, but only two of the P5.[54]

The war in Ukraine put reform debates squarely back on the agenda yet again.[55] In 2021, Secretary-General António Guterres produced a report, "Our Common Agenda," that called for improving international cooperation. It resulted in the appointment of a High-Level Advisory Board on Effective Multilateralism tasked with developing a proposal to strengthen global governance.[56] During the General Assembly's Eleventh Emergency Special Session, called in response to Russia's full-scale invasion of Ukraine in February 2022, member States once again began calling for Security Council reform.[57] As the conflict progressed, some diplomats, U.N. officials, and other international law experts began to question whether the international

51. *Id.*; Jessica Kroenert, *France and Mexico Co-Host High-Level Meeting on "Framing the Veto in the Event of Mass Atrocities," Center for UN Reform Education* (Oct. 5, 2015), https://centerforunreform.org/2015/10/01/france-and-mexico-co-host-high-level-meeting-on-framing-the-veto-in-the-event-of-mass-atrocities.

52. Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, https://www.globalr2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities.

53. In Hindsight, *supra* note 50.

54. *Id.*; Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, U.N. Doc. A/70/621-S/2015/978, (Dec. 14, 2015), https://www.globalr2p.org/wp-content/uploads/2019/06/2015-December-Code-of-Conduct.pdf; List of Signatories to the ACT Code of Conduct, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (June 8, 2022), https://www.globalr2p.org/resources/list-of-signatories-to-the-act-code-of-conduct.

55. *See* William B. Taylor & James Rupert, *The Ukraine War Escalates Demands to Reform the United Nations, United States Institute of Peace* (Apr. 29, 2022), https://www.usip.org/publications/2022/04/ukraine-war-escalates-demands-reform-united-nations"https://www.usip.org/publications/2022/04/ukraine-war-escalates-demands-reform-united-nations; Gowan, *supra* note 44.

56. Our Common Agenda, UNITED NATIONS, https://www.un.org/en/common-agenda; HLAB Report: A Breakthrough for People and Planet, https://highleveladvisoryboard.org.

57. Press Release, General Assembly, As Russian Federation's Invasion of Ukraine Creates New Global Era, Member States Must Take Sides, Choose between Peace, Aggression, General Assembly Hears, U.N. Press Release GA/12406 (Mar. 1, 2022), https://press.un.org/en/2022/ga12406.doc.htm (During the third and fourth meetings, held on March 1, 2022, the representative from Paraguay "underlined the urgent need for Security Council reform, given the current situation." The Representative from Papua New Guinea stated: "It is times such as this that bring to the fore and underscore long overdue Council reform of the veto power and an archaic body that remains a prisoner of its past to the detriment of collective security, as has been regrettably witnessed in Ukraine.").

community was "approaching a 'new San Francisco moment': a historical juncture like 1945, when it is possible for states to rewrite the rules of global governance from scratch."[58] The 2022 Round-Up Release from the Security Council summed up the sentiments of many member States: Following Russia's use of force in Ukraine, "[t]he constraints placed on the Council's capacity to act prompted ever more vociferous calls for its reform."[59]

Secretary-General Guterres endorsed a "New Agenda for Peace," as part of the preparations for the 2024 "Summit for the Future," at which world leaders discussed a broad range of potential reforms.[60] The title of the initiative harkens back to the "Agenda for Peace" produced by Secretary-General Boutros Boutros-Ghali, that outlined "analysis and recommendations on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and for peace-keeping."[61] The International Crisis Group recommended that drafters of the "New Agenda for Peace" strategically omit recommendations for amendment-based reforms, given that they appear unlikely to win P5 approval.[62] Some commentators pointed out the risks posed by formal reform efforts, given the current international crises straining multilateralism: "Efforts to revise the U.N. Charter are more likely to kill most existing structures of multilateral cooperation than to produce a more just institution."[63] Ultimately, the Pact for the Future—a key outcome document from the Summit of the Future—called for enlarging the Security Council to "increase representation of developing nations and small- and medium-sized States."[64] However, the Pact included no details about how that would be accomplished.

58. Gowan, *supra* note 44.

59. Round-Up Release, Security Council, With Invasion of Ukraine, Security Council's 2022 Efforts to Maintain International Peace, Stability Mired by Widening Rifts between Veto-Wielding Members, U.N. Round-Up Release SC/15172 (Jan. 12, 2023,) https://press.un.org/en/2023/sc15172.doc.htm.

60. United Nations, Our Common Agenda Policy Brief: A New Agenda for Peace (July 2023), https://www.un.org/sites/un2.un.org/files/our-common-agenda-policy-brief-new-agenda-for-peace-en.pdf.

61. U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, ¶ 1, U.N. Doc. A/47/277 (June 17, 1992).

62. Ten Challenges for the UN in 2022-2023, International Crisis Group 24 (Sept. 14, 2022), https://www.crisisgroup.org/b8-united-states/ten-challenges-un-2022-2023.

63. Anjali Dayal & Caroline Dunton, *The U.N. Security Council Was Designed for Deadlock—Can It Change?*, United States Institute of Peace (Mar. 1, 2023), https://www.usip.org/publications/2023/03/un-security-council-was-designed-deadlock-can-it-change.

64. United Nations, Pact for the Future 26–27 (Sept. 2024), https://www.un.org/sites/un2.un.org/files/sotf-pact_for_the_future_adopted.pdf.

There is still optimism among many States that reform is possible.[65] Indeed, a leading proposal looks much like the last successful significant formal reform, in that it would expand the non-permanent members of the Council—a move that broadens representation while posing little threat to the P5's power. President Joe Biden made clear the United States favored the reforms.[66] Indeed, a week before the Summit of the Future, the Biden Administration announced its support for two new permanent U.N. Security Council seats for Africa and one to be rotated among small island developing States, though it would not grant them the veto power held by the P5.[67] And yet, given the formal hurdles, and the diversity of views among States,[68] the challenges remain daunting. Even if this reform succeeds, it will do so only because it poses little threat to the P5's grip on power.

* * *

The failure of formal reform has created pessimism about the potential for reform at the United Nations. But focusing on the difficulty of formal reform blinds us to the ways that the United Nations has been evolving. Expanding our vision to encompass non-amendment reform allows us to see that the United Nations has been open to change all along.

III. NON-AMENDMENT REFORM

Efforts to reform the United Nations through Charter amendment have repeatedly met with failure. But that does not mean that change is impossible—it instead means that, if change is to happen, it must take place outside a formal amendment process. This Part begins by outlining a theory of non-amendment reform. It then shows that not only is such reform possible, but it has repeatedly taken place over the course of the United Nations' history. This article for the first time examines the history of the United Nations through the lens of non-amendment reform. In the process, it demonstrates that, while these reforms often escape notice, they have nonetheless been transformative.

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65. *See* Letter of the Co-Chairs of the Intergovernmental Negotiations on the Question of Equitable Representation on and Increase in the Membership of the Security Council to President of the UN General Assembly (Apr. 5, 2023).

66. Missy Ryan, *U.S. Seeks to Expand Developing World's Influence at United Nations*, WASH. POST (June 12, 2023). The U.S. State Department has continued to signal U.S. support for reform. *See* Vedant Patel, Principal Deputy Spokesperson, Department of State, Department Press Briefing (Apr. 17, 2024), https://www.state.gov/briefings/department-press-briefing-april-17-2024 ("We certainly support reforms to the UN institution, including the Security Council, to make it reflective of the 21st century world that we live in.").

67. Michelle Nichols, US Supports Two Permanent UN Security Council Seats for Africa, Reuters (Sept. 12, 2024), https://www.reuters.com/world/us-supports-two-permanent-un-security-council-seats-africa-2024-09-12. As of this writing, the incoming Trump administration has not yet made clear whether it will maintain that position.

68. ADEKEYE ADEBAJO ET AL., UN SECURITY COUNCIL REFORM: WHAT THE WORLD THINKS (Stewart Patrick ed., 2023).

A. *A Theory of Non-Amendment Reform*

The formal amendment process is one mechanism of change, but it is not the only one. The U.N. system can change over time in multiple ways—through amendments, yes, but also through what we refer to as "non-amendment reform."

Non-amendment reform bears a resemblance to the process of international customary law formation and transformation, but it is distinct. Non-amendment reform operates through the formation of a shared understanding of the authority and capacity of various U.N. entities, and of the United Nations as a whole. The Charter defines that understanding, but like any written document, it is necessarily incomplete. Non-amendment reform is part of a critical gap-filling function that takes place through the interpretation (and reinterpretation) of the Charter's text.

The idea of non-amendment reform is familiar in constitutional law. Most constitutional scholars recognize that constitutional change can and does occur outside a formal amendment process. Indeed, some argue that nearly all the key changes in U.S. constitutional law have occurred outside the amendment process. David Strauss, for example, wrote in 2001 of "the irrelevance of constitutional amendments."[69] He noted that the existence of a formal amendment process in the U.S. Constitution creates the natural assumption that Article V sets out the principal way of changing the Constitution. "But, in fact," he explains, "through most of our history, the amendment process has not been an important means of constitutional change."[70] Bruce Ackerman, too, offers a theory of constitutional change that relies on non-amendment reform.[71] He argues that there are periods in history when "normal lawmaking" gives way to "higher lawmaking."[72] During these periods, matters fundamental to U.S. governance become the subject of public debate, opening up the possibility of constitutional transformation through public affirmation of a revised understanding of the constitutional order, rather than through formal constitutional amendment.

The relationship between the U.S. Constitution and the U.N. Charter is closer than it may initially seem. The idea of a modern written constitution was a U.S. innovation,[73] and the U.S. Constitution predated the very first treaty to

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69. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

70. *Id.* at 1458.

71. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995); *see also* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997).

72. *See* ACKERMAN, WE THE PEOPLE: FOUNDATIONS, *supra* note 71, at 6.

73. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 259–68 (1998).

create an international organization that is still in operation—the Central Commission for Navigation on the Rhine, initially established in 1815.[74]

Like the U.S. Constitution and the constitutions of many other States,[75] the amendment process for the U.N. Charter is extremely difficult, requiring consensus of the P5 members.[76] This process was intended to carve in stone (or at least into the Charter) a snapshot of the political and military power that had recently won World War II. In a departure from the practice of the past, the victorious States seized little new territory (the key exception being the Soviet Union, which insisted on annexing portions of Poland as well as the Baltic States). Instead, they seared their power into the global order by making themselves essential players in all key decisions of the new United Nations that would provide the political and legal framework of the post-war era. The rigidity of the system they created quickly proved untenable. In response to the changing realities of shifting economic, political, and military power, non-amendment reform has emerged as an important pressure valve.

To be sure, the U.N. Charter is not a domestic constitutional system; it is, rather, an international treaty.[77] But it is similar to a constitution in one key respect: Formal amendment of the written text is one form of transformation, but it is not the only one.[78]

We identify a four-step process by which non-amendment reform takes place at the United Nations: (1) trigger, (2) proposal for reform, (3) contestation leading to a new shared interpretation, and (4) consolidation. First, there

74. CENTRAL COMMISSION FOR THE NAVIGATION OF THE RHINE, *Legal Basis/Texts*, https://www.ccr-zkr.org/11020000-en.html (the initial agreements were superseded by the 1831 Mainz Convention).

75. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355 (1994) (ranking the U.S. constitution the hardest to amend, and Constitution of New Zealand, which can be amended by simple legislative majority in the country's unicameral legislature, the easiest); Dieter Grimm, *Types of Constitutions*, *in* OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 111 (Michel Rosenfeld & Andras Sajo eds., 2012).

76. At San Francisco in 1945, the Delegate from Australia compared and contrasted the two instruments' amendment process: "[We have been reminded] that ten vital amendments in the United States Constitution were made within four years of its adoption. . . . No amendment of the Charter as it now stands will be possible without the unanimous consent of the five permanent members . . . [and] [a]ny one of the five will therefore be able to make the present constitution immutable. If the United States Constitution had given to the five major original states a similar entrenched position, I do not think that many constitutional amendments would have been carried." 1 U.N.I.O. 178 (Apr. 27, 1945).

77. *Cf.* Michael W. Doyle, *Dialectics of a Global Constitution: The Struggle Over the UN Charter*, 18 EUR. J. INT'L REL. 601 (2012) (exploring how constitutional the Charter is in theory and practice).

78. Arguably, the case for non-amendment reform for international treaties is even stronger than it might be for constitutions, as Article 31(3) of the Vienna Convention on the Law of Treaties specifically directs that interpretation shall take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties art. 31(3), May 23, 1969, 1155 U.N.T.S. 331.

is a *trigger*. A trigger can be changing facts on the ground or a particular crisis that the organization faces, for example. That trigger makes clear that the organization as currently operating is not fit for purpose and thus unable to respond adequately to the problem faced or the need expressed by its members. The idea of a trigger prompting change in the international system is, of course, not new. Paul Diehl, Charlotte Ku, and Daniel Zamora argued that the international legal system has an inherent inertia, and thus "some significant impetus must be present before the operating system adjusts to the normative change. That impetus must come from a significant political shock."[79] Political shocks can "place issues or policies on the global agenda and thereby prompt the community of states to take action on them."[80]

Second, this leads to a *proposal* for reform. States debate whether the existing structure can be made to address the challenge, generally without formal amendment, though formal amendment has at times been contemplated. At this stage, multiple options are often placed on the table and are the subject of debate. Sometimes this is the end of the process and no reform takes place. The institution proves incapable of response. There are many instances of such failure—for example, the failure of the organization to respond to the horrific violations of international law during the Syrian civil war.[81] Where non-amendment reform succeeds, however, there is a concrete proposal for change.

Third, there is a period of *contestation leading to a new shared interpretation*. The proposal is discussed and debated by the member States. The feasibility, legality, legitimacy, and desirability of the proposal are all likely to be discussed and, sometimes, contested. States seek to persuade one another to move forward with the non-amendment reform or block it. If non-amendment reform is successful, it is because the process of debate leads to a new shared interpretation. That can occur through a consensus or near-consensus of the members involved. It can alternatively occur through referral of the debate to the International Court of Justice ("ICJ" or "the Court"), which may issue an opinion resolving the debate. That interpretation then becomes the new shared understanding of the Charter, even if the language of the Charter is in some tension with that interpretation.

Fourth, that new interpretation goes through a process of *consolidation*. Once the new interpretation is put forward, it then is consolidated—and often

79. Paul F. Diehl, Charlotte Ku, & Daniel Zamora, *The Dynamics of International Law: The Interaction of Normative and Operating Systems*, 57 INT'L ORG. 43, 57 (2003).

80. *Id.* at 58.

81. *See, e.g.*, Press Release, Security Council, Violence Raging 'In All Theatres of Syria', UN Special Envoy Tells Security Council, Urging Return to Political Track Inclusive of All Actors, All Issues, U.N. Press Release SC/15543 (Dec. 21, 2023) (discussing regret among Security Council members over the political impasse preventing a negotiated solution to the conflict); *'Clear and convincing' evidence of chemical weapons use in Syria, UN team reports*, UN NEWS (Sept. 16, 2013) (discussing findings of "clear and convincing evidence" that Sarin gas was used in a 2013 chemical attack on Ghouta, Syria); *Attacks on Syrian civilians and aid workers in Aleppo were war crimes*, OHCHR (Mar. 3, 2017) (reporting on the ruthless targeting of civilians and humanitarian aid in Aleppo, including the use of civilians as human shields).

extended—through practice over time. That practice reaffirms and clarifies the shared interpretation and thus makes clear that it is not simply a one-off event but an ongoing shift in the functioning of the organization.

The next Section shows how this four-stage process—trigger, proposal, contestation leading to a new interpretation, and consolidation—has led to non-amendment reform of the U.N. Charter throughout its history. Even as there has been much hand-wringing over the inflexibility of the Charter, important reforms have been quietly taking place through this multi-stage process. By bringing these reforms together for common analysis, this article shows that, despite being an underappreciated means of change, non-amendment reform can transform the United Nations and enable it to respond to grave threats to international peace and security.

Before turning to these successful reforms, it is important to note that non-amendment reforms frequently fail. The process of reform can be derailed at any of the four stages—trigger, proposal, contestation leading to a new interpretation, and consolidation. There may be a triggering event and no proposal for reform emerges. Or a proposal may emerge, but the contestation leads to rejection of the proposal. A new interpretation could be adopted but then reversed rather than consolidated. Merely because the process starts does not mean that it will inevitably progress. Many proposed reforms never progress far enough for the public to become aware of them, thus remaining invisible to all but a handful of those involved.

It is possible to point to many instances of failure. Here we will mention just one: the Kosovo crisis. During the armed conflict in Kosovo, the Russians repeatedly stated that any military intervention needed to be approved by the U.N. Security Council, but that Russia intended to exercise its veto to prevent approval.[82] With the Security Council deadlocked in the face of an unfolding humanitarian crisis, there was no successful non-amendment reform. Proposals for the adoption of a constraint on the veto based on a "Responsibility to Protect" met with little support. Only the United Kingdom, the Netherlands, and Belgium expressed clear support for humanitarian intervention as a justification for military intervention in the absence of Council authorization.[83] In the end, the decision of the North Atlantic Treaty Organization ("NATO") to launch a military intervention without Security Council approval, coupled with the Security Council's failure to "exert any meaningful influence over the

82. Mary Ellen O'Connell, *The UN, NATO, and International Law after Kosovo*, 22 HUM. RTS. Q. 57, 76 (2000); *see* Ved P. Nanda, *Legal Implications of NATO's Armed Intervention in Kosovo*, 75 INT'L L. STUD. 313, 321 (2000); *see, e.g.*, Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Press Release SC/6659 (Mar. 26, 1999).

83. U.N. SCOR, 54th Sess., 3988th mtg. at 8, 12, U.N. Doc. S/PV.3988 (Mar. 24, 1999) (statement of the U.K.); *id.* at 8 (statement of the Netherlands). Belgium argued in ICJ proceedings on the legality of NATO's intervention that "the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State." Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. Pleadings 12 (May 10, 1999).

humanitarian intervention in Kosovo prompted discussion on the continued suitability of the U.N. collective security framework."[84] The Kosovo crisis thus did not lead to innovation but instead highlighted the United Nations' incapacity to respond to a global crisis.

This failure, and others like it, need not lead us to give up on the possibility of change. We should consider instead how to build on the many successes that have occurred. But they do offer a reason for caution: When the United Nations fails to evolve, then it is doomed to be ill-fitted to respond to the crises facing the international community.

B. *Past Non-Amendment Reform*

The United Nations has been continually undergoing evolution that enables the institution to not only survive the challenges posed by various crises, but also continue contributing to the goal of international peace and security. The United Nations has made this progress through a series of non-amendment reforms, many of the most significant examples of which we document in this Section. While non-amendment reforms cannot entirely replace formal reform, these examples demonstrate that non-amendment reform can be transformative. Over time, such reforms have allowed the United Nations to respond effectively to crises that, at the outset, it seemed ill equipped to address. As such, they offer a promising roadmap for the future.

Here we outline nine key reforms that have taken place outside the formal amendment process. This is not an exhaustive list. It is intended instead to illustrate the range of changes that have taken place. These reforms, moreover, reflect significant institutional shifts. But there are many more small-scale shifts that take place on an almost daily basis at the United Nations. As one U.N. employee put it, "[w]hat you call non-amendment reform, we would call interpretation of the Charter in practice."[85]

1. Voting in the Security Council (1946-1970)

Voting in the U.N. Security Council provides a rich example of non-amendment reform of the Charter. The Charter does not expressly allow for voluntary abstention from Security Council votes. Through the four-step process outlined above, the Charter came to be understood to allow voluntary abstention or absence from substantive U.N. Security Council votes, a practice that has allowed the Council to function much more effectively than if only affirmative or negative votes were permitted.

Trigger. The Charter provides that each member of the Security Council shall have one vote, decisions on procedural matters shall be made by an affirmative vote of nine members, and decisions of the Council on all other

84. Michael Ramsden, *Uniting for Peace and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly*, 25 WASH. INT'L L. J. 267, 278 (2016).

85. Interview by Oona Hathaway with U.N. Employee (Nov. 15, 2023).

matters "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."[86] That same voting rule applies for decisions under Chapter VI, and under 52(3) (relating to regional arrangements), except that "a party to a dispute shall abstain from voting."[87] The latter provision is the only one that provides for abstention from Security Council votes, and there is no express provision for *voluntary* abstention. The Charter text does not specify whether States must vote, but legislative history suggests that, at the time of the Charter's adoption, many participants assumed States, especially the P5, would all vote and would do so in person—and that if they failed to do so, it would be equivalent to a negative vote.[88]

Proposal. As early as 1946, U.N. Security Council practice began to diverge from this initial understanding. Council members (mostly the Union of Soviet Socialist Republics ("USSR"), but each P5 member at one point or another) began to exercise voluntary abstention or absence from substantive U.N. Security Council votes.[89] One of the first to do so was the Soviet representative, Andrei Gromyko, who abstained to allow a resolution to pass but stated that he did not intend to establish a precedent.[90] Before the Korean War began in 1950, meeting records reflect debates regarding the proper interpretation of abstentions and the legally binding effect of resolutions adopted with the abstention of a P5 member. Some nations maintained that an abstention should not be interpreted as a "no" vote but instead as an indication that the member did not wish to affirmatively participate in the vote but also did not wish to block Council action.[91]

Contestation Leading to a New Shared Interpretation. Despite its occasional use of voluntary abstentions, the Soviet Union periodically opposed the interpretation of absences and abstentions as concurrences.[92] The debate came to a head when, in the midst of the looming Korean conflict in 1950,

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86. U.N. Charter art. 27.

87. *Id.*

88. *See* Yuen-Li Liang, *The Settlement of Disputes in the Security Council: The Yalta Voting Formula,* 24 BRIT. Y. B. INT'L L. 330, 358 (1947) ("[T]he agreement reached among these delegations was that the concurrence of the five permanent members should take the form of affirmative votes of all of them in favor of the decision. . . ."); *see also* Yuen-Li Liang, *Abstention and Absence of a Permanent Member in Relation of the Voting Procedure in the Security Council*, 44 AM. J. INT'L L. 694 (1950). The Australian delegate stated that they "believed that "concurring' meant that each permanent member must be present and must vote." XI United Nations Information Organization, Documents of the United Nations Conference on International Organization San Francisco 516 (1945). The Canadian delegation proposed an amendment that would make clear that "abstention from voting or absence from the Council when a vote was cast would not be equivalent in effect to a negative vote." *Id.* at 534–35. The proposal was withdrawn without a vote. *Id.* at 516.

89. *See* Leo Gross, *Voting in the Security Council: Abstention from Voting and Absence from Meetings*, 60 YALE L.J. 209, 212–15 (1951).

90. Liang, *supra* note 88, at 358.

91. Gross, *supra* note 89, at 221–33.

92. *Id.* at 229–32.

the Soviet Union announced its intention to boycott the Security Council and to consider as illegal "*any* decision of the Security Council" until such a time that its demand to seat the representative of China was met.[93] Shortly after, in June 1950, North Korean troops crossed the 38th Parallel into the newly recognized Republic of Korea.[94] The Security Council seized the opportunity created by the Soviet Union's boycott to pass a flurry of substantive resolutions, recognizing the breach of peace,[95] recommending that member States "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security,"[96] and recommending that members provide forces to constitute a "unified command under the United States of America."[97] Although the Soviet Union soon realized its mistake and returned to the Security Council to exercise its veto to block subsequent measures,[98] the evolved interpretation remained: Security Council votes on substantive matters now are understood to require only the unanimous vote of all P5 members who voted; absences and abstentions do not block adoption.[99]

The ICJ settled any remaining doubt over the new interpretation by upholding the constitutionality of this interpretation in its 1970 advisory opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia*. The Court held that "[b]y abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote."[100]

Consolidation. Since the ICJ's decision, there have been no meaningful challenges to this new interpretation. Indeed, in a 1976 bulletin, the U.S. State

93. *Id.* at 238.

94. Andrew J. Carswell, *Unblocking the UN Security Council: The* Uniting for Peace *Resolution*, 18 J. CONFLICT & SEC. L. 453, 457 (2013).

95. S.C. Res. 82 (June 25, 1950).

96. S.C. Res. 83 (June 27, 1950).

97. S.C. Res. 84 (July 7, 1950).

98. Carswell, *supra* note 94, at 457; *see also* Keith S. Petersen, *The Uses of Uniting for Peace since 1950*, 13 INT'L ORG. 219, 224 (1959) (noting that the Council had been considering military intervention on the Korean Peninsula, which was vetoed on November 30 by the Soviet Union).

99. *See* U.N. Security Council, Voting System, https://www.un.org/securitycouncil/content/voting-system; *see also* Sydney D. Bailey, *New Light on Abstentions in the UN Security Council*, 50 INT'L AFF. 554, 573 (Oct. 1974) (noting the settled acceptance of the practice in 1974, especially among permanent members who interpreted such abstention as a mere waiver of a state's "right of concurrence.").

100. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. ¶ 22 (June 21, 1971); *see also* Frederic L Kirgis, *The Security Council's First Fifty Years,* 89 AMER. J. INT'L L. 506 (1995) (Article 27 was amended in 1965 to increase the membership of the Security Council from eleven to fifteen. There was a corresponding change from seven to nine votes to adopt Security Council resolutions, but the permanent members' veto remained unchanged).

Department referenced the long-standing success of this reform in justifying its lack of interest in amendment-based reform of the Charter: "We view this evolution both as a positive contribution to the work of the Council . . . and as an excellent example of how the language of the charter permits important evolutionary changes without requiring textual changes."[101]

2. Chapter VI and Chapter VI *"Plus"* Peacekeeping Operations (1948-1971)

Trigger. The concept of peacekeeping emerged early in the U.N.'s life and has evolved through customary practice to fill a role somewhere between Chapter VII enforcement powers and Chapter VI recommendations for the pacific resolution of interstate disputes.[102] The trigger for the emergence of Chapter VI peacekeeping operations was the failure of States to agree to supply troops to the command of the Security Council as initially intended. Chapter VII was drafted in expectation that military measures authorized by the Security Council would be undertaken not by member States at the Council's behest, but by a consolidated U.N. military force under the Council's control, supplied by member States under Article 43.[103] However, as the organization emerged from its creation stage and moved nearly immediately into the throes of the Cold War, member States declined to submit control of their military forces to their foes, even if indirectly through an Article 43 agreement.[104]

Proposal. In 1948, the United Nations formed the U.N. Truce Supervision Organization ("UNTSO"), through which a small number of military observers were sent to monitor the Armistice Agreement between Israel and its neighbors.[105] The United States played a part in steering the Security Council away from the use of formal Chapter VII enforcement measures to carry out the operation. It was reluctant to dedicate its own troops,[106] and was

101. 74 DEP'T STATE BULL., 118, 119 (1976).

102. Chapter VI of the Charter has been described as "quasi-judicial," expressing preventative measures undertaken by either the General Assembly or Security Council to peacefully end disputes by negotiation, mediation, recommendation, and other types of settlement. There are no plain-text indications that Chapter VI could be used as an independent basis for raising or deploying a UN force. *See* U.N. Charter art. 33–38; *see also* Kirgis, supra note 100, at 527.

103. U.N. Charter art. 43; *see also* Carswell, *supra* note 94, at 462.

104. *See generally* Frederick M. Burkle, Jr., *United Nations Charter Chapter VII, Article 43: Now or Never*, HARVARD INT'L REV. 26 (2017); *see also*, Implementation of paragraph 8 of resolution 377 A (V) adopted by the General Assembly on 3 November 1950, U.N. Doc. A/1822/Add.9 (Nov. 14, 1951).

105. *See* Sally Morphet, *UN Peacekeeping and Election-Monitoring, in* UNITED NATIONS, DIVIDED WORLD, 184, 185–86 (Adam Roberts & Benedict Kinsbury eds., 1993). The UNTSO has been employed in subsequent conflicts of the region, to include the cease-fire in the Suez Canal and the Golan Heights in the 1960's, as well as to deploy observers to Beirut after 1982. *Id.* at 186.

106. *See* Policy Planning Staff, U.S. Dep't of State, Armed Forces to Be Furnished Under Article 43 of the United Nations Charter, at 360 (June 29, 1948). A renewed effort in 1951 also failed. *See* Letter from the U.S. (June 8, 1951).

also concerned that introducing Soviet troops to the Middle East, even under a central U.N. command, could jeopardize western influence in the region and delegitimize U.N. enforcement actions more broadly.[107] The UNSTO offered an alternative approach. The operation was such a success that the U.S. representative suggested that, considering that problems in Palestine were being "dealt with with reasonable effectiveness by the United Nations," he did not think that Article 43 forces would *ever* be required to manage postwar international crises.[108]

Contestation Leading to a New Shared Interpretation. Initially, there was significant dissent regarding Chapter VI peacekeeping, particularly from socialist countries, predominantly on the grounds that no U.N. force could be constituted in the absence of an Article 43 agreement.[109]

A key legal argument favoring the power to deploy peacekeepers arose from Article 40 in Chapter VII, which states that "the Security Council may, before . . . deciding upon measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable."[110] But this argument faced many hurdles. Article 40 was intended to encompass measures that would be taken by the disputing parties in response to Council recommendations, not by the Council itself.[111] Moreover, the plain text of the article indicates that these recommendations

107. *See, e.g.*, Off. of the Historian, *Foreign Relations of the United States*, *1948, The Near East, South Asia, and Africa, Volume V, Part 2*, U.S. DEPT. ST. Doc. 211 (1945-1952), https://history.state.gov/historicaldocuments/frus1948v05p2/d121 (noting that the military forces of the U.N. should "whenever practicable, be made up of troops of the smaller nations which have no immediate partisan interest in the area to be policed, and should not be made up of units of larger nations with any special interest in the area."); *see generally* PETER HAHN, CAUGHT IN THE MIDDLE EAST: U.S. POLICY TOWARD THE ARAB-ISRAELI CONFLICT, 1945-1961, 52–53 (2004) (noting that there was a complexity of factors leading to this outcome, one of which being U.S. concern that presence of Soviet troops in the areas of dispute in the 1940's would impact the balance of power between East and West and implicate the U.N.'s mission).

108. Off. of the Historian, *Foreign Relations of the United States, 1948, General; the United Nations, Volume I, Part 1*, U.S. DEPT. ST. Doc. 121 (1945-1952), https://history.state.gov/historicaldocuments/frus1948v01p1/d211.

109. *See, e.g.*, U.N. GAOR, 15th Sess., 5th Comm., 828th mtg., ¶¶ 7 (USSR), 13–14 (Czechoslovakia) (Mar. 30, 1961); 829th mtg., ¶¶ 21 (Bulgaria), 31 (USSR) (Mar. 30, 1961); 830th mtg., ¶¶ 4, 6 (Poland) (Apr. 3, 1961); 832nd mtg., ¶ 1 (Hungary) (Apr. 6, 1961); U.N. GAOR, 17th Sess., 5th Comm., 961st mtg., ¶¶ 33-34 (USSR) (Dec. 3, 1962).

110. U.N. Charter art. 40 ("[T]he Security Council may, before . . . deciding upon measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable."). The Secretary-General endorsed this view in 1960. U.N. SCOR, 15th Sess., 920th mtg., at 21, U.N. Doc. S/PV.920 (Dec. 13, 1960). ("My own view, which I had expressed to the Council, is that the resolutions may be considered as implicitly taken under Article 40 and, in that sense, as based on an implicit finding under Article 39.").

111. *See Report to the President on the Results of the San Francisco Conference Before the S. Comm. on Foreign Relations*, 79th Cong. 90 (1945) (report of Chairman of the United States Delegation).

are made *before* a determination is made that there is a threat or breach of the peace. The Security Council's new practice reversed this order.[112]

The interpretation that ultimately won the day was that there are general or inherent powers vested in the Security Council by virtue of its primary responsibility for the maintenance of international peace and security and those powers may be exercised through Chapter VI. The ICJ supported this view in its opinion on the *Legal Consequences for the States of the Continued Presence of South Africa in Namibia*, where it stated: "Article 24 vests in the Security Council take action such as that taken in the present case. The reference in [Article 24] to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general power to discharge the responsibilities conferred [. . .]."[113] In part as a consequence of the ICJ's endorsement, dissent quieted in the 1970s.

Several formerly dissenting nations constructively engaged in the comprehensive review of peacekeeping operations.[114] From that point on, the debate surrounding peacekeeping operations became less about the legality of the function broadly, and more about the operations themselves.[115] As a result of the growing consensus, peacekeeping operations proliferated during the Cold War period (thirteen in total).[116]

Consolidation. The demand for peacekeeping has only increased since the end of the Cold War,[117] covering a broad range of operations. Indeed, once Chapter VI peacekeeping operations became well established, a

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112. Take, for example UNEF II, S.C. Res (Oct. 25, 1973), created by resolution two days *after* the Council called for a cease fire and negotiations for peace. S.C. Res. 338 (Oct. 23, 1973); *see also* Dan Ciobanu, *The Power of the Security Council to Organize Peace-Keeping Operations*, *in* UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 15, 22 (Antonio Cassese ed., 1978).

113. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 341 (1970), Advisory Opinion, 1971 I.C.J. ¶110 (June 21).

114. *See, e.g.*, Permanent Representative of the Union of Soviet Socialist Republics to the United Nations, Letter dated 17 March 1972 from the Representative of the Union of Soviet Socialist Republics to the Secretary-General, U.N. Doc. A/8669 (Mar. 20, 1972).

115. Ciobanu, *supra* note 112, at 15.

116. *See* Marrack Goulding, *The Evolution of United Nations Peacekeeping,* 69 INT'L AFF. 451, 451–54 (1993). There was a separate and parallel non-amendment reform regarding operations authorized under Chapter VII. The wording of Article 106, on its face, indicates that exercise of Article 42 powers cannot occur *until* the U.N. force is created pursuant to Article 43 agreements. Therefore, use of Article 42 powers in absence of Article 43 agreements appears to contravene the provisions of the U.N. Charter. Nonetheless, over time, States accepted that the Security Council could authorize enforcement operations under Chapter VII even in the absence of Article 43 agreements. The first such operation took place under United Nations Security Council Resolution 83, calling for a cessation of hostilities in Korea and recommended that "Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area." U.N.S.C. Res. 83 (June 27, 1950).

117. Goulding, *supra* note 116, at 451 (noting a five-fold increase in UN peacekeeping activity in the 1990's).

subsequent round of reform led to what are effectively "peacemaking" operations with an enforcement "twist."[118] As intra-state wars became more common, the pressure built for the United Nations to do more to address internal conflicts. As the P5 veto hamstrung Chapter VII enforcement operations, the Security Council turned instead to Chapter VI operations to fill the gap. The consolidation of peacekeeping operations enabled further progression of the practice as peacekeeping measures became more active. Peacekeepers began engaging in what would be more properly termed pseudo-enforcement—such as post-conflict peacebuilding in 1960's Congo or ceasefire *enforcement*, rather than mere observation and facilitation.[119] Hence U.N. peacekeeping operations have become well accepted, and that acceptance has opened up avenues for further expansion of the U.N.'s role in keeping, building, and enforcing peace.

3. The Establishment of the United Nations Administrative Tribunal (1949)

Trigger. As the United Nations became a major employer, it became clear that it needed a mechanism for mediating internal and employment disputes. Because the U.N. Headquarters in New York exists outside the jurisdiction of U.S. courts, claims of ill treatment or the organization's failure to meet employment obligations lacked a venue.

Proposal for Reform. In 1946, the U.N. Secretary-General informed the Fifth Committee of the General Assembly that it was necessary to give international civil servants rights equivalent to those enjoyed by many national civil servants in the courts or administrative tribunals of their own countries. For that purpose, he advocated establishing an administrative tribunal.[120] Heeding this call, the General Assembly established the United Nations Administrative Tribunal ("UNAT") in 1949,[121] setting it up as an independent organ that could hear and judge internal administrative matters, such as employment contract disputes.

Contestation Leading to a New Shared Interpretation. The tribunal was not welcomed by all U.N. members, some of whom found it unnecessary.[122] And it took a decision of the ICJ to settle the Tribunal's legality. In 1954, the ICJ issued an Advisory Opinion, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*. The Court began by observing that there was "no express provision for the establishment of judicial bodies

118. *See id.* at 456–60.

119. *See id.* at 459–61.

120. Abdelaziz Megari, *The Establishment of the UN Administrative Tribunal*, *in* THE INTERNAL JUSTICE OF THE UNITED NATIONS: A CRITICAL HISTORY 1945-2015, at 8 (2015).

121. G.A. Res. 351 (IV) A, Establishment of a United Nations Administrative Tribunal, at 49 (Nov. 24, 1949), https://digitallibrary.un.org/record/666782?ln=en.

122. Megari, *supra* note 120.

or organs and no indication to the contrary."[123] But that silence was not the end of the story. The Court noted that it had earlier determined that, "[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." The Court went on to note that, among other things, the Secretary-General is "the chief administrative officer of the Organization." It was "inevitable," the Court noted, "that there would be disputes between the Organization and staff members as to their rights and duties." And while the Charter does not authorize any of the U.N. organs to adjudicate these disputes, it would "hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them." It thus concluded that the power to establish a tribunal that could resolve such disputes "arises by necessary intendment out of the Charter."[124]

This decision not only clarified that it was within the power of the General Assembly to create a Tribunal to adjudicate internal disputes, it also articulated an interpretive theory of General Assembly power in the process. The General Assembly's authority was not confined to the powers expressly provided in the Charter. It also had those powers that, "though not expressly provided in the Charter," are implied "as being essential to the performance of its duties."[125] Hence the Court put forth a vision of the United Nations as a whole, and the General Assembly in particular, as an institution that possesses the capacity for growth. It also made clear that the Charter should not be read narrowly, but that it should instead be read in light of the overall purpose of the organization.

Consolidation. The internal justice system, which now includes a number of separate tribunals as well as an Appeals Tribunal, is well established as an important part of the United Nations system. [126] Indeed, there is currently a proposal to form a Joint Tribunal for the two independent administrative tribunal systems, namely, the International Labor Organization Administrative Tribunal and the United Nations Tribunals (United Nations Dispute Tribunal and United Nations Appeals Tribunal).[127] This proposed reform aims to build on the innovations of the past.

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123. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J., at 56 (July 13).

124. *Id.* at 57.

125. *Id.* at 56.

126. *See Why the UN Needs an Internal System of Justice*, UNITED NATIONS, https://www.un.org/en/internaljustice; *Administration of Justice at the UN: UN Internal Justice System*, UNITED NATIONS https://www.un.org/en/internaljustice/overview/about-the-system.shtml.

127. Advisory Comm. on Admin. and Budgetary Questions, Review of the Jurisdictional Set-Up of the United Nations Common System, U.N. Doc. A/78/555 (Oct. 27, 2023).

4. Uniting for Peace Resolution (1950)

Trigger. By 1950, it had become clear that the international political dynamics of the Cold War, particularly the foreign policies of the Soviet Union, posed a major obstacle to the Organization's efforts to carry out collective action for peace and security.[128] Returning to the Security Council following its boycott of voting on the Korean conflict, the Soviet Union once again began vetoing resolutions.[129]

Proposal. Amidst paralysis in the Security Council over the war in Korea, the General Assembly stepped up to fill the gap. The Assembly initially created an interim committee to consider matters pertaining to threats during the period between General Assembly sessions, to conduct investigations, and to report "on any dispute or situation which, in virtue of Articles 11, 14 or 36 of the Charter, has been proposed for the inclusion in the agenda of the General Assembly."[130] In October 1950, the General Assembly adopted Resolution 377(V), now known as the Uniting for Peace Resolution. The Resolution provides that,

> [I]f 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.[131]

It further provides that if the General Assembly is not in session, it may meet in emergency special session if requested by seven members of the Security Council or by a majority of the General Assembly.[132] The declared purpose of the Resolution was "to improve the machinery of the United Nations for preserving peace"[133] by enabling the Assembly to more

128. JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES 24–25 (2020).

129. Carswell, *supra* note 94, at 457; *see also* Keith S. Petersen, *The Uses of Uniting for Peace since 1950*, 13 INT'L ORG. 219, 224 (1959) (noting that the Council had been considering military intervention on the Korean Peninsula, which was vetoed on November 30 by the Soviet Union).

130. G.A. Res. 111 (II), Establishment of an Interim Committee of the General Assembly, (Nov. 13, 1947).

131. G.A. Res. 377 (V), ¶ 1 (Nov. 3, 1950) (emphasis added).

132. *Id.*

133. *See* Juraj Andrassy, *Uniting for Peace*, 50 AMER. J. OF INT'L L. 563, 564 (1956).

expeditiously and effectively coordinate future responses to threats to international peace and security.[134]

Contestation Leading to a New Shared Interpretation. Debate over the proposal was heavily influenced by the power struggle between the Soviet Union and the United States and its allies.[135] The U.S. delegation led the effort, arguing that to maximize the effectiveness of the United Nations "certain organizational weaknesses would have to be remedied."[136] In particular, the U.S. delegate to the United Nations emphasized that while the organization's actions in Korea proved that it could successfully act to thwart aggressors, such action had only been possible as a result of "favourable circumstances" (the voluntary absence of the Soviet Union).[137] To maintain peace and security in the future, "a reliable system would have to be created instead of matters being left to chance."[138] The Resolution faced strenuous objection from the Soviet delegation.[139] Nonetheless, the General Assembly adopted the Resolution by a vote of 52-5, with 2 abstentions.[140] The vote reflected "both the level of international frustration with Soviet tactics . . . and the fact that the General Assembly of the day contained a secure majority of Western states and their allies."[141]

In her work tracing the history of the Resolution, Jennifer Trahan notes that commentators voiced differing views of the significance of the Resolution: Some emphasized that it "did not confer upon the General Assembly a competence which it did not have under the Charter," while others described the Resolution as "one of the most important attempts by the U.S. and its allies to change the institutional balance of power between the Security Council and the General assembly."[142] Trahan argues that the Resolution was

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134. U.N. GAOR, 1st Comm., 355th mtg., ¶ 6, U.N. Doc. A/C.1/SR.355 (Oct. 9, 1950). (noting the comments of Mr. Sarper, Representative of Turkey, who stated that the response to UNSC's failure to act was taken "only improvisationally by the UNGA, and that the UNGA may not "be able to afford improvisation a second time; a new act of aggression might be disastrous for mankind."). For a helpful introduction to Uniting for Peace, see Larry D. Johnson, *"Uniting for Peace": Does it Still Serve Any Useful Purpose?*, AJIL UNBOUND (July 15, 2014).

135. Jean Krasno & Mitushi Das, *The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council*, *in* THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY 173 (Bruce Cronin & Ian Hurd eds., 2008) ("The purpose initially was to wrestle the use of the veto away from the Soviet Union at the time when the United States and the West wanted the United Nations to legitimize action taken to defend South Korea from encroachment from the north.").

136. U.N. GAOR, 1st Comm., 354th mtg., ¶ 1, U.N. Doc. A/C.1/SR.354 (Oct. 9, 1950).

137. *Id.* ¶ 1.

138. *Id.* ¶ 3.

139. U.N. GAOR, 5th Sess., 301st plen. mtg., ¶¶ 33–139, U.N. Doc. A/PV.301 (Nov. 2, 1950); *see also* U.N. GAOR, 5th Sess., 302nd plen. mtg., ¶¶ 2–15, U.N. Doc. A/PV.302 (Nov. 3, 1950).

140. *Id.* ¶ 73.

141. Carswell, *supra* note 94, at 458.

142. TRAHAN, *supra* note 128, at 25–26; *see also* L.H. Woolsey, *The "Uniting for Peace" Resolution of the United Nations*, AM. J. INT'L L. 129, 129 (Jan. 1951) (noting that international

both: It drew "upon existing General Assembly powers under the Charter, but [was] designed to shift discussion of matters of international peace and security from the Security Council to the General Assembly."[143] In this respect, it is an emblematic non-amendment reform: The text of the Charter remains unchanged, but the understood meaning of that text evolves, changing in the process what the organs of the United Nations can accomplish.

The Resolution does not amend the Charter, but instead builds on the General Assembly's existing subsidiary responsibility in the maintenance of international peace and security.[144] Even so, it functionally expands the role of the General Assembly in matters relating to international peace and security. When the Security Council cannot fulfill its mandate, the Resolution prompts the General Assembly to step into the breach.[145] The General Assembly already possesses recommendary powers under Articles 10 and 11 of the U.N. Charter.[146] By triggering an emergency session and placing the matter on the General Assembly's agenda, the Resolution sets the stage for the General Assembly to exercise those existing powers, sometimes in new ways.

Consolidation. Since its adoption, the Uniting for Peace Resolution has been activated thirteen times.[147] Early on, the Resolution was used to convene the first emergency special session in response to the Suez Crisis in 1956, through which the Assembly established a United Nations Command made up of member States' forces to secure and supervise the cessation of hostilities.[148] Other cases of its use have resulted in General Assembly resolutions condemning States for their use of hostilities in violation of Article 2(4) of

law experts at the time called it the "most momentous action ever taken by the General Assembly").

143. *Id.*; *see also* U.N. GAOR, 1st Comm., 355th mtg., ¶¶ 9–11, 17–19, U.N. Doc. A/C.1/SR.355 (Oct. 9, 1950).

144. U.N. Charter art. 24. Article 24 provides that "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary* responsibility for the maintenance of international peace and security . . . ." *Id.* (emphasis added). The proposed Resolution sought to recognize that the Security Council was the organ primarily, but not exclusively responsible for peace and security, a point that was emphasized by Member States in the General Assembly discussions. *See* U.N. GAOR, 5th Sess., 1st Comm., 355th mtg. (1950); s*ee also* TRAHAN, *supra* note 128, at 23.

145. *See* Woolsey, *supra* note 142, at 134; DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE 44 (2001).

146. U.N. Charter arts. 10, 11.

147. Security Council Report, Security Council Deadlocks and Uniting for Peace: An Abridged History (2013), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security_Council_Deadlocks_and_Uniting_for_Peace.pdf. Since this report, Uniting for Peace has been invoked once more—in Ukraine. *See* Press Release, *supra* note 11.

148. G.A. Res. 998 ES-1 (Nov. 4, 1956); G.A. Res. 1000 ES-I (Nov. 5, 1956).

the Charter,[149] or to coordinate humanitarian aid for victims of conflicts.[150] The General Assembly established a national register of damages during its tenth Special Emergency Session, in complement to the ICJ *Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*.[151]

The Uniting for Peace Resolution fell into disuse, partly due to U.S. disenchantment after it was used in 1997 in response to a U.S. veto on "The Question of Palestine."[152] The Resolution was revived twenty-five years later in the wake of the full-scale Russian invasion of Ukraine in February 2022. As noted at the outset of this article, the Resolution has played an important role in the response to the Russian invasion of Ukraine and is currently providing a means for the General Assembly to respond, in the face of Security Council inaction, to the crisis unfolding in Gaza.[153] The repeated resolutions condemning Russia's invasion by large majorities have helped generate global support for the unprecedented program of sanctions against Russia and military and economic aid for Ukraine, without which Ukraine would have long ago lost the war.[154] Bolstered by its revival in the context of the war in Ukraine, the General Assembly has again wielded the Resolution to adopt a powerful resolution condemning violations of international humanitarian law resulting from the Israeli-Gaza conflict, and to call for a humanitarian truce in the hostilities.[155]

5. Establishment of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda (1992-1994)

Trigger. The conflicts in the former Yugoslavia and Rwanda—both defined by genocide and other mass war crimes and human rights abuses—shocked the international community.[156] Alarmed by reports of mass

149. *See, e.g.*, G.A. Res. 1004 ES-II (Nov. 4, 1956); G.A. Res. 1237 ES-III (Aug. 21, 1958); G.A. Res. ES-6/2 (Jan. 14, 1980).

150. *See, e.g.*, G.A. Res. 1006 ES-II (Nov. 9, 1956); G.A. Res. 1007 ES-II (Nov. 9, 1956); GA. Res. 2252 ES-V (July 4, 1964).

151. Press Release, General Assembly, General Assembly Establishes Register of Damage Arising from Construction of Wall by Israel in Occupied Palestinian Territory, U.N. Press Release GA/105060 (Dec. 15, 2006); *see* Keith S. Peterson, *The Uses of the Uniting for Peace Resolution Since 1950*, 13 INT'L ORG. 219, 219 (1959) (for more on uses of the Resolution since 1950).

152. U.N. GAOR, 10th Emergency Special Sess., U.N. Doc. A/ES/10/1 (Apr. 22, 1997) (where the resolution was invoked by the General Assembly at the Request of Qatar).

153. *See supra* text accompanying notes 13-19.

154. Oona A. Hathaway, How Russia's Invasion of Ukraine Tested the International Legal Order, BROOKINGS (Apr. 3, 2023), https://www.brookings.edu/articles/how-russias-invasion-of-ukraine-tested-the-international-legal-order.

155. *See, e.g.*, G.A. Res. L.25 ES-10, U.N. Doc. A/ES-10/L.25 (Oct. 26, 2023).

156. YVES BEIGBEDER, INTERNATIONAL CRIMINAL TRIBUNALS: JUSTICE AND POLITICS 49 (2011); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 1 (4th ed. 2019).

casualties and planned, systemic ethnic cleansing in the former Yugoslavia, the Security Council adopted Resolution 780 in 1992, requesting the Secretary-General to create a Commission of Experts to investigate and provide "its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia."[157] After an interim report concluded that grave breaches of international law had been committed, the pressing question was what the international community would do about it. As national prosecution was unrealistic, support grew for international prosecution. "U.S. policy makers were becoming increasingly vocal on the need for such prosecution,"[158] and more members of the international community coalesced behind the creation of an international tribunal for the former Yugoslavia conflict. Changing political realities at the end of the Cold War facilitated this rising consensus: "The easing of Cold War tensions and the willingness, at that time, of the Russian Federation and the People's Republic of China to engage constructively on a fresh approach to international justice."[159]

Proposal. In February 1993, the Council adopted Resolution 808 in which it determined that the "situation [in Yugoslavia] constitutes a threat to international peace and security" and that the Security Council should "put an end to such crimes and [] take effective measures to bring to justice the persons who are responsible for them."[160] Based on its understanding that the continuing mass atrocities were further exacerbating ethnic divisions and conflict,[161] the Council was "[c]onvinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace."[162] Accordingly, the Council decided that such "an international tribunal shall be established" and requested that the Secretary-General produce a report including "specifical proposals and where appropriate options for the effective and expeditious implementation of the decision" to establish such a tribunal.[163]

Contestation Leading to a New Shared Interpretation. The Security Council's competence to create an international criminal tribunal was initially controversial. Some States and commentators questioned whether the Security Council had the legal authority to create an international tribunal, and

157. S.C. Res. 780, ¶ 2 (Oct. 6, 1992); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 7, U.N. Doc. S/25704 (May 3, 1993) [hereafter *Report of Secretary-General*].

158. Michael J. Matheson & David Scheffer, *The Creation of the Tribunals*, 110 AM. J. INT'L L. 173, 174 (2016).

159. *Id.* at 175.

160. S.C. Res. 808 (Feb. 22, 1993).

161. Matheson & Scheffer, *supra* note 158, at 180.

162. S.C. Res. 808, *supra* note 160.

163. *Id.* ¶¶ 1, 2.

whether a political organ of the United Nations should be able to establish a judicial organ.[164] In particular, before the Security Council's creation of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), it was not clear that the Council could use its Chapter VII authority to create an international criminal tribunal.[165]

States offered different proposals for establishing a tribunal, including different ideas about the authority needed to create it.[166] It was generally agreed that the Nuremberg and Tokyo tribunals, which were the only prior precedents for creating international criminal tribunals, could not serve as a model.[167] Some States, including China, and the Conference on Security and Co-operation in Europe supported creating the Yugoslav tribunal through a treaty ratified by member States.[168] But, as the Secretary-General's report ultimately highlighted, creation by treaty posed significant problems for establishing the Yugoslav tribunal; in particular, the process of negotiating and creating a treaty would take years.[169]

Ultimately it was decided that the Security Council would create the tribunal using its Chapter VII authority. Under Article 39, the Council has the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and make recommendations for measures. Article 41 lists nonmilitary measures the Council can take to "give effect to its decisions."[170] While Article 41 does not expressly provide for the authority to create an international criminal tribunal, advocates argued that the list in this provision is "exemplary only and does not preclude other measures that the Council may find necessary."[171]

It was initially unclear whether the international community would accept the proposal. It advanced, in part, because the Yugoslav crisis erupted "in the period immediately after the end of the Cold War when the members of the Security Council were freely using Chapter VII to take wide-ranging actions having important political, military, and economic consequences."[172] By early 1993, the initial objections of some member States to the proposal

164. CRYER ET AL., *supra*, note 156, at 128.

165. Matheson & Scheffer, *supra* note 158, at 179.

166. *Report of Secretary-General*, *supra* note 157, ¶¶ 19–21; *see also* Matheson & Scheffer, *supra* note 158, at 175.

167. The legal authority for creating those military tribunals was specific to the conditions after WWII and, thus, was not available in the case of Yugoslavia. Matheson & Scheffer, *supra* note 158, at 178; BEIGBEDER, *supra* note 156, at 34 ("[T]he Tribunal was not an international jurisdiction, but an inter-allied jurisdiction, a victors' jurisdiction.").

168. Matheson & Scheffer, *supra* note 158, at 178 (noting that the UN International Law Commission was also considering the creation of a permanent international criminal court by treaty).

169. Matheson & Scheffer, *supra* note 158, at 179.

170. U.N. Charter arts. 39, 41.

171. Matheson & Scheffer, *supra* note 158, at 179.

172. *Id.*

gave way as it became clear both that a treaty approach was impractical and that there were political and practical advantages to Council action. In a key development, Russia and China did not obstruct the Council's creation of the tribunal.[173]

In May 1993, the Secretary-General submitted a report to the Council that, among other things, examined the legal basis for establishing an international tribunal.[174] The report ultimately recommended "that the Security Council, acting under Chapter VII of the Charter, establish the International Tribunal [for Yugoslavia]."[175] The report explained that establishing such a tribunal under the Council's Chapter VII power was "legally justified" both under the object and purpose of the Charter and based on past Council practice,[176] including prior decisions under Chapter VII that "involved the establishment of subsidiary organs for a variety of purposes."[177] The tribunal, the report concluded, would be such a subsidiary organ, "but one of a judicial nature."[178] The Council agreed, and adopted Resolution 827 on May 25, 1993, which provided that the Council, acting under Chapter VII of the Charter, decided "to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia."[179]

Consolidation. The decision to create the ICTY established the Security Council's authority to create international criminal tribunals. Thus, by the time the Rwanda genocide came to a head in 1994,[180] it was generally accepted that the Council had the authority to create a second tribunal.[181] The Security Council adopted a resolution creating a commission of experts to investigate the allegations of serious violations of international humanitarian law and genocide in Rwanda, and the Special Rapporteur of the U.N. Human Rights Commission on Rwanda reported that "grave and massive violations of human rights," including genocide and war crimes, had been committed in Rwanda and recommended that the United Nations should establish an ad hoc international criminal tribunal.[182] Only China, "nervous that it was becoming

173. *Id.* at 175, 180.

174. *Report of Secretary-General*, *supra* note 157, ¶¶ 6–8.

175. *Id.* ¶ 30.

176. *Id.* ¶ 24.

177. *Id.* ¶ 27.

178. *Id.* ¶ 28.

179. S.C. Res. 827, ¶¶ 1–2 (May 25, 1993).

180. DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 62 (2011).

181. Matheson & Scheffer, *supra* note 158, at 180–81.

182. Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Rwanda, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories, Report on the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, Under Paragraph 20 of*

too easy to build ad hoc tribunals," instead favored prosecutions in Rwandan courts, with international assistance.[183] On November 8, 1994, the Security Council adopted Resolution 955, with the only dissenting vote cast by Rwanda[184] and with China abstaining,[185] establishing an international criminal tribunal "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law" committed in the Rwandan conflict.[186]

The Council's creation of the ICTY and International Criminal Tribunal for Rwanda ("ICTR") gained wide acceptance, which "triggered a massive revival of the prospects for international prosecution of international crimes."[187] Following the establishment of these ad-hoc tribunals, a series of international and hybrid criminal tribunals and courts were created, with various roles played by the United Nations: the International Criminal Court ("ICC") (1998),[188] East Timor Panels (2000),[189] Special Court for Sierra

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Commission Resolution E/CN.4/S-3/1 of 25 May 1994, ¶¶ 41–48, 54, 75, U.N. Doc. E/CN.4/1995/7 (June 28, 1995).

183. SCHEFFER, *supra* note 180, at 73.

184. The Rwandan government ultimately opposed the resolution because they favored a tribunal that could issue the death penalty, the primacy of Rwandan law, and a limited temporal jurisdiction (to prevent prosecution of Tutsi leaders for actions taken when they took over the government). *Id.* at 70–73.

185. S.C. Res. 955 (Nov. 8, 1994) (on Establishment of an International Tribunal for Rwanda and Adoption of the Statute of the Tribunal).

186. *Id.* ¶ 1.

187. Matheson & Scheffer, *supra* note 158, at 177.

188. Although the ICC exists outside of the U.N. framework, the U.N. General Assembly played a pivotal role in its creation—in a move that was itself a form of non-amendment reform. The effort began in 1947 with a General Assembly resolution to codify certain principles of international criminal law. Among others, see G.A. Res. 177 (II) (Nov. 21, 1947) (directing the ILC to prepare a draft code of offenses against the peace and security of mankind). The General Assembly began the process of drafting what would become the Rome Statute, through the ILC in 1950. *See*, *e.g.*, G.A. Res. 489 (V), International Criminal Jurisdiction, ¶ 4 (Dec. 12, 1950) (requesting the ILC to begin drafting "conventions and proposals relating to the establishment of an international criminal court."); G.A. Res. 36/106, Draft Code of Offences Against the Peace and Security of Mankind (Dec. 10, 1981) (inviting the Commission to resume its work on the draft code of offenses); G.A. Res. 46/54, (Dec. 9, 1991) (inviting the Commission to consider "the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court"); G.A. Res. 47/33 (Nov. 25, 1992) (inviting the ILC to undertake the "elaboration of a draft statute for the court"); G.A. Res. 48/31 (Dec. 9, 1993) (requesting the ILC to continue its work on the draft statute); G.A. Res. 49/53, Establishment of an International Criminal Court (Dec. 9, 1994) (establishing an ad hoc committee to discuss the draft statute and to consider arrangements for the convening of an international conference); *see also* Final Act of the U.N. Diplomatic Conference of Plenipotentiaries in the Establishment of an International Criminal Court, at 67–70, U.N. Doc. A/CONF.183/10* (July 17, 1998) (detailing the final stages of General Assembly involvement in the drafting of the court's statute and administrative tasks). Hence, the U.N. gave rise to an entirely independent international body—a possibility likely never foreseen by the Charter's drafters.

189. The United Nations Transitional Administration in East Timor (UNTAET) aided in establishing the Special Panels for Serious Crimes of the Dili District Court after the

Leone (2002),[190] and Extraordinary Chambers in the Courts of Cambodia (2004),[191] and Special Tribunal for Lebanon (2007).[192]

These tribunals and courts demonstrate not only that international criminal prosecution was an accepted tool to support the maintenance and restoration of international peace and security, but also that the United Nations had an accepted role to play in the creation of these judicial organs. Moreover, the creation of these international courts and tribunals provides another example of the U.N. evolving in response to crises, despite the impossibility of amendment-based reform. Non-amendment reform led to additional non-amendment reform, as each new international court and tribunal served as a precedent for those that followed. For example, the ICC was created on the heels of the ICTR and ICTY, because it had become clear that reliance on *ad hoc* bodies in the long-term was infeasible.[193] And while the ICC took a new form, [194] it built on the different models of tribunals that had already been established.[195]

6. Establishment of the Special Court for Sierra Leone (2002)

Trigger. As the 1990s wore on, high-profile atrocities and human rights disasters continued to catalyze the international appetite for enforcement of

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International Commission of Inquiry on East Timor concluded that there were "patterns of gross violations of human rights and breaches of humanitarian law." U.N. Secretary-General, Letter dated Jan. 31, 2000 from the Secretary-General addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, U.N. Doc. A/54/726 (Jan. 31, 2000); *see* UNTAET, Organization of Courts in East Timor, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000). The Panels were established by national legislation but were staffed by both Timorese and international judges, lawyers, and investigators. They proceeded under UNTAET regulation, and the prosecutorial component, the Serious Crimes Unit (SCU), was funded and staffed by the U.N. *See* BEIGBEDER, *supra* note 156, at 113–17.

190. *See infra* Subsection III.B.6.

191. *See infra* Subsection III.B.7.

192. Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, Leb.-U.N. (June 10, 2007), https://treaties.un.org/pages/showDetails.aspx?objid=080000028005e0e7.

193. *See* Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, 3 ASIL (Aug. 11, 1998), https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court (explaining the "tribunal fatigue" that set in after the creation of ad hoc tribunals such as the ICTY and ICTR and the hope that the ICC would solve such fatigue).

194. *See* Int'l L. Comm'n, Report of the ILC on the work of its forty-sixth session, U.N. Doc. A/49/10 at 27–28 (July 22, 1994) (summarizing the views of those who considered Charter amendment "unrealistic", and preferred a treaty-based alternative, despite risks to the instrument's efficacy and legitimacy).

195. The ILC relied upon the ICTY for administrative and procedural templates in developing its draft statute for the ICC. *See id.* at 20, ¶ 47 (explaining the ILC's reliance on the ICTY's statute, rules of procedure, and rules of evidence when drafting its draft statute).

international criminal law. One of those disasters was the Sierra Leone civil war, during which a number of atrocities were committed.

Proposal. On June 12, 2000, Sierra Leone's President Ahmad Tejan Kabbah wrote U.N. Secretary-General Kofi Annan requesting him to "initiate a process whereby the United Nations would resolve on the setting up of a special court for Sierra Leone."[196] On August 10, 2000, the U.N. Security Council adopted Resolution 1315 requesting the Secretary-General to start negotiations with the government of Sierra Leone to create a Special Court.

Contestation Leading to a New Shared Interpretation. The character of the Special Court for Sierra Leone ("SCSL") differed from its ad hoc predecessors in several important respects, reflecting important institutional innovations. The SCSL was the first treaty-based, "nationalized" tribunal established pursuant to a bilateral treaty with the United Nations, which had several important consequences.[197] First, unlike a subsidiary organ, the SCSL was not funded by the U.N. budget under Article 17, but relied entirely on voluntary financial contributions.[198] Second, the mixed *ratione materiae* jurisdiction of the tribunal meant that both international and Sierra Leonean law could be called upon to prosecute offenders—an important innovation to consolidate the prosecution of those who bore the greatest responsibility for crimes of both international and domestic character in the same forum.[199] Finally, while the Security Council explicitly called upon Chapter VII enforcement powers in the creation of the ICTY and ICTR, it did not do so for the SCSL.[200]

Since the court lacked coercive enforcement powers, many commentators lamented that the tribunal would be ineffectual.[201] Consequently, the court shocked many when it unsealed an indictment of sitting President of

196. Permanent Representative of Sierra Leone, Letter dated 9 Aug. 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, at 2, U.N. Doc. S/2000/786 (Aug. 9, 2000).

197. Vincent O. Nmehielle & Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107, 108 (2006).

198. *Id.* at 121; U.N. Charter art. 17. This aspect is a primary source of criticism of the SCSL, as warned by the Secretary-General himself. CHARLES C. JALLOH, THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE 58 (Cambridge Univ. Press, 2020). The court also had a mixed composition, including judges of both International and Sierra Leonean origin. Marissa Miraldi, *Overcoming Obstacles of Justice: The Special Court of Sierra Leone*, 19 N.Y.L. SCH. J. HUM. RTS. 849, 885 (2003).

199. Nmehielle & Jalloh, *supra* note 197, at 115.

200. In fact, the Secretary-General requested that the Security Council consider granting the court Chapter VII powers in order to oblige third-party States to surrender individuals for prosecution, but the Security Council declined to do so. *See* U.N. Secretary-General, *Report of the Security Council Mission to Sierra Leone*, ¶ 47, U.N. Doc. S/2000/992 (Oct. 4, 2000); *see also* Prosecutor v. Taylor, Case. No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 37 (May 31, 2004).

201. *See generally* Robert Cryer, *A Special Court for Sierra Leone*, 50 INT'L & COMP. L.Q. 435, 445–46 (2001) (acknowledging the "pitfalls" of the SCSL, including its lack of Chapter VII enforcement power).

Liberia Charles Taylor while he was in peace talks in Ghana.[202] He fled to Nigeria, which eventually capitulated to political pressure and agreed to extradite him.[203] Taylor challenged the indictment, arguing that he was immune from prosecution as a sitting Head of State.[204] In answer, the court affirmed it was an international court and therefore was not obligated to observe personal immunities that would apply to a foreign domestic court, including Head of State immunity. The court explained that the agreement between the "United Nations and Sierra Leone is [] an agreement between *all* members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international."[205]

Consolidation. The SCSL heard twenty-four cases before concluding its work in 2013.[206] The first prosecution of a sitting president in the *Taylor* case is widely regarded as a key precedent regarding the reach and limits of Head of State immunity under international law. The fact that the tribunal that prosecuted him was constituted not under Chapter VII but under Chapter VI has further affirmed that enforcement powers are not *sine qua non* for the status of an international tribunal capable of prosecuting a foreign head of State.[207]

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202. JALLOH, *supra* note 198, at 223. Taylor was accused of creating and backing the rebel, Revolutionary United Front, which committed a range of atrocities in the Sierra Leone civil war. Note that, although Taylor was no longer a head of state at the time of prosecution, the tribunal made its decision as of the time when he was still sitting President. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 30 (May 31, 2004).

203. *See, e.g.*, Chandra Lehka Sririam, *Wrong-Sizing International Justice – The Hybrid Tribunal in Sierra Leone*, 29 FORDHAM INT'L L.J. 472, 486–87 (2006) (explaining that the Nigerian court would "honor a request for extradition" from a permanent Liberian government).

204. Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on immunity from jurisdiction, ¶ 20 (May 31, 2004).

205. *Id.* ¶ 38. Liberian President Ellen Johnson Sirleaf announced that she welcomed the prosecution of Charles Taylor in The Hague, but that announcement was two years after the indictment and after the Special Court concluded that it was "international" and thus not obligated to observe head of state immunity. *See* Craig Timberg, *Liberian President Back Bid to Move Taylor Trial to the Hague*, WASH. POST, Mar. 31, 2006 ("President Ellen Johnson-Sirleaf said. . .that she supported a bid to move the war crimes trial of former Liberian president Charles Taylor from neighboring Sierra Leone to The Hague and that Taylor's dignity and rights must be guaranteed as the case advanced"). The Court's authority to try Taylor was thus not dependent on Liberia's consent.

206. After the closure of the SCSL, an agreement between the United Nations and the Government of Sierra Leone established the Residual Special Court for Sierra Leone to oversee the continuing legal obligations of the court. *See Home*, RESIDUAL SPECIAL COURT FOR SIERRA LEONE, https://rscsl.org (describing the power of the court as being to "oversee the continuing legal obligations of the Special Court for Sierra Leone after its closure in 2013").

207. *Id.*

7. Establishment of the Extraordinary Chambers in the Courts of Cambodia (2004)

Trigger. During the rule of the Khmer Rouge from 1975 to 1979, more than 1.5 million Cambodians were killed. Two decades after they were overthrown, the Government of Cambodia approached the United Nations with a request for "assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity committed" during that time.[208]

Proposal. A panel of experts, appointed by the Secretary-General to consider the request,[209] submitted a report regarding the form of a potential tribunal. The Panel floated three possibilities: (1) Creating an international tribunal as a subsidiary body under Chapter VII enforcement powers, following the examples of the ICTR and ICTY; (2) Establishing an international tribunal outside of Cambodia, under the Security Council's Chapter VI powers; (3) Forming a subsidiary tribunal under General Assembly's authority, pursuant to its own recommendatory powers.[210] Although the experts indicated a preference for either of the first two options, they found that the route through the General Assembly, though it signified a departure from previous templates, was practically acceptable and legally sound.

Contestation Leading to a New Shared Interpretation. Political constraints in the United Nations dictated yet a fourth path for Cambodia's tribunal. In the Security Council, China communicated a clear intention to veto the creation of any Chapter VII court with respect to Cambodia, while Cambodia steadfastly declined to agree to prosecutions outside of its own national jurisdiction, nullifying the second proposal.[211] Stepping into the gap, the General Assembly asked the Secretary-General to conclude a bilateral agreement with Cambodia to create a hybrid tribunal.[212] After years of

208. U.N. Secretary-General, Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, ¶¶ 141–46, U.N. Doc. A/53/850 (Mar. 16, 1999).

209. The General Assembly requested the Secretary-General to act on the request. G.A. Res. 52/135, Situation of Human Rights in Cambodia, ¶ 6 (Feb. 27, 1998).

210. U.N Secretary-General*, supra* note 208, ¶¶ 139–43. The report noted that VI provided a permissible basis to create a tribunal instead of VII, as VI still "gives it broad powers over issues related to international peace and security. This chapter . . . has formed a basis for other consent-based activities by the Council," *id.* ¶ 142, and later noting that "the difference between Chapter VI and Chapter VII may turn out to be rather small in practice." *Id.* ¶ 145.

211. David P. Forsythe, *The UN Security Council and Response to Atrocities: International Criminal Law and the P-5*, 34 HUM. RTS. Q. HUM. RTS. Q. 840, 848–49 (2012).

212. General Assembly, *Report of the Secretary-General on Khmer Rouge trials,* U.N. Doc. A/57/769 (Mar. 31, 2003); *see also* Hans Corell, Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Introductory Note, U.N. Audiovisual Library of International Law (Sept. 2020), https://legal.un.org/avl/ha/abunac/abunac.html.

negotiations, a distinctive tribunal emerged.[213] The Extraordinary Chambers in the Courts of Cambodia ("ECCC") marked the first time the General Assembly was involved in the creation of a criminal tribunal. Unlike earlier courts involving the United Nations, the ECCC was rooted in Cambodia's domestic jurisdiction.[214] With no supervisory power, the United Nations agreed to render support to the tribunal upon threat of withdrawal of assistance should Cambodia stray from the agreement's specifications.[215]

Consolidation. Despite its lackluster success in Cambodia (few cases successfully concluded), the model has nonetheless proven instructive when considering how the General Assembly may approach the development of hybrid tribunals in consenting jurisdictions.[216] It marks an expansion of the General Assembly's role in the development of U.N. institutional mechanisms generally, and in the realm of accountability in particular.[217]

8. Impartial and Independent Mechanism (2016)

Trigger. The Syrian Civil War was one of the largest crises in the twenty-first century. By early 2016, the war had been raging for five years and had resulted in a death toll of 470,000 and an extreme humanitarian crisis with millions of people internally displaced and millions more seeking refuge abroad.[218] In addition to an estimated 1 million people living in besieged areas

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213. Negotiations which ultimately resulted in the ECCC began in 1999 and finally concluded in 2003. For timing, see Letter from Hun Sen, Prime Minister of Cambodia to HE Thomas Hammarberg, Special Representative of the UN Secretary-General for Human Rights in Cambodia dated 17 July 1999; whereas the final signature did not occur until 2003. *See* UN and Cambodia Reach Draft Agreement for Prosecuting Khmer Rouge Crimes, UN NEWS (May 13, 2003), https://news.un.org/en/story/2003/03/62252.

214. Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea, 2329 U.N.T.S., 41723 (June 6, 2003) [hereinafter Agreement between the United Nations and Cambodia]. The General Assembly had approved the draft of the agreement, G.A. Res. 57/228 (May 22, 2003).

215. The U.N. Agreement specifies the structure, scope, and composition which the tribunal must conform to in order to continue receiving assistance from the U.N., with the threat of withdrawal of assistance should there be a breach of the bilateral agreement. Agreement between the United Nations and Cambodia, *supra* note 214, art. 28 (May 22, 2023).

216. Called by some the "treaty plus" model, the ECCC model has risen to the fore in debates concerning the basis of the General Assembly's authority to create a special tribunal to try President Putin for the crime of aggression. *See, e.g.*, Carsten Stahn, *From 'United for Peace' to 'United for Justice?': Reflections on the Power of the United Nations General Assembly to Create Criminal Tribunals or Make Referrals to the ICC*, 55 CASE W. RES. J. INT'L L. 251, 267 (2023); *see also* Jennifer Trahan, *U.N. General Assembly Should Recommend Creation of a Crime of Aggression Tribunal for Ukraine: Nuremberg is Not the Model*, JUST SECURITY (Mar. 7, 2022), https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model.

217. Stahn, *supra* note 216, at 269–70.

218. HUMAN RIGHTS WATCH, WORLD REPORT 2017: SYRIA: EVENTS OF 2016 2 (2017) https://www.hrw.org/world-report/2017/country-chapters/syria?gad_source=1&

without life-saving assistance, more than 117,000 people had been detained or disappeared and there were widespread reports of rampant torture and ill-treatment of persons held in Syrian detention facilities.[219] Repeated efforts to get the Security Council to take action failed, due to repeated vetoes of draft resolutions by Russia and China.[220]

Proposal. On December 21, 2016, in response to the inaction and political deadlock in the Security Council, the General Assembly adopted a draft resolution to establish an International, Impartial, and Independent Mechanism ("IIIM") to assist in the investigation and prosecution of those responsible for the most serious crimes under international law committed in Syria since March 2011. The Resolution, proposed by Christian Wenaweser, Liechtenstein's Representative to the United Nations,[221] established a novel investigative mechanism to "collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings . . . in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes."[222] Unlike the ECCC and SCSL, the mechanism was created over the territorial State's objection and its mandate allowed investigations of possible crimes "to a prosecution standard."[223]

Contestation Leading to a New Shared Interpretation. A small number of States, led by Russia and Syria, opposed the creation of the IIIM, arguing that the mechanism was "unprecedented" in the U.N. system, violated the Charter, and undermined the sovereignty of Syria.[224] During the debate, Syria opposed the IIIM's creation as an interference with its sovereignty and a

gclid=Cj0KCQiAtOmsBhCnARIsAGPa5yZ-AhupWa2tpAMLlfKcJ7A_5wCj-aD9Rzgd5-KqNINkUXEbCxR0YDYaAuf-EALw_wcB.

219. *Id.*

220. *See, e.g.*, Meetings Coverage, Security Council, Security Council Fails to Adopt Two Draft Resolutions on Syria, Despite Appeals for Action Preventing Impending Humanitarian Catastrophe in Aleppo, SC/12545 (Oct. 8, 2016); *see also* Anni Pues, *The UN General Assembly as a Security Actor: Appraising the Investigative Mechanism for Syria*, 25 MAX PLANCK Y.B. U.N. L. 553, 564 (2022) (noting that by December 2016, Russia had vetoed six and China five draft resolutions on the war).

221. Letter from Christian Wenaweser, to all Permanent Representatives/Legal Advisers, Re: Draft UN General Assembly Resolution on Establishment of Accountability Mechanism for Syria (Dec. 15, 2016).

222. G.A. Res. 71/248, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, ¶ 4 (Dec. 21, 2016) (recognizing the work of the Independent International Commission of Inquiry on the Syrian Arab Republic (created by Human Rights Council Resolution S-17/1) and the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, and noting the impunity for serious violations of international human rights and humanitarian law).

223. Pues, *supra* note 220, at 553, 556.

224. U.N. GAOR, 71st Sess., 66th plen. mtg., at 25, U.N. Doc A/71/PV.66 (Dec. 21, 2016).

contravention of Article 12(1) of the U.N. Charter.[225] Russia complained that "the General Assembly acted *ultra vires*—going beyond its powers as specified in . . . the Charter of the United Nations."[226] It claimed that the mechanism vested powers that were prosecutorial in nature and that "prosecutions, criminal investigations and support of criminal investigations are not among the functions of the General Assembly. It cannot create an organ that has more powers than the Assembly itself."[227]

The legal arguments raised in opposition to the IIIM were unsuccessful. States that supported creating the mechanism made clear that there was an urgent need for the General Assembly to address impunity by taking a decisive step to ensure there would be accountability for crimes committed in the Syrian war.[228] In response to Russian opposition, Liechtenstein reaffirmed that the purpose of the mechanism was not to prosecute, but to "facilitate and expedite future criminal proceedings, without prejudice to where and when such proceedings will take place."[229] In response to Syria's legal argument, the President of the General Assembly ruled that the Resolution creating the IIIM fell within the competence of the General Assembly because "Article 12 [of the Charter] does not prevent the General Assembly from generally considering, discussing and making recommendations on items that are on the agenda of the Security Council."[230] The creation of the IIIM was viewed as a key step to preserve evidence and signaled members' intolerance of impunity.[231]

Consolidation. Since its founding, the IIIM has enhanced the standard of investigation and served as a central repository, working with States and private actors to facilitate efforts to prosecute those responsible for international crimes in Syria.[232] The mechanism received 239 requests for assistance between 2018 and 2022, a number that has increased each year, and has served fifteen competent jurisdictions.[233] While the IIIM initially had to raise voluntary contributions to fund its work, the General Assembly voted to

225. *Id.* at 21–22.

226. Permanent Mission of the Russian Federation to the United Nations, Note verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General, at 1, U.N. Doc A/71/793 (Feb. 8, 2017); United Nations General Assembly Session 71, *supra* note 224, at 23.

227. Permanent Mission of the Russian Federation to the United Nations, *supra* note 226, at 1.

228. *See* United Nations General Assembly Session 71, *supra* note 224, at 19, 30–31, 34.

229. *Id.* at 19.

230. *Id.* at 28–29.

231. *See, e.g.*, *id.* at 30–31; U.N. Secretary-General, *Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, ¶¶ 44–45, U.N. Doc. A/71/755 (Jan. 19, 2017).

232. Pues, *supra* note 220, at 570–76.

233. Report of the IIIM Syria, IIIM Strategic Plan 2023-2025, at 6 (2023).

include it in the regular budget of the United Nations for 2020.[234] In 2022, it received $17.1 million in regular budget funds and an additional $7.1 million in voluntary contributions.[235]

Beyond the rapid growth and strengthening of the mechanism itself, the IIIM has also had a catalyzing effect leading to the subsequent establishment of similar investigative mechanisms within the U.N.[236] In September 2017, the Security Council adopted Resolution 2379 establishing the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL ("UNITAD"),[237] and in September 2018, the U.N. Human Rights Council acted to address the serious international crimes and human rights situation in Myanmar by creating the Independent Investigative Mechanism for Myanmar.[238] Like the IIIM, the mechanism for Myanmar is tasked with collecting, preserving, and analyzing evidence and preparing case files to share with national, regional, and international courts or tribunals to enable and support prosecutions of perpetrators.[239] Thus, the General Assembly's establishment of the IIIM provides another example of how its role in maintaining international peace and security has evolved over time.

9. The Veto Initiative (2022)

Trigger. The immediate trigger for the Veto Initiative was the war in Ukraine, but it also grew out of long simmering frustration with the Security Council—frustration that had not only blocked a response to the war in Ukraine but had also prevented any effective response to the war in Syria.

Proposal. Proponents of reform put forward General Assembly Resolution 76/262, which would come to be known as the "Veto Initiative." The Resolution provided that whenever a veto is cast in the Security Council, the General Assembly would meet within ten working days (provided that it does not meet in an emergency special session on the same issue) and "hold a debate on the situation as to which the veto was cast."[240] This proposal built on the pre-existing Uniting for Peace Resolution, which allows for the General Assembly to take up matters when a permanent member of the Security Council blocks action. The key innovation in the Veto Initiative was to make that referral automatic.

Contestation Leading to a New Shared Interpretation. Advocates of the proposal explained that they aimed to strengthen the General Assembly in the face of Security Council paralysis in order to enable the United Nations as a

234. This change was made pursuant to G.A. Res. 74/262 (Dec. 27, 2019).

235. Report of the IIIM Syria, *supra* note 233, at 18.

236. Pues, *supra* note 220, at 571–74.

237. S.C. Res. 2379 (Sept. 21, 2017).

238. UNITED NATIONS, Independent Investigative Mechanism for Myanmar, https://iimm.un.org.

239. *Id.*

240. G.A. Res. 76/262 ¶ 1 (Apr. 26, 2022).

whole to more effectively achieve the purposes and principles of the Charter. Representing the draft resolution, Liechtenstein Representative Ambassador Christian Wenaweser explained that the "membership, as a whole, should be given a voice when the Council is unable to act . . . there has never been a stronger need for innovation in order to secure the central role and voice of the United Nations in this respect."[241] The Resolution would allow the General Assembly itself to play a greater role in matters of international peace and security when the Security Council failed. Qatar's Representative Alya Ahmed Saif Al-Thani, voicing her support, stated that the Resolution would "promote the Assembly's role in accordance with its mandate, which gives it powers and authority in matters related to the maintenance of peace and security," and expressed hope that it would mark "a step forward in strengthening the United Nations system in cases where it cannot stand idly by and should respond effectively."[242]

Syria's representative, though ultimately supporting the initiative, opposed its use to curb or shame use of the veto. He argued that "the right to use the veto has represented a cornerstone in the international balance of Powers, protecting the international order from arbitrary decisions taken by one or more countries."[243] He noted, too, that the former Soviet Union had cast a veto in 1946 supporting the independence of Syria in objection to the extension of existing U.N. Mandates to include Syria. The representative of Belarus similarly signaled concern, noting that "[t]he use of veto, enshrined in the United Nations Charter, serves as an important instrument to develop balanced decisions. Talk of direct discussions based on a text is premature, given that negotiations have not reached maturity, he said, citing a proverb: 'Don't rush ahead.'"[244]

Nonetheless, in April 2022, the U.N. General Assembly adopted the landmark resolution by consensus and without a recorded vote.[245]

Consolidation. As of November 2024, the new Resolution has been in effect for over two years. In this time, there have been fourteen vetoes cast in the Security Council.[246] The Veto Initiative has prompted the General

241. Press Release, General Assembly, General Assembly Adopts Landmark Resolution Aimed at Holding Five Permanent Security Council Members Accountable for Use of Veto, U.N. Press Release GA/12417 (Apr. 26, 2022), https://press.un.org/en/2022/ga12417.doc.htm (quoting Ambassador Wenaweser).

242. *Id.* (quoting Ambassador Al-Thani).

243. Press Release, General Assembly, General Assembly Holds First-Ever Debate on Historic Veto Resolution, Adopts Texts on Infrastructure, National Reviews, Council of Europe Cooperation, U.N. Press Release GA/12500 (Apr. 26, 2023) (summarizing remarks of Ambassador Bassam Sabbagh).

244. *Id.* (summarizing the remarks of Ambassador Siarhei Makarevich).

245. Press Release, General Assembly, General Assembly Adopts Landmark Resolution Aimed at Holding Five Permanent Security Council Members Accountable for Use of Veto, U.N. Press Release GA/12417 (Apr. 26, 2022).

246. *See* Dag Hammarskjöld Library, U.N. Security Council Meetings & Outcomes Tables, https://research.un.org/en/docs/sc/quick (underlining the frustration over certain

Assembly to hold debates on each of the fourteen vetoes.[247] In fact, by the October 12, 2022 General Assembly debate, "the new accountability mechanism—that had been celebrated in June—was barely an issue."[248] In September 2023, Dennis Francis, the President of the General Assembly, underscored that "[t]he veto initiative has opened the door for a new form of collaboration and accountability" between the Assembly and Security Council.[249]

The Veto Initiative is therefore now well established as an accepted procedural mechanism forcing States that veto a Security Council resolution to explain themselves to the General Assembly.[250] In April 2023, at the one-year anniversary of the Resolution, the General Assembly held its first ever formal debate on the use of the veto in the Security Council and discussed the impact of the Resolution as a transparency and accountability mechanism.[251] While discussing the historic resolution and its impact, Csaba Kórösi, former President of the General Assembly, emphasized that "vetoes should always remain the very last resort" and many member States expressed their support for continued efforts to constrain the use of the veto through non-amendment reforms, such as the France-Mexico initiative to have the P5 members voluntarily suspend the use of their veto in the Security Council in situations of mass atrocities and bolstering the abstention requirement in Article 27(3),

members persistently using vetoes in the Security Council, which gave rise to the Veto Initiative, the Russian Federation has cast a veto in all five instances).

247. *See, e.g.*, Press Release, General Assembly, General Assembly Holds Landmark Debate on Security Council's Veto of Draft Text Aimed at Tightening Sanctions against Democratic People's Republic of Korea, U.N. Press Release GA/12423 (June 8, 2022); U.N. G.A.O.R., 76th Sess., 96th plen. mtg. at 1–14, U.N. Doc. A/76/PV.96 (July 21, 2022); U.N. General Assembly: Eleventh Emergency Special Session of the General Assembly (Resumed) - 14th Plenary Meeting (Oct. 12, 2022), https://webtv.un.org/en/asset/k1a/k1acs2l80m k1acs2l80m (recording debate which took place during the Assembly's resumed eleventh emergency special session after Russia vetoed the Security Council Resolution condemning the Russian Federation's referendums preceding Moscow's proclamation of annexation of four occupied Ukrainian territories); Press Release, General Assembly, In Meeting Following Russian Federation's Veto of Cross-Border Aid Text, General Assembly Speakers Highlight Humanitarian Consequences for Millions, U.N. Press Release GA/12517 (July 19, 2023); Press Release, General Assembly, Meeting After Russian Federation's Veto of Sanctions Text, General Assembly Speakers Consider Consequences for Stability in Mali, U.N. Press Release GA/12528 (Sept. 11, 2023); Press Release, General Assembly, Meeting Two Weeks after United States Vetoes Security Council Resolution Recommending Full UN Membership for Palestine, General Assembly Debates Ramifications, U.N. Press Release GA/12595 (May 1, 2024); *see also* Adrian Steube*, The Veto Initiative's First Tests: Is the Step Toward Reform Working?* (Aug. 2, 2022), https://www.passblue.com/2022/08/02/the-veto-initiatives-first-tests-is-the-step-toward-reform-working.

248. Groupe D'Études Géopolitiques, *The War in Ukraine and the Curtailment of the Veto in the Security Council*, https://geopolitique.eu/en/articles/the-war-in-ukraine-and-the-curtailment-of-the-veto-in-the-security-council.

249. U.N. General Assembly GA/12528, *supra* note 247.

250. *Id.*

251. U.N. Press Release GA/12500, *supra* note 243.

which stipulates that a member that is party to a dispute shall abstain from voting.[252]

As the next Part will discuss, there are already efforts to begin to build on this innovation.

IV. A New Approach to Change at the United Nations

As we have seen, despite the near-complete absence of formal reform of the U.N. Charter, there has been regular and significant non-amendment reform at the United Nations. This Part begins by assessing what we can learn from the history of non-amendment reform. It then outlines four current opportunities for non-amendment reform. And, finally, it steps back to consider what this new perspective on reform at the United Nations teaches us about the future role of the organization in addressing evolving global challenges.

A. *Lessons Learned*

1. Formal Reform is the Exception; Non-Amendment Reform is the Rule

The previous parts of this article teach us a fundamental lesson about the possibility for change at the United Nations: formal reform is the exception; non-amendment reform is the rule. Significant reform has not—and almost certainly will not—come through formal amendment. Instead, reform, when it happens, takes place through non-amendment changes. Indeed, as Part III demonstrates, non-amendment reforms have repeatedly taken place since the very start of the organization. Challenges have been met time and again by innovations in the United Nations. Even those matters that are most fraught—including the deployment of troops—have seen radical change over time.

This is true of significant innovations, some of which we detail in Part III. It is also true on a more modest scale. For example, procedural changes are often made that are unlikely to be detected from the outside but may make a real difference on the inside. Consider, for example, the "silence procedure." The Sixth Committee, the primary forum for the consideration of legal questions in the General Assembly, generally adopts its resolutions by consensus. In the last decade, it has developed a procedure that makes this much easier: A draft of a decision or resolution is circulated to all member States, and any member State can object before a specified deadline, generally not less than seventy-two hours. If there is no objection—silence—then the decision or resolution is adopted. This "silence procedure," initially developed informally, was adopted by the General Assembly more broadly

252. *Id.* (discussing members arguments for limiting the use of the veto, and others that the veto power should be extended to other members of the Security Council).

in 2020, in response to the COVID-19 pandemic.[253] In November 2020, the General Assembly further consolidated this procedural change by adopting a draft decision that provides for using the silence procedure in future exceptional circumstances when an in-person meeting is not possible.[254] This draft resolution continued to innovate by also providing for an electronic means of voting when silence is broken or a proposal is put to a vote without an in-person meeting, by adopting a draft decision.[255] These kinds of procedural reforms are not specified in the Charter, but develop over time through practice, and they can significantly ease the work of the United Nations.

Non-amendment reform is part of the daily lived experience of those who work at the United Nations. It comes to the attention of those of us outside the United Nations when more significant changes take place that would otherwise call for a Charter amendment. In those cases, it is common to see those innovations as one-off revisions rather than what they are: part of the pattern of ongoing innovation that allows the United Nations to respond to new challenges, big and small, over time.

2. Reform Begets Reform

This leads to the second lesson: Reform begets reform. For almost every non-amendment reform we trace in Part III, the process of consolidation led to extension of the reform over time. Moreover, several of the non-amendment reforms we discuss build on prior non-amendment reforms, extending and strengthening the prior innovations. What may not originally register attention as a significant advancement creates precedential support for later, more significant reforms.

For example, the creation of ICTY and ICTR through Security Council Chapter VII powers was an innovation in its own right. But that innovation then provided a foundation for further innovation and reform—in this case, for the creation of the SCSL on recommendation of the Security Council acting under Chapter VI, not Chapter VII, and the ECCC on recommendation of the General Assembly. In this way, the United Nations has been the site of innovation leading to a number of alternative international criminal mechanisms.[256]

We see a similar phenomenon of reform begetting reform when we examine the evolution of Chapter VI peacekeeping operations. The initial innovation was the decision to allow the deployment of troops for

253. Interview by Oona Hathaway with UN Employee, *supra* note 85; INT'L INST. FOR SUSTAINABLE DEV., *UN Bodies Formalize Silence Procedure for Decision-making During Pandemic* (Apr. 17, 2020), https://sdg.iisd.org/news/un-bodies-formalize-silence-procedure-for-decision-making-during-pandemic.

254. U.N. GAOR, 75th Sess., 26th plen. mtg. at 1–12, U.N. Doc. A/75/PV.26 (Nov. 13, 2020).

255. General Assembly, Procedure for Decision-making in the General Assembly When an In-person Meeting Is Not Possible, ¶¶ (d)-(e), U.N. Doc. A/75/L.7/Rev.1 (Nov. 6, 2020).

256. *See, e.g.*, *supra* Subsections III.B.5 & 6.

peacekeeping under Chapter VI. The next step was the gradual expansion of these missions from strictly passive measures into increasingly active ones, the step from peacekeeping to peacemaking in what are often referred to as Chapter VI plus operations. Innovation can be trans-substantive as well: The creative exercise of consent-based peacekeeping operations formed part of the legal basis of the Expert Group's recommendation for the creation of a Chapter VI court, eventually manifesting in the SCSL.[257]

Long-term non-amendment reform is therefore a story of incremental progression, in which each new innovation provides a foothold for yet another stride forward. This process of stacking innovations one on top of the other enables increasingly progressive reforms. Over time, this process can generate fundamental organizational change.

3. The Growing Role of the General Assembly

This brings us to lesson three: the growing role of the General Assembly. Though the P5 veto remains a source of frustration, over time there have been a number of reforms that have lessened the P5's stranglehold over the United Nations. Many of the reforms outlined in Part III are non-amendment reforms that have strengthened the General Assembly's power and created tools for action in cases when the Security Council is paralyzed.

The adoption of the United Nations Administrative Tribunal through a recommendation of the General Assembly was a first step toward expanding the General Assembly's role. When that tribunal was challenged, the ICJ affirmed that the General Assembly had the power to create a tribunal competent to render judgments binding on the United Nations.[258] In doing so, the ICJ made clear that the General Assembly not only possesses the powers expressly provided in the Charter; it also possesses those powers that, "though not expressly provided in the Charter," are implied "as being essential to the performance of its duties."[259] This holding provided a foundation on which a broader role for the General Assembly could be built.

This potential manifested with the Uniting for Peace Resolution. That Resolution expressly allows the Security Council to vote to refer a situation that threatens international peace and security to the General Assembly when the permanent members of the Council are deadlocked. This acknowledges the failure of the Security Council to live up to its obligation to protect international peace and security and provides a tool for the General Assembly to act in its stead. As we have seen recently, that can have powerful consequences: The General Assembly resolutions condemning Russia, calling for the end to the war, and recommending the establishment of a registry of

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257. *See supra* Subsection III.B.6.

258. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47 (Feb. 15).

259. *Id.*

claims have made a real difference in the war, helping to clarify the isolation of Russia.

The creation of the ICTY and ICTR by the Security Council established the capacity of the United Nations Security Council to create international criminal tribunals. That then set the foundation for the creation of the SCSL without relying on Chapter VII authorities and, then, with the creation of the ECCC, the extension of that authority to the General Assembly. That latest step builds on the earlier Administrative Tribunal, as well. It is now firmly established that while the Security Council can establish an international criminal tribunal, the General Assembly can approve the means by which to create an administrative or treaty-based tribunal as well—a development of importance today, as the next Section will show.

Finally, the Veto Initiative builds on the Uniting for Peace Resolution and specifically provides that whenever a veto is cast in the Security Council, the General Assembly will meet within ten days and "hold a debate on the situation as to which the veto was cast."[260] This again shifts power to the General Assembly, making it clear that a P5 veto will never signal the end of the discussion. Rather, the General Assembly will meet to discuss the matter and may decide to act within the scope of its own powers.

Thus, we see that non-amendment reform has played an important role in expanding the authority of the General Assembly. The P5 members retain exclusive authority to authorize Chapter VII enforcement actions. But the General Assembly can act to secure the purposes of the United Nations when the Security Council fails to do so. This is an important evolution for the organization. The Charter would seem to cast in amber the power dynamic that existed at the close of World War II. If the United Nations was entirely incapable of evolving beyond that formal structure, it would be doomed to failure. But the mechanisms allowing for the General Assembly to play a greater role allows more States to have a say in the United Nations—and for their actions to have consequences. For a global organization devoted to maintaining the peace, this evolution is not only dictated by principles of equity and fairness, it is essential to its relevance and, indeed, survival.

B. *Current Opportunities for Non-Amendment Reform*

The current conflicts in Gaza and Ukraine have already served as a trigger inspiring a number of proposals for reform that are currently in the process of contestation. The conflicts have been a generative trigger in part because they have exposed fundamental weaknesses of the United Nations. The United States, a permanent member of the Security Council, has used its veto to oppose U.N. action on the Israel-Gaza war. Moreover, the manifestly illegal war in Ukraine has been waged by Russia, a permanent member of the Security Council. Given the role of the P5 members at the United Nations, this is a perfect recipe for paralysis. That, in turn, threatens to render the United Nations

260. G.A. Res. 76/262 (Apr. 26, 2022).

irrelevant in the face of significant challenges to its *raison d'etre*—maintaining and sustaining international peace and security.

Non-amendment reform has already played a key role in the United Nations' efforts to respond to the war in Ukraine. The Uniting for Peace Resolution was activated for the first time in decades when Russia's veto stymied the Security Council. Acting under the Resolution, the General Assembly repeatedly condemned Russia, expelled it from the Human Rights Council, and created a registry of damages caused by the war.[261] The response also led to a procedural innovation—the Veto Initiative—automatically placing any vetoed matter on the General Assembly's agenda.[262]

Here we outline a set of proposals for non-amendment reform that would allow the United Nations to respond more effectively to global threats to international peace and security where the Security Council is unable to act.[263] Whether these new proposals will lead to a new shared interpretation remains to be seen. But viewing these proposals against the historical backdrop helps us see that what may seem to be radical proposals for change are simply efforts to do what generations before have done—use non-amendment reforms to meet the new challenges faced by the United Nations.

1. Pass a Framework Resolution of Automatic Consequences for Grave Charter Violations

The success of the Liechtenstein Veto Initiative offers valuable insights that can be applied to future non-amendment reform proposals. In particular, it highlights the benefits of a procedural framework that incorporates automatic procedural triggers. Both the Veto Initiative and the Uniting for Peace Resolution operate in this way—they are principle-affirming framework

261. *See supra* Subsection III.B.4; *see also* G.A. Res. ES-11/1, *supra* note 12; G.A. Res. ES-11/L.7, *supra* note 12; G.A. Res. ES-11/3 (Apr. 8, 2022); G.A. Res. ES-11/L.6, *supra* note 12.

262. *See supra* Subsection III.B.9.

263. This is a non-exhaustive list. Other proposals include reenergizing the use of Article 99, which allows the Secretary-General to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security," U.N. CHARTER art. 99; discouraging, or perhaps even prohibiting, the use of the veto in cases of atrocity, see, e.g., Trahan, *supra* note 128; giving the General Assembly the power to override a veto when there is a single P5 veto cast, see U.N. SECRETARY GENERAL, *Questions of Equitable Representation on and Increase in the Membership of the Security Council, Addendum,* at 7–8, U.N. Doc. A/48/264/Add.2 (Aug. 27, 1993) (restricting the use of the P5 veto); *see* Egypt, *Question of the Veto: Working Paper by Egypt on Behalf of the Movement of Non-Aligned Countries*, U.N. Doc. A/AC.247/1996/CRP.9, GLOB. POL'Y F. (May 20, 1996), https://archive.globalpolicy.org/security/reform/egypt.htm; Mexico, *Proposed Amendments to the Charter of the United Nations: The Question of the Veto*, U.N. Doc. A/AC.247/1996/CRP.7, GLOB. POL'Y F. (May 13, 1996), https://archive.globalpolicy.org/security/reform/mexico.htm; Special Comm. on the Charter of the United Nations and on the Strengthening of the Role of the Org., Discussion on the application of Article 51, in the light of its interrelation with Article 2(4), of the Charter of the United Nations, U.N. Doc. A/AC.182/L.159 (Nov. 22, 2022); Report of the Special Comm. on the Charter of the United Nations and on the Strengthening of the Role of the Organization, ¶ 14, U.N. Doc. A/79/33 (2024).

resolutions that trigger defined consequences without requiring further action from the General Assembly. The Veto Initiative has been especially effective because it defines both a context-neutral procedural trigger—the veto of a Security Council resolution—and a specific defined automatic consequence—the requirement that the President of the General Assembly convene a formal meeting within ten working days. The General Assembly could build on this innovation by passing a resolution that likewise puts in place automatic consequences that follow from a finding by the General Assembly that a member State has committed a grave violation of the U.N. Charter.[264]

The General Assembly could pass a resolution that would provide specific, defined consequences that automatically follow when a State is found to have violated the U.N. Charter by engaging in an unlawful use of force in violation of Article 2(4).[265] The finding could be made by the General Assembly itself or, perhaps preferably, by a competent, quasi-judicial expert body.[266] (The necessity of a quick decision is likely inconsistent with referral to the ICJ, unless there was a novel procedure for highly expedited consideration.) An advantage of delegation to an expert body is that the process of finding a violation would be less political. The expert body could also be charged with monitoring the situation and determining when the State has come back into compliance and thus sanctions should be lifted. If the matter is delegated, the expert body could be required to periodically report to the General Assembly, which could overturn its decisions with a two-thirds (or majority) vote—thus retaining some measure of control.

A State that is found to have committed a grave violation of the Charter would lose the benefits of membership in the United Nations.[267] For example, a State could be suspended from a Committee (e.g., Fifth Committee), an organ of the United Nations (e.g., ECOSOC), or a subsidiary organ

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264. The proposal described in this subsection grows out of conversations with Ambassador Alexander Marschik, Permanent Representative of Austria to the United Nations. The Permanent Mission of Austria and the Yale Law School Center for Global Legal Challenges, which Oona Hathaway directs, are participating in a three-year collaboration on the UN Security Council and its relation to the rule of law. *See also* Alexander Marschik, *Improving the UN Response to Aggression and Mass Atrocities*, *in* EMPOWERING THE SECURITY COUNCIL: REFORMS TO ADDRESS MODERN THREATS (Mona Ali Khalil & Floriane Lavaud eds., 2024) (discussing automatic sanctions for Charter violations).

265. As an important matter, this resolution would be made by a two-thirds majority of members present and voting. U.N. Charter art. 18, ¶ 2.

266. It would be critical to ensure some level of procedural justice for the accused, including the ability to present and dispute facts and to defend its actions. If a General Assembly resolution were to be used, such a resolution, like other UNGA decisions on "important questions," would require a two-thirds majority of members present and voting. *See* U.N. Charter art. 18, ¶ 2.

267. The General Assembly has implied powers to that "though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." Effects of Awards of Compensation by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 53, at 56 (July 13).

(e.g., Board of Auditors). A State could lose the right to speak at the next General Debate of the General Assembly during the high-level week or be suspended from meetings held on U.N. grounds, including informal bilateral meetings. An offending State could face a reduction in the number of positions allocated to it under the formula for equitable geographic distribution.[268] It could also lose any funding it receives from U.N. agencies. Indeed, a State could even face suspension of its membership altogether.[269] The automaticity of this proposal would ensure that consequences would be consistently applied to member States regardless of the political whims of the moment or the influence of powerful members.[270]

Rather than put in place all the consequences at once, the new system would be most effective if it set and defined escalating consequences that would automatically go into effect over time. Incremental measures could be implemented based on predefined timeframes—for example, escalating each month—or based on specific events—for example, to coincide with reporting deadlines. The gradual and incremental ratcheting up of consequences would avoid using all tools of persuasion up front. It would also make it more likely that a violation would be identified when it occurs—if the initial penalty is modest and the offending State is offered off ramps along the way, States are more likely to support finding a violation at the outset.

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268. U.N. Charter art. 101, ¶ 3 ("The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.").

269. U.N. Charter art. 18, ¶ 2 ("Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include . . . the suspension of the rights and privileges of membership, the expulsion of members . . . ."). Indeed, the General Assembly suspended South Africa in 1974 over its system of apartheid. Kathleen Teltsch, *South Africa Is Suspended By U.N. Assembly, 91-22*, N.Y. TIMES, Nov. 13, 1974, at 3. That decision was made through a stand-alone vote of the General Assembly. The proposal here is to create a system of automatic escalating consequences that could include suspension as a penalty.

270. Consistent treatment of parties through fair and impartial procedures has long been recognized as a core component of procedural justice in domestic legal systems. Adherence to procedural justice principles has been quantitatively proven in that setting to be an integral part of the perceived legitimacy of adjudicative bodies. Tom R. Tyler & Justin Sevier, *How do the Courts Create Popular Legitimacy—The Role of Establishing the Truth, Punishing Justly, and /or Acting through Just Procedures*, 77 ALB. L. REV. 1095, 1112 (2013). The U.N. is a political, not adjudicative body, but this concern is nevertheless responsive to wide criticism of its inconsistent reactions or "double standards". *See, e.g.*, Dina Shelton, *International Human Rights Law: Principled, Double, or Absent Standards*, 25 L. & INEQ. 467, 469–70 (2007) (highlighting decades of criticism that the U.N. "has a double standard when it comes to enacting and enforcing internationally recognized human rights."); Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AM. J. INT'L L. 811 (1984) ("No indictment of the United Nations has been made more frequently or with greater vehemence than that it singles out [some states] for obloquy, while winking at far worse excesses committed by [others].").

While States could also opt to tie their own sanctions—for example, trade sanctions—to the finding of a violation, it is important for this proposal that the consequences for the violation be consequences that the United Nations can carry out itself. First, the General Assembly does not have enforcement powers over States. Hence if it were to rely on States to put in place sanctions, there is little guarantee that they would do so. Limiting the sanctions to those the United Nations can itself execute is thus essential to ensure predictable and automatic consequences. Second, there is a certain logic to the proposal: A State that violates the core rule of the U.N. Charter, the prohibition on the use of force, should not enjoy the full benefits of membership in the United Nations. The longer it violates that norm and thus inflicts harm on the United Nations system, the fewer benefits of membership it should enjoy.

This proposal is not all that different from an existing automatic penalty for a violation of U.N. rules: If a member State fails to pay its U.N. dues, its right to vote is suspended.[271] The automatic suspension of voting rights under Article 19 has been applied remarkably consistently throughout the Organization's history.[272] An expert body, the Committee on Contributions, advises the General Assembly on the apportionment of organizational expenses to the

271. Article 19 of the U.N. Charter enforces automatic procedures for suspending the voting rights in the General Assembly for delinquent states "if the amount of its arrears equals or exceeds the amount of contributions due from it for the preceding two full years." U.N. Charter art. 19.

272. This is with the notable exception of the contentious practice of "selective withholding" from the financial contributions to certain U.N. activities, which grew out of the refusal of France and the Soviet Union to pay for peacekeeping operations in the Middle East and former Belgian Congo in the 1960's. Repertory of Practice of United Nations Organs Supp. No. 3 (1959-1966), Vol. I, Article 19, ¶ 3. Despite the ICJ's confirmation in its Opinion on Certain Expenses of the United Nations that these costs were legitimate expenses of the organization under Article 17 of the Charter, France and the Soviet Union continued to refuse payment and soon had arrears that exceeded the threshold for forfeiture of the vote under Article 19. *Id.* ¶ 13. Acknowledging that Article 19 articulated a procedure of *automatic suspension* in these circumstances, the General Assembly nevertheless avoided applying the suspension rule in this case on a narrow theory of the right of states to "make an exception to the principle of collective financial responsibility with respect to certain United Nations activities." U.S. Dep't of State, Office of the Historian, 365. Circular Telegram from the Department of State to All Posts, in 33 Foreign Relations of the United States, 1964–1968, Organization and Management of Foreign Policy; United Nations (2004), https://history.state.gov/historicaldocuments/frus1964-68v33/d365; Frederic Kirgis, *United States Dues: Arrerages in the United Nations and Possible Loss of Vote in the U.N. General Assembly*, ASIL INSIGHTS (July 3, 1998), https://www.asil.org/insights/volume/3/issue/8/united-states-dues-arrearages-united-nations-and-possible-loss-vote-un. Despite the contested legality of waivers of collective financial responsibility, all members—including the powerful P5—remain subject to the automatic suspension of voting rights in the General Assembly under the terms of Article 19. *See, e.g.*, U.S. Gov't Accountability Off., NSIAD-98-201BR, United Nations: Financial Issues and U.S. Arrears (June 18, 1998), https://www.govinfo.gov/content/pkg/GAOREPORTS-NSIAD-98-201BR/html/GAOREPORTS-NSIAD-98-201BR.htm (warning U.S. Congress that failing to apportion sufficient funds in 1998 would put the United States "sufficiently in arrears to lose its General Assembly vote in January 1999").

member States and on actions to suspect for nonpayment.[273] The procedure is designed to be blind to the delinquent State's power, influence, or Security Council membership.[274]

The automatic nature of the proposed initiative has two key benefits. First, the principle-affirming framework will be established *before* the political complications of individual contexts arise. This enables the General Assembly to consider what is best for the institution, rather than make a one-off decision based on the political impulses of the moment. Then, when individual conflicts later arise, the General Assembly can rely upon the procedural structure that already exists, and it need not depend on political will in the moment to reaffirm its earlier-stated principles. In short, this design resets the default of the General Assembly to *action*, regardless of political will, rather than *inaction.* Second, the impartiality of the automatic mechanism bolsters the transparency and consistency of enforcement and thus strengthens the organization's legitimacy.

While this proposal draws on the example of the Veto Initiative, there are some differences that may prove to be drawbacks. First, the Veto Initiative requires no action beyond the exercise of a veto to trigger consequences. The proposal here, however, requires a finding that there has been a violation of the U.N. Charter. Undeniably, the knowledge that consequences will follow may make a finding of a violation less likely.[275] This is a reason for relying

273. *See* U.N. General Assembly, *Rules of Procedure*, U.N. Doc. A/520/Rev. 20, at 44–45 (2022).

274. Repertory of Practice of United Nations Organs Supp. No. 11 (2010-2015), Vol. II, Article 19, ¶ 2; *see e.g.*, U.N. Secretary-General, Letter dated Jan. 8, 2024 from the Secretary-General addressed to the President of the General Assembly, U.N. Doc. A/78/707 (Jan. 8, 2024). The Secretary-General further updates the President of the General Assembly when states again become eligible. *See* U.N. Secretary-General, Letter dated Jan. 11, 2024 from the Secretary-General addressed to the President of the General Assembly, U.N. Doc. A/78/707/Add.1 (Jan. 11, 2024) (informing the President that Antigua, Barbuda, and the Islamic Republic of Iran made "payment necessary to reduce their arrears below the amount specified in Article 19 of the Charter").

275. The voting records for various General Assembly resolutions on Ukraine demonstrate the risk of losing support by member states when resolutions provide for concrete consequences, instead of mere repudiation. Early General Assembly resolutions that deplored Russia's aggression in Ukraine, without providing concrete consequences, received overwhelming support from member states. Meetings Coverage, General Assembly, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, GA/12407 (Mar. 2, 2022). Voting in favor of such resolutions was likely seen as a way for members to show support for Ukraine without much risk of severing ties with Moscow. In contrast, later General Assembly resolutions imposing concrete consequences faced a drop off in support from members. UN General Assembly Votes to Suspend Russia from the Human Rights Council, UN NEWS (Apr. 7, 2022), https://news.un.org/en/story/2022/04/1115782; Meetings Coverage, General Assembly, General Assembly Adopts Text Recommending Creation of Register to Document Damages Caused by Russian Federation Aggression Against Ukraine, Resuming Emergency Special Session, GA/12470 (Nov. 14, 2022); *see* Richard Gowan et al., *U.N. Votes Reveal a Lot About Global Opinion on the War in Ukraine*, INT'L CRISIS GRP. (Feb. 21, 2023), https://www.crisisgroup.org/global/un-votes-reveal-lot-about-global-opinion-war-ukraine (discussing that

on an expert body rather than the General Assembly itself to make the determination. While there is no way to eliminate politics from a consequential decision, relying on appointed experts could dilute the impact of politics. Moreover, as noted earlier, the use of escalating sanctions is meant to make the initial decision less consequential and thus less freighted.

Another concern arises from the "outcasting" effect of this proposal. While the Veto Initiative puts in place procedural consequences, this proposal entails substantive ones. Outcasting is a potent tool of international legal enforcement. It "involves denying the disobedient the benefits of social cooperation and membership"[276]—in this case, the benefits and privileges of membership in the United Nations. However, outcasting sanctions are an exhaustible resource—there is a finite number of cooperative benefits that can be withdrawn. Once those benefits are exhausted, there is the danger that the State in question could decide to abandon the cooperative enterprise altogether.[277] The system of sanctions must therefore be carefully managed. There must also be a clear mechanism for rescinding sanctions, giving the State a clear path to rejoining the fold.

This brings us to the key impact of this proposal; while the General Assembly undeniably has the ability to bring harsh consequences on violating member States, the expectation is not that these consequences will suffice on their own to deter or halt acts of aggression, especially by powerful States—just as the Veto Initiative cannot *stop* P5 members from wrongfully exercising the veto in pursuit of narrow State interests. Instead, the point is both to (1) generate deliberation in the General Assembly around the wrongfulness of grave violations and (2) elevate the General Assembly's ability to fulfill its subsidiary responsibility to maintain international peace and security when the Security Council fails to act.

2. Strengthen Chapter VI

Another potential non-amendment reform to improve accountability of the Security Council is to revive the expectation that States do not vote on a matter brought under Chapter VI if they are directly involved in the dispute. This proposal entails strengthening compliance with the Charter's abstention requirement in Article 27(3), which provides that "a party to a dispute shall abstain from voting."[278]

General Assembly voting data shows that "although the bulk of U.N. members have demonstrated sympathy for Ukraine, many want to avoid imposing concrete penalties on Russia through the General Assembly").

276. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252, 258 (2011).

277. *Id.* at 341.

278. U.N. Charter art. 27 ¶ 3. The issue was recently raised in the Security Council, albeit obliquely, on July 31, 2023, by the Ambassador from Ecuador, who stated, "Other draft resolutions were vetoed, due to a partial application of Article 27.3 of the UN Charter, which results in the 'veto' but also results in the obligation for the parties to a dispute 'to abstain from

A bit of background is helpful to understanding the proposal to resuscitate the abstention requirement in Article 27(3). As discussed earlier, at Yalta, Churchill and Roosevelt bowed to Stalin's insistence that each permanent member of the U.N. Security Council be granted a veto over any action under Chapter VII. In return, they won a concession from Stalin: Votes taken under Chapter VI, which relates to pacific settlement of disputes, would provide for a P5 veto, but the Charter would specify that a party to a dispute would abstain from voting.[279] Hence any member, including P5 members, would be expected not to vote on a Chapter VI matter in which they were directly involved, based on the age-old principle of *nemo judex in sua causa*—literally, "no one should be made a judge in their cause."[280]

In the early years of the Charter, some members abided by the provision.[281] But not all did. In 1946, the Soviet Union voted in the passage of a unanimous resolution pertaining to the Iran-USSR dispute, and again in 1948 wielded its veto to block a resolution regarding its invasion of Czechoslovakia.[282] Although obligatory abstention was raised a number of times in challenge to members' failure to abstain, States repeatedly ignored the provision. In 1978, the representative from France defended the French veto of a draft resolution to be adopted in response to the situation in Comoros in reference to this progressive reform, stating that he "could give a rather impressive list of precedents where . . . in cases completely analogous and similar to the one . . . of

voting.'" Discurso del Ecuador en la sesión informativa del Consejo de Seguridad sobre Amenazas a la Paz y la Seguridad Internacionales (Speech by Ecuador at the briefing of the Security Council on Threats to International Peace and Security) (July 31, 2023) (trans. Google Translate) (on file with authors).

279. *See* Hathaway & Shapiro, *supra* note 22, at 208.

280. *See* Jan Wouters & Tom Ruys, *Security Council Reform: A New Veto for New Century*, 44 MIL. L. & L. WAR REV. 139, 147 (2005).

281. The United Kingdom did not participate in voting on the Corfu Channel question. *See* U.N. SCOR, 2nd Sess., 122nd mtg. at 609, U.N. Doc. S/PV.122 (Mar. 25, 1947) (abstaining from participation in a vote on a draft resolution submitted by the UK); *see also* U.N. SCOR, 2nd Sess., 122nd mtg. at 727, U.N. Doc S/PV.127 (Apr. 9, 1947) (relying explicitly on Art. 27(3) in declining participation in the second vote on the same resolution). The UK also did not participate in voting on a number of draft resolutions with respect to the Egyptian question in 1947 under 27(3), all of which failed adoption for other reasons. *See* U.N. SCOR, 2nd Sess., 198th and 199th mtgs. at 2304–05, U.N. Doc. S/PV.198 (Aug. 28, 1947) (abstaining from voting on a proposed amendment and a Chinese resolution); U.N. SCOR, 2nd Sess., 201st mtg. at 2363, U.N. Doc. S/PV.201 (Sept. 10, 1947) (abstaining from voting a second time on the proposed amendment and Chinese resolution). In 1950, India abstained from voting in the India-Pakistan question. *See* U.N. SCOR, 5th Sess., 470th mtg. at 4, U.N. Doc. S/PV.470 (Mar. 14, 1950) (abstaining from voting on a draft resolution submitted by Cuba, Norway, the UK and the United States); U.N. SCOR, 5th Sess., 471st mtg. at 5–6, 11, U.N. Doc. S/PV.471 (Apr. 12, 1950) (abstaining from voting on the appointment of a U.N. special representative for India and Pakistan). In 1960, Argentina did not participate in a vote on whether Israel violated its sovereignty in capturing Eichmann on Argentine territory. U.N. SCOR, 15th Sess., 868th mtg. at 11, U.N. Doc. S/PV.868 (June 23, 1960).

282. Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1 (1970).

today [, where members] did not hesitate to use their veto, and cases where this right has never been challenged by anyone."[283]

While Article 27(3) has arguably become something of a dead letter, that development has not gone uncontested. Over the years, States[284] and even an ICJ judge (albeit in a personal capacity) have spoken out against disregard of the mandatory abstention requirement.[285] Several formal amendments have been unsuccessfully proposed.[286] Yet the impossibility of formal amendment reform of the Charter has all but ensured that these proposals have not, and in all likelihood never will, come to fruition.

Despite past failures, conditions may now be optimal for the General Assembly to pressure the Security Council to better enforce the abstention principle. In the wake of the recent success of the Veto Initiative, there is momentum in the General Assembly to tackle other reform initiatives. Indeed, the effort to revive and strengthen the Article 27(3) voting abstention provision came up in the General Assembly's first ever formal debate on the use of the veto in the Security Council—a debate that was held on the one-year anniversary of the Veto Initiative.[287] The Veto Initiative has also, by some accounts, already changed dynamics in both the General Assembly and the Security Council. It was noted in a panel event hosted by the Accountability, Coherence, and Transparency group ("ACT") in spring 2023, that the reform "had clearly changed the dynamic inside the Council."[288] General Assembly members have also shown a striking appetite for participating in the meetings convened under the Veto Initiative, which might be harnessed to resuscitate obligatory abstention under Article 27(3).[289]

The reform initiative to realign voting on Chapter VI resolutions has thus been triggered, growing—just as the successful Veto Initiative did—out of frustration with the Security Council. It only remains to be seen if and how the rest of the informal amendment process will unfold.

The General Assembly could trigger this process by adopting a resolution outlining an official interpretation of Article 27(3)'s key terms and

283. Jennifer Trahan, *Legal Issues Surrounding Veto Use and Aggression*, 55 CASE W. RSRV. J. INT'L L. 93, 140 (2023).

284. Israel raised Art. 27(3) after Kuwait failed to abstain from a vote pertaining to the situation in the Middle East. *See* U.N. SCOR, 2147th meeting, ¶ 81, U.N. Doc. S/PV.2147 (Jun. 12, 1979); Raised by Iran in 1983 in challenge to France and the U.S., *see* U.N. SCOR, 2466th meeting, ¶ 85, U.N. Doc. S/PV.2466 (Aug. 12, 1983); Raised by Libya in challenge to France, the U.K., and the U.S., see U.N. SCOR, 3033d meeting, U.N. Doc S/PV.3033 (Jan. 21, 1992).

285. Judge Nabil Elaraby, speaking in a personal capacity in 2003, urged that the Council should "consider the strict and faithful application of Article 27, paragraph 3." U.N. SCOR 58th Sess., 4753d meeting, at 24–25, U.N. Doc. S/PV.4753, 8 (May 13, 2003).

286. Jan Wouter & Tom Ruys, *Security Council Reform: A New Veto for a New Century*, 44 MIL. L. & L. WAR REV. 139, 154–55 (2005).

287. U.N. Press Release GA/12500, *supra* note 243.

288. Chair's Summary on the Side Event "Decade of ACT: Working methods for a more accountable, coherent and transparent UN Security Council."

289. *Id.*

reaffirming its mandate on Security Council members. This would not be the first time that the General Assembly has made this move in an attempt to rein in politicized behavior of the Security Council in contravention of the Charter. In 1974 the General Assembly adopted a resolution that defined aggression, for the express (albeit nonbinding) purpose of aiding the Security Council's determination of the existence of an act of aggression.[290] Surprising no one, the Security Council has not adhered to that interpretation,[291] but the conversation has not ended there. The ICC adopted the General Assembly's definition in its Rome Statute.[292] The definition has also made its way into the ICJ's jurisprudence, where the Court has relied upon it when considering the unlawful use of force by States.[293]

The General Assembly could also request an advisory opinion from the ICJ on the legality of a veto of a Chapter VI resolution by a State directly involved in the matter. An Advisory Opinion would harness the power of the ICJ to provide an authoritative interpretation of the Charter, offering the possibility of a new shared interpretation of Article 27(3).[294] While the ICJ has not yet exercised judicial review of Security Council resolutions, there is legal authority for it.[295] Prudentially, conditions may also be right—amid

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290. G.A. Res. 3314, ¶ 4 (Dec. 14, 1974) (calling upon the Security Council to "take account of that Definition in determining, in accordance with the Charter, the existence of an act of aggression.").

291. *See* Sergey Sayapin, *Definition of the Crime of Aggression for the Purpose of the International Criminal Court: Problems and Perspectives*, 13 J. CONFLICT & SEC. L. 333, 334 (2008).

292. *See* Rome Statute of the International Criminal Court art. 8, ¶ 2.

293. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. ¶ 195 (June 27); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J., ¶ 146 (December 19).

294. Jennifer Trahan has made a similar proposal. She argues the General Assembly should request an advisory opinion from the ICJ on Russia's illegal use of the veto to block the U.N. Security Council Resolution condemning its invasion of Ukraine. She argues that the use of the veto that helps enable continuing violations of the UN's Purposes and Principles and *jus cogens* obligations, should be found *ultra vires* and thus void. Trahan, *supra* note 283, at 122–29, 140.

295. The ICJ has the authority to "give an advisory opinion on any legal question" upon request of the General Assembly or the Security Council. U.N. Charter art. 95. The ICJ has exercised this authority to render an advisory interpretation of U.N. provisions relating to the power of the General Assembly, *see* Effects of Awards of Compensation by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 53 (July 13), and there is no apparent basis in the Charter for differential treatment in an advisory opinion that interprets a provision relating to General Assembly powers versus a provision relating to powers of the Security Council. *See* Bernd Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, 10 EUR. J. INT'L L. 517, 525–28 (1999). It is worth distinguishing Prof. Trahan's approach from what is more properly termed "judicial review," which would entail the ICJ ruling directly on the legality of a decision of a U.N. organ. Judicial review of Security Council Chapter VII decisions remains contested, but is well-supported in theory when it comes to non-Chapter VII actions of U.N. bodies that are incidental to, or "bear upon a case properly before the Court[]". *Id.* at 525–28 (*quoting* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding

widespread calls for greater veto accountability and consensus in the General Assembly (especially if an interpretive resolution were adopted).

Among other things, reviving Article 27(3) could open an alternative pathway for creating a Special Tribunal to Try the Crime of Aggression. If Russia properly abstains from voting (or its vote against was determined to be *ultra vires*),[296] the Security Council could potentially establish the international tribunal under Chapter VI, rather than Chapter VII. In doing so, it would be building directly on the Security Council's role in the creation of the SCSL, which was similarly established pursuant to Chapter VI.[297]

Reviving Article 27(3) might also bear on the conflict in Gaza. The barrier to Security Council action with respect to Israel-Gaza is the United States' veto in the Security Council.[298] The United States is not a direct party to the Israel-Gaza conflict, but in light of its intense and longstanding investment in Israel's military effort, the same principles that counsel in favor of abstention of direct parties could potentially counsel in favor of abstention of the United States in this conflict. Article 27(3), however, makes no provision for the obligatory abstention of indirect parties to a conflict. The call to clarify the scope of Article 27(3) concerning indirect parties is not

Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Reports 16 (June 21), at ¶ 45, ¶¶ 143–44). Thus, while there is support for the more radical proposition that the ICJ could strike down a Security Council resolution as illegal, Prof. Trahan's approach is more modest in comparison.

296. Forcing a permanent Member of the Security Council to abstain is not without its challenges. Doing so requires a determination by the Council that there is a dispute, that the Member is party to it, and that the draft relies on Chapter VI authority. Such determinations have been regarded as substantive and therefore subject to the P5 veto, including by the Member who is alleged to be party to the dispute. Loraine Sievers & Sam Daws, THE PROCEDURE OF THE UN SECURITY COUNCIL 69–70 (4th ed. 2014). Notably, there is a history of disagreements as to which matters are procedural and which substantive. Security Council Report, *UN Security Council Working Methods: Procedural Vote*, https://www.securitycouncilreport.org/un-security-council-working-methods/procedural-vote.php.

297. *See supra* Subsection III.B.6.

298. The United States frequently vetoes resolutions relating to Israel. *See, e.g.*, Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Middle East, Owing to Negative Vote by United States, U.N. Press Release SC/8867 (Nov. 11, 2006); *United States vetoes Security Council on Israeli settlements*, UN NEWS (Feb. 18, 2011), https://news.un.org/en/story/2011/02/367082; *Israel-Gaza crisis: U.S. vetoes Security Council resolution*, UN NEWS (Oct. 18, 2023), https://news.un.org/en/story/2023/10/1142507; Press Release, Security Council, Security Council Fails to Adopt Either of Two Draft Resolutions Addressing Conflict and Humanitarian Crisis in Gaza, U.N. Press Release SC/15464 (Oct. 25, 2023); *U.S. vetoes resolution on Gaza which called for 'immediate humanitarian ceasefire*', UN NEWS (Dec. 8, 2023), https://news.un.org/en/story/2023/12/1144562. The U.S. abstained from voting on a successful compromise resolution calling for a humanitarian pause in the conflict, *see* S.C. Res. 2720 (Dec. 22, 2023), but it has indicated intent to veto more robust measures condemning Israel's use of force. *See, e.g.*, Alex Marquardt, Priscilla Alvarez & Donald Judd, *UN Security Council passes compromise resolution on Israel-Hamas war as US abstains*, CNN (Dec. 22, 2023), https://www.cnn.com/2023/12/22/politics/un-security-council-resolution-israel-gaza-resolution/index.html.

unprecedented.[299] The moment may be ripe for clarification of this provision, especially given that the modern age of warfare has seen an increase in major powers pursuing their interests indirectly, rather than directly.[300] Reviving Article 27(3) could unlock a broader spectrum of potential Security Council responses under Chapter VI.

The proposal to strengthen Chapter VI by reviving the abstention requirement in Article 27(3) remains at its earliest stages. So far, it has been only obliquely raised at the United Nations, and robust debate has not yet begun. Nonetheless, it offers an opportunity for further evolution of the Charter, building on the earlier Security Council Veto Initiative. If adopted, it would further strengthen the United Nations, by providing a tool for proceeding on matters at the Security Council even in instances in which a P5 member is substantially involved.

3. Establish a Special Tribunal to Try the Crime of Aggression

Russia's war of aggression in Ukraine laid bare the absence of any international tribunal with jurisdiction to try the crime of aggression—a crime that the Nuremberg Tribunal declared to be "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[301] The International Criminal Court, which has jurisdiction over war crimes, crimes against humanity, and genocide committed during the war in Ukraine, does not have jurisdiction over the crime of aggression. The Rome Statute creating the Court includes the crime but grants jurisdiction differently than it does for the other three crimes.[302] In particular, the Court only has jurisdiction over the crime for States parties that have ratified the aggression

299. Madagascar raised the question in Security Council discussions concerning the apartheid government in South Africa in 1974. U.N. SCOR 29th Sess., 1801st meeting, ¶24, U.N. Doc. S/PV.1801 (Oct. 24, 1974) ("In strictly legal terms, it may be difficult to decide to what extent a State other than the State directly concerned may be regarded as a party to the dispute."). Certainly, determining the demarcation line for indirect parties under 27(3) is fraught. One possible point of reference may be whether the indirect party's assistance is sufficient to trigger state responsibility doctrines under the ILC Draft Articles. U.N. INT'L LAW COMM'N, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, U.N. Doc. A/56/10 (2001), arts. 8, 16.

300. *See, e.g.*, Andre Mumford, *Proxy Warfare and the Future of Conflict*, 158 RUSI J. 40, 41 (2013) (highlighting that, in modern warfare, superpowers are largely opting out of "total warfare," instead pursuing alternative avenues for attaining strategic advantage, including proxy war"); *see also* Candace Rondeaux and David Sterman, *Twenty-First-Century Proxy Warfare*, *in* UNDERSTANDING THE NEW PROXY WARS 13, 31–42 (Peter Bergen and others eds., 2022) (outlining the rise of proxy conflicts in the Cold War era).

301. 22 Nuremberg Trial Proceedings, Two Hundred and Seventeenth Day (Sept. 30, 1946), https://avalon.law.yale.edu/imt/09-30-46.asp.

302. *See generally Conditions for Action by the ICC*, THE GLOB. CAMPAIGN FOR RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDS. ON THE CRIME OF AGGRESSION, https://crimeofaggression.info/role-of-the-icc/conditions-for-action-by-the-icc.

amendments, unless there is a referral by the Security Council.[303] Russia and Belarus are not parties to the Rome Statute, and Russia holds a veto on the Security Council. This leaves an accountability gap that members of the international community have begun to consider how to fill.

One leading proposal to fill the gap builds on prior criminal courts established under the auspices of the United Nations but innovates a step beyond them. Under this proposal, the United Nations General Assembly would pass a resolution requesting the Secretary-General to negotiate an agreement with the government of Ukraine to create a Special Tribunal. That proposal was first circulated in the summer of 2022.[304] Thus began an extended process of contestation.[305] As of this writing, that debate has not been resolved, though it appears likely that a tribunal, if created, will be established through the Council of Europe rather than the United Nations.[306] This leaves a substantial accountability gap, particularly for victim States located outside Europe.

The issues raised in the course of the debate over establishing a Special Tribunal have been both legal and political. A key legal concern has been whether the General Assembly has the authority to approve acts (negotiation by the U.N. Secretary-General of a U.N. treaty with a member State) that would create a criminal tribunal of the kind advocated by supporters. Here, the historical practice outlined in Part III has been critical to the case in favor of the General Assembly's power to do so. In particular, the earlier non-amendment reforms of the Uniting for Peace Resolution;[307] the General Assembly's creation of the United Nations Administrative Tribunal;[308] and

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303. Rome Statute of the International Criminal Court, *supra* note 283, art. 15 bis *&* art. 15 ter.

304. The proposal was first made public at an event hosted by the Permanent Mission of Liechtenstein to the U.N. and the Permanent Mission of Latvia to the U.N. and attended by representatives of the Government of Ukraine as well as several other U.N. member States, academics, and members of civil society. *See* Permanent Rep. of Latvia to the U.N., Chargé d'affarires a.i. of Lichtenstein to the U.N., & Permanent Rep. of Ukraine to the U.N., Letter dated Aug. 12, 2022 from the Representatives of Latvia, Liechtenstein and Ukraine to the United Nations addressed to the Secretary-General, U.N. Doc. A/ES-11/7, S/2022/616 (Aug. 17, 2022) (Chair's summary). One of the authors, Oona Hathaway, was involved in some of the events described herein, including this meeting.

305. Advocates of the proposal have written a number of public articles in support. *See U.N. General Assembly and International Criminal Tribunal for the Crime of Aggression Against Ukraine*, JUST SEC., https://www.justsecurity.org/tag/u-n-general-assembly-and-international-criminal-tribunal-for-aggression-against-ukraine (a series of articles published on various aspects of the proposal to prosecute the crime of aggression in Ukraine).

306. Core Group on the Establishment of a Special Tribunal for the Crime of Aggression of the Russian Federation Against Ukraine, COUNCIL EUR., https://rm.coe.int/0900001680af831c (Apr. 30, 2024); Press Release, Council of Europe, Justice for Crimes Committed in Ukraine: Ministers of Justice Discuss Legal Cooperation and a Special Tribunal for the Crime of Aggression (Sept. 3, 2024) https://www.coe.int/en/web/portal/-/justice-for-crimes-committed-in-ukraine-ministers-of-justice-discuss-legal-cooperation-and-a-special-tribunal-for-the-crime-of-aggression.

307. *See supra* Subsection III.B.4.

308. *See supra* Subsection III.B.3.

the procedures used to create the SCSL, ECCC, and IIIM[309]—support the case in favor of the Special Tribunal.

The Uniting for Peace Resolution affirmed that when the Security Council is unable to act, the General Assembly has a subsidiary role in upholding the U.N.'s core purpose in ensuring international peace and security. A key part of this purpose, as provided in Article 1 of the Charter, is to "bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes."[310] Prosecuting the crime of aggression, which is by definition a violation of Article 2(4) of the Charter and a threat to and breach of international peace, is critical to upholding the central purpose of the Charter. In absence of action by the Security Council, the Uniting for Peace Resolution affirms that the General Assembly has an enhanced role and responsibility to secure the organization's chief purpose.

Second, the United Nations Administrative Tribunal and the *Effect of Awards of Compensation* ICJ opinion established that the General Assembly has the authority to create a judicial body competent to render binding judgments.[311] As indicated by the ICJ, though this authority is not expressly conferred in the Charter, it is impliedly conferred as necessary to the performance of its duties.[312]

Finally, the prior innovations of the SCSL, ECCC, and IIIM provide support for this proposal. As noted above, the SCSL was created by an agreement between the United Nations and Sierra Leone, and it was supported by the Secretary-General upon a request by the Security Council acting under Chapter VI, not Chapter VII. Because the Security Council did not act under Chapter VII (and because the Court was created by agreement between the United Nations and Sierra Leone and not other States), the SCSL was unable to require non-consenting States to execute its arrest warrants. Nonetheless, the tribunal was found to be an "international" court with the power to set aside personal immunities, enabling it to issue an arrest warrant for then-still sitting Liberian President Charles Taylor.[313] This precedent demonstrates that Chapter VII authority is not essential to the creation of an international criminal tribunal with the support of the United Nations.[314]

309. *See supra* Subsection III.B.6, 7, 8.

310. U.N. Charter art. 1(1).

311. *See supra* Subsection III.B.3; *see also* Effects of Awards of Compensation by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 53 (July 13).

312. 1954 I.C.J. 47 (July 13).

313. The SCSL Appeals Chamber specifically found that a sitting head of state of a foreign state that was not party to the agreement between Sierra Leone and the U.N.—Liberian President Charles Taylor—was subject to prosecution in the court for crimes committed in Sierra Leone and could not rely on personal immunities to avoid indictment. Prosecutor v. Taylor, SCSL-2003-01-I, Decision on Immunity from Jurisdiction [Special Ct. for Sierra Leone, Appeals Chamber], ¶ 42, 59 (May 31, 2004), http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf.

314. *See supra* Subsection III.B.6.

The establishment of the ECCC provides another key precedent. There, the General Assembly requested the Secretary-General negotiate with Cambodia to establish an agreement between the United Nations and Cambodia that gave rise to a new court to try atrocities committed in Cambodia. The Cambodian government preferred a domestic, rather than international, tribunal, and thus the negotiations led to the creation of a court within the Cambodian legal system. The ECCC nonetheless provides clear evidence that the General Assembly can contribute significantly by treaty to the legal and administrative structure and operation of a tribunal to try international crimes.[315] The more recent IIIM, also established pursuant to a General Assembly resolution, reinforces the conclusion that a criminal justice mechanism can be created by the United Nations pursuant to a General Assembly recommendation.[316]

Regardless of what happens with regard to Ukraine, the problem of a major accountability gap for the crime of aggression will remain for future conflicts. The United Nations can innovate to provide accountability for international crimes, including for the crime of aggression against Ukraine or any other State that faces similar aggression. Past experience shows that such innovation is possible, and, indeed, the proposal for creating a Special Tribunal through the United Nations, based on a General Assembly recommendation, builds on a long history of innovation at the United Nations. However, proposals for non-amendment reform do not always succeed. It remains to be seen whether the contested proposal to create a tribunal to try the crime of aggression will lead to a shared interpretation and the establishment of a tribunal, either now or in the future.

4. Establish a Reparations Mechanism

Russia's illegal war in Ukraine has brought another issue to the top of the agenda: the need for reparations for the damage done in war. Russia has not signaled any intent to negotiate a halt to the war or to submit to its reparative responsibilities. And while ongoing International Criminal Court cases may yield some reparations, the ICC cannot deliver reparations for the majority of damage resulting from the war, as its purview is cabined to specific crimes and to defendants over which the court has jurisdiction. As a result, there has been a global scramble to determine how to seize frozen Russian sovereign assets and use them to fund Ukraine's defense as well as to provide reparations for the damage done in the war.[317] While the situation is less developed

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315. *See supra* Subsection III.B.7.

316. *See supra* Subsection III.B.9.

317. *See* Oona A. Hathaway, Maggie Mills, & Thomas Poston, *War Reparations: The Case for Countermeasures*, 76 STAN. L. REV. 971 (2024); *see also* Laurence H. Tribe & Jeremy Lewin, *$100 Billion. Russia's Treasure in the U.S. Should Be Turned Against Putin.*, N.Y. TIMES (Apr. 15, 2022), https://www.nytimes.com/2022/04/15/opinion/russia-war-currency-reserves.html; Philip Zelikow & Simon Johnson, *How Ukraine Can Build Back Better*, FOREIGN AFF. (Apr. 19, 2022), https://www.foreignaffairs.com/articles/ukraine/2022-04-19/how-ukraine-can-build-back-better.

in the case of the war in Gaza, calls upon Israel to pay reparations have already begun, and fulfilling those demands will certainly face related, though undeniably distinct, challenges.[318] The resolution of these challenges through U.N. action in the context of Ukraine can pave the way to the use of similar infrastructure in other conflicts, including the Israel-Gaza war.

So far, the United Nations has played a limited role in the pursuit of reparations. Any action by the Security Council pursuant to Ukraine, it is clear, would be blocked by Russia. The same would likely occur in the context of reparations for the war in Gaza, with the United States blocking action. In the face of Security Council paralysis on these twin issues, there is an opportunity to further clarify that the General Assembly has the power to establish and support reparative mechanisms. This change could signal another subtle shift: an expansion of the Assembly's institutional role in ensuring, sustaining, and maintaining international peace and security.

The General Assembly has taken a first step in this direction. In the context of Ukraine, in November 2022, the Assembly passed a resolution recommending the creation of an "international register of damage."[319] Following this resolution, Ukraine and the Council of Europe announced the establishment of a register backed by most of the Council's members and the European Union.[320] Although the registry for Ukraine has proceeded outside of the United Nations, it could have been created by the organization directly. Indeed, in 2004, the General Assembly established a damage registry as a subsidiary organ for damages resulting from the construction of a wall in the occupied Palestinian territory pursuant to an ICJ advisory opinion.[321] The General Assembly's authority to establish a registry does not depend on the ICJ. A combined reading of Articles 7 and 22 of the U.N. Charter indicates that *a fortiori*, it may exercise

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318. Michael L. Gross, *What Israel Owes Gaza*, N.Y. TIMES (Nov. 30, 2023), https://www.nytimes.com/2023/11/30/opinion/israel-gaza-war-compensation.html; U.N. Special Procedures Experts, Occupied Palestinian territory and Israel: Women and Girls Face Exacerbated Violence, Inequalities, and Discrimination and See Their Future Destroyed in Front of Their Eyes (Dec. 14, 2023) (calling on Israel to institute a ceasefire and "[i]mpartial processes to ensure justice, support and full reparations to all victims and accountability for the crimes perpetrated. . . .").

319. G.A. Res. A/ES-11/L.6, *supra* note 12.

320. COUNCIL OF EUR. COMM. OF MINISTERS, Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine (May 12, 2023), https://rm.coe.int/0900001680ab2595. As earlier announced, the Netherlands has agreed to host the registry at the Hague. *See The Netherlands Has Agreed to Host the Registry at The Hague*, UKRAINIAN MINISTRY JUST. (Feb. 17, 2023), https://minjust.gov.ua/news/ministry/mijnarodniy-reestr-zbitkiv-zavdanih-ukraini-rosiyskoyu-agresieyu-bude-roztashovaniy-u-gaazi. The register opened for claims submissions in April 2024. *See* Chiara Giorgetti, *The Register of Damages for Ukraine Opens for Claims Submissions*, JUST SECURITY (May 16, 2024). https://www.justsecurity.org/95773/register-damages-ukraine-open.

321. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136 (July 9); *see* G.A. Res. A/RES/ES-10/15 (Aug. 2, 2004).

that authority to lend support to an international damage registry.[322] Therefore, the General Assembly could recommend the creation of a damage registry pursuant to the conflict in Gaza, either as a subsidiary organ or as an external entity.

For Ukraine, there are a number of efforts under way to support reparations. The General Assembly could elect to establish a comprehensive reparations mechanism to accompany the damage registry. Although it has "recognize[d] the need for the establishment . . . of an international mechanism for reparation for damage,"[323] the details of this process have not yet emerged. While direct creation of a subsidiary international claims mechanism would break new ground for the Assembly, such a move would not be beyond its power under the U.N. Charter. As previously noted, Article 7(2) grants the General Assembly the authority to establish "[s]uch subsidiary organs as may be found necessary."[324] Particularly in light of the creation of the United Nations Administrative Tribunal, which judges and issues decisions with binding legal effect, there is clear support for the establishment of an international claims commission, binding on consenting claimants, as a subsidiary organ of the General Assembly.

The question remains how to fund the compensation of claims. Countermeasures doctrine can justify freezes of assets, though not seizures; hence, substantial reparations from Russia must wait for Russian consent.[325] In the meantime, however, the General Assembly can play a role by establishing an international registry of frozen funds. Of course, as the General Assembly has no enforcement powers, it cannot compel States to participate, but under its Article 14 powers, which authorizes the Assembly to "recommend measures for the peaceful adjustment of any situation . . . which it deems likely to impair the general welfare . . . *including situations resulting from a violation of the provision of the present Charter*,"[326] it can recommend the creation of an agreement between consenting States and the organization. Such an agreement could specify an agreement to maintain Russian government assets in a frozen state in respective countries, and an agreement to transfer assets to a

322. U.N. Charter art. 7 ("Such subsidiary organs as may be found necessary may be established in accordance with the present Charter."); U.N. Charter art. 22 ("The General Assembly shall establish such subsidiary organs as it deems necessary for the performance of its functions.").

323. G.A. Res. A/ES-11/L.6, *supra* note 12.

324. U.N. Charter art. 7(2). Article 22 of the Charter further provides that the Assembly has the power to create subsidiary organs necessary to fulfill its functions. U.N. Charter art. 22. Some scholars argue that 7(2) provides a more general grant to support the creation of a mechanism which performs functions that the parent organization cannot itself perform. The ICJ holding in *Effects of Awards of Compensation by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47 (July 13), supports such a reading. *See* DANESH SAROOSHI, THE DELEGATION OF POWERS TO UN SUBSIDIARY ORGANS 92–93 (Oxford, 2000).

325. *See* Hathaway, Mills & Poston, *supra* note 317.

326. U.N. Charter art. 14.

U.N.-approved authority to fund a reparations mechanism, contingent on Russia's consent.[327]

Such a mechanism has numerous benefits. As a complement to the aforementioned damages registry, it would go some ways toward ensuring that the measures adopted against Russia do not grow disproportionate to its reparative obligations. It further supports compliance with international legal doctrines by leveraging the collective agreement of States to pressure individual States both not to release the frozen funds too soon, nor to unilaterally seize the assets in apparent violation of sovereign immunity under international law.[328] Because there is no transfer of assets absent Russian consent (or an international court award), such an approach would remain true to the requirement that countermeasures be reversible once the target nation complies with its legal obligations. Finally, institutionalizing collective countermeasures under a central authority reduces the transaction costs for Russia, providing some transparency to the process and a level of assurance that it will not be required to quibble individually with dissenting States in the negotiations process.

The idea of a reparations mechanism created through General Assembly powers has potential applications in many other contexts, including the conflict in Gaza. While the funding of such a mechanism, as with Ukraine, depends ultimately on the consent of those owing reparations, there is value in establishing infrastructure even before funding is settled. Doing so can set the conditions necessary for the future—an approach the General Assembly has taken before.[329]

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The four proposals discussed in this section demonstrate the possibilities for continuing to use non-amendment reform to respond to the pressing challenges of the moment. Non-amendment reform offers the United Nations the tools that it needs to be able to meet this test. But whether that will happen will ultimately be decided by member States, who will have to be willing to take the steps necessary to make these proposals a reality.

C. *The Promise of a New Theory of Change at the United Nations*

This article has argued for a new theory of change at the United Nations. As we have shown, this perspective on the possibilities for reform at the United Nations should cause reform advocates to think differently about both the possibility for change and the best paths toward change at the United

327. Such an agreement, as well as the ultimate design for the reparations fund, has precedent. For the United Nations Compensation Commission (UNCC), the Security Council funded a compensation mechanism by garnishing a percentage of oil exports from Iraq and calling upon States to liquidate and transfer Iraqi funds resulting from sales of petroleum in their possession to the central escrow account. S.C. Res. 778, ¶ 1 (Oct. 2, 1992).

328. *See* Hathaway, Mills & Poston, *supra* note 317, at 999-1004.

329. *See* G.A. Res. ES-10/15, *supra* note 321 (creating a damage registry to track damages in resulting from the construction of a wall in occupied Palestinian territory); *see also* G.A. Res. 71/248, *supra* note 222 (creating the IIIM investigative body).

Nations. But this theory of change does more than just offer a new roadmap for reform-minded internationalists. It also, we hope, provides a new lens on the United Nations itself.

When we view formal reform as the only possible method for accomplishing fundamental change at the United Nations, the future of the institution looks bleak. After all, significant change through formal reform requires the consent of the permanent five members, whose veto power is the very source of the rigidity and paralysis that plagues the institution. If formal reform is the only path forward, the institution is doomed to fail. It risks becoming more and more moribund until it collapses under the weight of its own irrelevance, just as did the League of Nations before it.

But the U.N. Charter has not, in fact, been static; it has been growing and changing throughout its history in response to various triggers that demanded a response beyond the institution's capabilities at the time. Recognizing this capacity, we see that the United Nations might survive, and even thrive, after all. The non-amendment reform process—progressing from trigger to proposal, to contestation leading to shared interpretation, and finally, to consolidation—allows the organization to shift and evolve. There are, of course, limits to this change, as some actions will remain the exclusive province of the Security Council. But when we look at the history of reform, we can see that non-amendment reform has allowed changes that would have once seemed unthinkable. Chapter VI operations have been authorized to make peace outside the constraints of the Chapter VII process. The United Nations has created court after court to bring those responsible for atrocities to account. And the General Assembly has gradually but steadily expanded its power to assume increasingly important roles over time. These are not mere details; these are essential to the project of the organization.

The possibility of non-amendment reform, then, offers nothing less than the prospect that the United Nations could, despite its formal rigidity, respond flexibly to the new and constantly evolving challenges that the world faces now and will face in the future. It can be a place not just for endless debates leading nowhere but for real, productive responses to threats to international peace and security.

Whether it will be that place—whether it will meet that challenge—is ultimately up to the representatives of the States that make up the organization. This, then, brings us to another important—perhaps even radical—implication of the theory of non-amendment reform offered in this article. Yes, the P5 members of the Security Council have outsized influence and power. But non-amendment reform places some measure of power back in the hands of the ordinary member States. Indeed, even the smallest of States can propose an idea for reform and build a coalition in favor of it. Indeed, it is widely acknowledged that Liechtenstein proposed, advocated for, and ultimately won the approval of the Veto Initiative in 2022. And Liechtenstein has led the campaign to create a Special Tribunal to Try the Crime of Aggression in Ukraine. Liechtenstein is not exactly a geopolitical powerhouse. But when it comes to the power of its ideas, it has proven powerful indeed.

Non-amendment reform creates space for any of the 193 member States, no matter who they are, to advocate for change. If they are willing to make proposals, make the case for them, and build coalitions to support them, they can, over time, bring about real change, regardless of their membership on the Security Council. It is no coincidence that many of the non-amendment reforms have served to raise the profile and power of the General Assembly—allowing it to, for example, create courts and take steps to protect international peace and security when the Security Council will not. States seeking reform are precisely those States that recognize the power imbalance in the formal structures. Their successful efforts to enhance the role of the General Assembly will prove essential to the organization's survival, for it is hard to imagine 188 States willingly remaining part of an organization for long in which five States make all the decisions and every other State is simply expected to fall in line. That is all the more true given the growing incongruency between the makeup of the Security Council and the economic, political, and military power around the globe.

While some States that hold formal power at the United Nations will undoubtedly see a threat in non-amendment reform, they should bear in mind that it is not realistic to cast their power in amber for all of eternity. An attempt to do so will merely assure the organization's inevitable demise, and their power and credibility along with it. Instead, they should participate in the process of reform, seeking to press forward their own ideas and initiatives and win converts to their causes. Doing so will not only ensure their influence but also allow an organization that has been key to helping to keep the peace since its inception to continue to play this critical role in our global politics.

V. Conclusion

Critics of the United Nations' outdated structure have often called for formal reform, especially focusing on reform to the makeup of the Security Council and its voting system. Yet, as this article has demonstrated, formal reform of this kind is almost certainly impossible. There have been only three amendments to the Charter in its entire history, and none that have significantly challenged the power of the permanent five members.

This does not mean reform is impossible. Examining the history of the United Nations demonstrates that it has experienced significant reform over the course of its history. That reform has not been formal reform but non-amendment reform. Understanding this history offers an important lesson for today: Rather than seek to amend the Charter, which is almost certainly a lost cause, advocates of change should look for opportunities to press forward non-amendment reform to enable the organization to meet the real challenges of the moment. In doing so, they might not only succeed at reforming the United Nations, they might just save it.