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Looking Beyond R2P for an Answer to inaction in the Security Council

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NOTES

LOOKING BEYOND R2P FOR AN ANSWER TO INACTION IN THE SECURITY COUNCIL

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I. INTRODUCTION

The subject of the inability, or perhaps lack of will, of the U.N. Security Council to respond to humanitarian crises is one that has received no shortage of attention. The world has watched as the Security Council has failed to take action to address situations in Kosovo and Rwanda, and more recently in Syria and Ukraine. These failures to act have left the international community scrambling to find alternative ways to respond in the face of international crises.

This note identifies the veto power as the root of the ineffectiveness of the Security Council and examines ways in which this power is used to thwart international action both within and beyond the Security Council. It will then examine a fairly recent response to this inaction, the development of the Responsibility to Protect doctrine, which argues that states have a responsibility to take action in the face of international crises, and evaluate how well poised this doctrine is to respond to this problem.

As an alternate to the Responsibility to Protect doctrine, this note assesses two potential checks on the veto power that are already established in international law. First, the obligatory abstention housed within the U.N. Charter, which limits the ability of a Security Council member to exercise its veto power when it is a party to the dispute being addressed by the Security Council. Second, the Uniting for Peace Resolution, which provides the only possibility of an override of a Security Council veto through General Assembly action.

While none of these three instruments provide perfect solution to the longtime problem of the power wielded by the five veto-holding states, I argue that the two options already established within international law, the obligatory abstention and the Uniting for Peace Resolution, are worthy—and even superior—alternatives with which to address this issue and should not be overlooked. At a minimum, they present a useful tool for serving to legitimize actions taken pursuant to the Responsibility to Protect doctrine.

II. THE VETO POWER

A. *Inclusion in the U.N. Charter*

Throughout negotiation of the U.N. Charter (Charter) the veto power was a contentious issue, with the major powers insistent on its inclusion.[1] Concern about the veto power, which belonged to the five permanent members of the Security Council, was immediately asserted. Soon after the United Nations passed the Charter, one commentator stated "[t]he inevitable effect of conferring the right of veto upon each of the permanent members is that no decision of any importance can be taken against the will of one of the privileged states even if the state is involved in the matter to which the decision refers."[2] In the decades since, it has become clear that these concerns were not without merit.

B. *Application of the Veto Power*

As the enforcement mechanism of the United Nations, the Security Council (the Council) is responsible for the maintenance of international peace and security and is the only U.N. body which can issue binding resolutions on a Member State.[3] The Security Council has fifteen Member States, including five permanent members—Russia, China, the United States, France, and Britain—often referred to as the Permanent 5 or the P-5.[4] The ten non-permanent members are elected for two-year terms and are prohibited from serving consecutive terms.[5]

The voting requirements within the Security Council differ based on

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1. Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 507 (1995).

2. Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 HARV. L. REV. 1087, 1111 (1946). Another commentator of the time, J.L. Brierly, also expressed concern regarding the veto provisions, stating "[i]t is certain . . . that the veto power has made impossible that enforcement measures should ever be taken against a Great Power" and "[t]hus the desire for a system of security ready always for immediate action, which was the leading motive behind the substitution of the Charter for the Covenant, has resulted in a system that can be jammed by the opposition of a single Great Power." J.L. Brierly, *The Covenant and the Charter*, 23 BRIT. Y.B. INT'L L. 83, 89, 91 (1946).

3. Richard Butler, *Reform of the United Nations Security Council*, 1 PENN ST. J.L. & INT'L AFF. 23, 26–27 (2012); Amber Fitzgerald, *Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319, 325 (2000).

4. Brian Cox, *United Nations Security Council Reform: Collected Proposals and Possible Consequences*, 6 S.C.J. INT'L L. & BUS. 89, 92 (2009).

5. Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319, 328 (2000). These ten spots are traditionally distributed as: two to Asia, three to Africa, two to Latin America and the Caribbean, two to Western Europe and others, and one to Eastern Europe. Cox, *supra* note 4, at 92.

whether the vote is considered procedural or substantive.[6] For votes on procedural matters, nine affirmative votes are required.[7] For votes on substantive matters, an affirmative vote of nine members of the Security Council, including the concurring vote of each of the P-5, is required.[8] Through the requirement of concurring votes of the P-5, the Charter gives these states the power to veto a substantive matter by not casting a concurring vote.[9]

This power allows the P-5 to have a veto in four situations.[10] First, they may veto any substantive and binding decision of the Council.[11] Second, they may veto a recommendation to the General Assembly (Assembly) of a Secretary-General appointment.[12] Third, they can veto state membership applications for the United Nations.[13] Finally, they can veto any amendment to the Charter.[14] This Note will focus on the first instance, the veto of a substantive and binding decision of the Council, which allows the P-5 to veto the passage of Council resolutions.

C. *Problematic Uses of the Veto Power*

The use of the veto by the five members which hold this power has led to increasing deadlock in the Security Council. Additionally, its influence extends beyond the Security Council to other bodies of the United Nations. What seems like a relatively minor aspect of how the United Nations functions has become one of the greatest impediments in its fight to stay relevant and responsive in the face of international crises. In exploring how this power hampers Security Council and United Nation actions, I will examine four main ways in which the use of the veto power has proven problematic.

1. Private Sessions

The first problem with the P-5 veto power is that it has implications

6. U.N. Charter art. 27; Cox, *supra* note 4, at 92–93.

7. Cox, *supra* note 4, at 92.

8. Fitzgerald, *supra* note 3, at 327.

9. *Id.*; Interestingly, the question of whether a matter is considered procedural or substantive is considered a substantive question, opening the door for a P-5 party to vote that a matter is substantive in order to subject a final vote on the matter to its veto power. Cox, *supra* note 4, at 93. This is known as the double-veto. This possibility initially concerned many states, however, it has not turned out to be an issue as the double veto was not used after 1959 because of an informal agreement between the P-5. JAN WOUTERS & TOM RUYS, ROYAL INSTITUTE FOR INT'L RELATIONS, SECURITY COUNCIL REFORM, A NEW VETO FOR A NEW CENTURY? 8 (2005).

10. Butler, *supra* note 3, at 29.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

far beyond an official veto vote. The P-5 sometimes threaten the use of a veto behind closed doors to convince a state not to bring a dispute to the attention of the Council. Alternately, the P-5 use their power to persuade states not to vote on certain resolutions, which results in what is known as a "hidden veto," where there are an insufficient number of member votes and the proposal is therefore automatically rejected.[15] The Council has continued to undertake most of its negotiations behind closed doors, only meeting in public to adopt resolutions on which it has already reached agreement.[16] This means that the true implications of the veto power are seldom seen and nearly impossible to measure.

2. To Shield Another State from Security Council Action

Another problematic use of the veto power occurs when P-5 states use their veto to prevent the passage of resolutions that are contrary to the interests of an ally state. This practice is known as voting "in defense of their client state."[17] One of the most noticeable examples of this use of the veto is the United States use of the veto on behalf of Israel.[18]

3. The Cascade Effect

The influence of the veto has a tendency to extend beyond the confines of the Security Council. In what has been referred to as the cascade effect, P-5 countries are able to wield this power in many other settings. When U.N. elections are held for any agency, committee, or commission, the P-5 are almost always awarded a seat because of their power and influence.[19] Although there is no ability to veto within these settings, the P-5 are often able to use their power to veto in the Council to encourage action in line with their interests in many other bodies of the United

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15. Fitzgerald, *supra* note 3, at 327.

16. Kirgis, *supra* note 1, at 518. Former Australian Ambassador to the United Nations, Richard Butler, confirmed that based on his time as part of the Security Council, he would estimate that 98% of work is done in private chambers while 2% is done in the public chamber. Butler, *supra* note 3, at 30.

17. Butler, *supra* note 3, at 31. In 1946, Kelsen predicted this powers saying that "members which have no such right may be induced to secure for themselves the friendship and protection of one of the five great powers." Kelsen, *supra* note 2, at 1119. He even went so far as to say that it was more important for a state that was not a P-5 member to have a friend or protector within the P-5 than to comply with existing law because with this protection, no action could be taken against them even in the event of a flagrant violation of the Charter. *Id.*

18. In fact, vetoes relating to the Israel/Palestine situation account for nearly half of all vetoes by the United States. JAN WOUTERS & TOM RUYS, SECURITY COUNSEL REFORM: A NEW VETO FOR A NEW CENTURY? 15 (Academia Press for the Royal Institute of for International Relations, Egmont Paper No. 9, Aug. 2005).

19. Butler, *supra* note 3, at 31.

Nations.[20]

4. To Prevent Security Council Action in Response to Humanitarian Crises

Throughout the history of the United Nations, and increasingly in recent years, P-5 members have utilized and threatened to utilize vetos to stand in the way of actions in response to international crises. This veto can be used by a member of the P-5 both to shield another aggressor state, as discussed above, and to shield itself when it is the aggressor. The situations in Kosovo and Rwanda provide examples of this use of the veto power.

When the Security Council considered its response to the fighting in Kosovo in 1998, China and Russia firmly indicated their intention to veto any use of armed force by the United Nations.[21] The inability of the Council to react to the killing of thousands of civilians eventually led to action outside of the United Nations. In March of 1999, the North Atlantic Treaty Organization (NATO) began a bombing campaign against President Milosevic's regime.[22] Although it seemed apparent that this action, taken without any Security Council authorization, was in violation of international law, it was well received. In fact, a Security Council resolution criticizing NATO's apparent violation of the Charter's prohibition on force was defeated by a vote of twelve to three.[23] A U.N. developed commission that investigated the NATO intervention found the intervention to be "illegal but legitimate."[24]

A similar deadlock occurred in the Security Council during the Rwandan genocide in 1994.[25] When the Security Council considered authorizing intervention forces in Rwanda, France and the United States blocked it and then used their hidden veto to assure that the situation was not labeled a "genocide," which has significance in requiring action from Member States.[26] Five years later, the United Nations issued a Report of the U.N. Independent Inquiry on Rwanda, which concluded that "[t]he Security Council itself bears responsibility for the hesitance to support new peacekeeping operations" and "for its lack of political will to stop

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20. *Id.*

21. WOUTERS & RUYS, *supra* note 18, at 17.

22. Matthew C. Cooper, *A Note to States Defending Humanitarian Intervention: Examining Viable Arguments Before the International Court of Justice*, 40 DENV. J. INT'L L. & POL'Y 167, 190 (2012).

23. *Id.*

24. Chelsea O'Donnell, *The Development of the Responsibility to Protect: An Examination of the Debate over the Legality of Humanitarian Intervention*, 24 DUKE J. COMP. & INT'L L. 557, 565 (2014).

25. WOUTERS & RUYS, *supra* note 18, at 16.

26. *Id.*

the killing."[27]

III. RESPONSE TO INACTION: THE RESPONSIBILITY TO PROTECT DOCTRINE

At the center of almost any current debate centering on the ineffectiveness of the Security Council is the emerging Responsibility to Protect Doctrine, known as R2P. This doctrine focuses on the responsibility of each state to protect its own citizens and the ability of other states to take action when this responsibility is shirked. However, as is explored below, this doctrine suffers from intense debate regarding almost every aspect of its source and application. This underlying uncertainty has resulted in an inconsistent application of the R2P doctrine and leaves it as a questionable solution for countering Security Council inaction.

A. *Establishment of R2P*

Following the unapproved action taken by the North American Trade Organization (NATO) in response to human rights violations in Kosovo as well as the overall failure of the international community to act in response to the Rwandan genocide, the international community began to question the ability of the United Nations to respond to these situations.[28] In his 2000 Millennium Report to the General Assembly, Secretary-General Kofi Annan addressed the conflict between state sovereignty and the need for action in response to these crises and issued a challenge for the resolution of these two principles.[29] The next year, the Canadian developed International Commission on Intervention and State Sovereignty (ICISS) released a report titled The Responsibility to Protect.[30]

Although prior to this report there were discussions of a right or responsibility to act in the face of a humanitarian crisis, this was the first instance of this formulation and title. The title stuck and now the doctrine

27. *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, Dec. 16, 1999, S/1999/1257, at 32, 37.

28. Andrew M. Bell, *Using Force Against the "Weapons of the Weak": Examining A Chemical-Biological Weapons Usage Criterion for Unilateral Humanitarian Intervention Under the Responsibility to Protect*, 22 CARDOZO J. INT'L & COMP. L. 261, 276 (2014).

29. *Id.* at 282.

30. Dana Michael Hollywood, *It Takes A Village . . . or at Least A Region: Rethinking Peace Operations in the Twenty-First Century, the Hope and Promise of African Regional Institutions*, 19 FLA. J. INT'L L. 75, 98 (2007); Michael Small, *An Analysis of the Responsibility to Protect Program in Light of the Conflict in Syria*, 13 WASH. U. GLOBAL STUD. L. REV. 179, 180 (2014).

itself is often broadly referred to as the Responsibility to Protect, or R2P. The ICISS formulation intended to shift the focus from a right to intervene into a duty of each state to protect its own citizens and the responsibility of other states to act when a state fails in this duty.[31] According to ICISS, this responsibility to protect defeats the principle of non-intervention in such cases.[32]

This report brought the idea of R2P to the forefront of the international community and at the 2005 World Summit the United Nations General Assembly endorsed R2P, although it did not approve the entire ICISS report.[33] Notably, while the ICISS version of R2P had supported the unauthorized humanitarian interventions in extreme cases[34], the United Nations version focused only on peaceful and preventative measures.[35] Although reaction to this endorsement was generally positive among supporters of R2P, some attacked this weakened version, labeling it "R2P-lite."[36]

B. *Limitations of the R2P Doctrine*

The amount of discussion surrounding R2P's potential successes and weaknesses is too extensive to survey in this note. However, it is important to examine certain criticisms as they relate directly to how apt this doctrine is to remedying Security Council inaction. Therefore, I will not address concerns surrounding allegations that R2P is an assault on state sovereignty or other arguments which, while valid in discussing the validity of R2P, are not necessarily indicative of its ability to help with the Security Council situation. Instead, I will focus on three aspects of R2P that directly contribute to its effectiveness, or lack thereof, in providing a way forward in the face of Security Council deadlock.

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31. John F. Murphy, *Responsibility to Protect (R2P) Comes of Age? A Sceptic's View*, 18 ILSA J. INT'L & COMP. L. 413, 421–22 (2012).

32. Christopher Clarke Posteraro, *Intervention in Iraq: Towards A Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151, 201 (2002).

33. Jamie Herron, *Responsibility to Protect: Moral Triumph or Gateway to Allowing Powerful States to Invade Weaker States in Violation of the U.N. Charter?*, 26 TEMP. INT'L & COMP. L.J. 367, 372 (2012); Hollywood, *supra* note 25, at 101.

34. *See* Brighton Haslett, *No Responsibility for the Responsibility to Protect: How Powerful States Abuse the Doctrine, and Why Misuse Will Lead to Disuse*, 40 N.C. J. INT'L L. & COM. REG. 171, 188 (2014).

35. Monica Hakimi, *Toward A Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247, 252–53 (2014).

36. *Id.* at 253; Bell, *supra* note 28, at 302; Small, *supra* note 30, at 181–82.

1. Tied to the Security Council

With this in mind, the most relevant criticism focuses on the fact that many formulations, and notably the one endorsed by the United Nations and ICISS, still focus on the Security Council as the foremost authority in authorizing military action.[37] The ICISS report insisted that ultimate authority for the use of R2P remained with the Security Council.[38] As a response to recent deadlocks in the Security Council, ICISS urged P-5 members to pledge not to veto action for humanitarian crises when their vital interests were not at stake.[39] However, despite this Pollyanna outlook, the report did present two alternative methods when the Security Council was caught in a deadlock.[40] Interestingly, later reports by the Secretary-General emphasized the Security Council as the only authority which could approve action under the R2P and did not mention these two alternatives.[41]

2. Susceptibility to Abuse

While the R2P movement has garnered strong support, some smaller states have expressed concern that it could pose as a pretext for politically motivated military actions by larger states.[42] Unfortunately, this concern has been realized through the inconsistent application of R2P principles.[43] There are numerous examples of R2P being used as justification for controversial action by a state or organization. In contrast, in other cases where intervention seemed objectively justified under the R2P doctrine, none was taken.

In 2003, both the United States and the United Kingdom framed the invasion of Iraq as an application of R2P, alleging that ending Saddam Hussein's tyranny justified humanitarian intervention.[44] Unable to gain

37. Bell, *supra* note 28, at 283–84.

38. Halil Rahman Basaran, *Responsibility to Protect: An Explanation*, 36 HOUS. J. INT'L L. 581, 591 (2014).

39. Bell, *supra* note 28, at 284; Hollywood, *supra* note 30, at 100.

40. Haslett, *supra* note 34, at 189; Major Jeremy A. Haugh, *Beyond R2P: A Proposed Test for Legalizing Unilateral Armed Humanitarian Intervention*, 221 MIL. L. REV. 1, 16 (2014) (interestingly, in its report, ICISS specifically mentioned two such alternates: (1) Action by regional organizations and (2) the Uniting for Peace Resolution).

41. Haugh, *supra* note 40, at 15.

42. Herron, *supra* note 33, at 372; Thomas G. Weiss, *R2p After 9/11 and the World Summit*, 24 WIS. INT'L L.J. 741, 748–49 (2006) (reporting the remarks of the Algerian President, stating "[w]e do not deny that the United National has the right and the duty to help suffering humanity, but we remain extremely sensitive to any undermining of our sovereignty, not only because sovereignty is our last defense against the rules of an unequal world, but because we are not taking part in the decision-making process of the Security Council.").

43. Haslett, *supra* note 34, at 190.

44. Bell, *supra* note 28, at 292.

the support of the Security Council, the action was implemented without its approval.[45] This use of R2P to justify military action has been characterized as a misuse of the doctrine and is blamed for increasing mistrust in the use of R2P.[46] Next, in 2008, Russia pointed to Georgia's failure to protect Russian citizens within its borders as justification for invading the country, although there were few who believed there was a true humanitarian motivation.[47] Finally, in 2011 as protests in Libya turned violent, R2P was put into action through a Security Council resolution which established a no-fly zone over Libya and famously authorized Member States to "take all necessary measures."[48] Initial support for the intervention dissipated as the extent of NATO airstrikes became clear and many began to see the action as a guise for regime change.[49] Russia and China, who abstained from the vote passing the resolution, were extremely upset about the extent of the airstrikes and the use of a Security Council resolution to secure regime change.[50]

Although this aggressive use of R2P was damaging to its case, this harm was magnified when it became apparent that when P-5 members did not have a strong enough incentive, action would not be taken even in the face of a developing humanitarian crises.[51] A prime example of its non-use is found in the Syria situation.[52] When violence erupted in Syria in 2011, the international community took notice and urged the Security Council to take action.[53] However, the Security Council was unable to pass a resolution on the matter due to the repeated vetoes of Russia and China.[54] They voiced wariness to authorize military intervention due to concerns that the bounds of appropriate action authorized by a resolution would be overstepped, as in the case of Libya.[55] This selective use of R2P has been the basis for one of the most significant critiques of the R2P doctrine—that its use, or lack of, often coincides with a state's interests in that region.[56]

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45. Weiss, *supra* note 42, at 749–51.

46. *Id.*

47. Bell, *supra* note 28, at 292–93; Robert P. Chatham, *Defense of Nationals Abroad: The Legitimacy of Russia's Invasion of Georgia*, 23 FLA. J. INT'L L. 75, 81 (2011).

48. O'Donnell, *supra* note 24, at 566.

49. *Id.* at 566–67; Alexandra T. Steele, *One Nation's Humanitarian Intervention is Another's Illegal Aggression: How to Govern International Responsibility in the Face of Civilian Suffering*, 35 LOY. L.A. INT'L & COMP. L. REV. 99, 100 (2012).

50. Murphy, *supra* note 31, at 429–30; O'Donnell, *supra* note 24, at 566.

51. Bell, *supra* note 28, at 298.

52. Murphy, *supra* note 31, at 432.

53. Small, *supra* note 30, at 190.

54. *Id.* at 190–91.

55. *Id.* at 190.

56. *Id.* at 195.

3. Questionable Legal Basis

Equally frustrating to the consistent application of R2P is the debate over whether it constitutes legitimate international law.[57] Some claim that R2P is a developing or established customary international law,[58] or even a general principle of international law.[59] The ICISS Responsibility to Protect Report pointed to several sources for the foundation of such a responsibility, although none has been affirmatively adopted in the years since.[60] As a result, any discussion of its legal source remains subject to intense debate.[61]

This lack of a clear legal basis also lends to the argument that R2P undermines international law by allowing action that is clearly outside the bounds of what is authorized under the Charter.[62] This reasoning follows the logic of a slippery slope argument, where any action outside the rules corrodes the system as it becomes more and more acceptable to take action despite a lack of Security Council approval.[63] This fractured approach to international action is exactly what the United Nations was formed to prevent.[64]

C. *Evaluation of R2P as a Solution to Security Council Inaction*

These three areas of criticism highlight the problems that are in the way of R2P serving as an effective solution to addressing international crises when a P-5 member wishes to prevent such action. The fact that the R2P doctrine remains tied to action through the Security Council is the main impediment to it serving as a solution to inaction in that body. Although earlier formulations of R2P suggested that in cases of a Council impasse the international community should take action outside the Council, the version adopted by the United Nations excluded these ideas. Further, the public's willingness to accept action taken without Council approval has been considerably weakened by the apparent abuses of R2P as a pretext for military action. The actions taken in Iraq and Libya may have served to strengthen support for the principle of non-intervention rather than gathering support for the ICISS proposition that this principle should be subordinate to the responsibility to act in these crises.[65]

57. Haslett, *supra* note 34, at 179.
58. O'Donnell, *supra* note 24, at 578–80; Steele, *supra* note 44, at 109–10; Weiss, *supra* note 42, at 743.
59. Basaran, *supra* note 38, at 582–83.
60. Haslett, *supra* note 34, at 179–80.
61. *Id.* at 180.
62. Bell, *supra* note 28, at 267.
63. *Id.* at 297.
64. Brierly, *supra* note 2, at 90.
65. *See* Weiss, *supra* note 42, at 750.

Clarification of the principles of R2P and concrete rules governing its application will be necessary before the international community is willing to accept this principle as a legitimate method of addressing crises without the risk of abuse.

IV. EXISTING CONTROLS ON THE VETO POWER

In contrast to the R2P doctrine, there are two mechanisms which are firmly established in international law and provide a method with which to either limit the use of a veto or take action in spite of one. However, these two tools also have important limitations which must be addressed in order to maximize their effectiveness.

First, the obligatory abstention found within the U.N. Charter prevents use of veto in certain instances. Although a potentially powerful check on the veto power when a State is a party to a dispute, in practice it has been minimized and is the weaker of the two. Second, the Uniting for Peace Resolution provides authorization to the General Assembly to take action in the face of Security Council inaction. This resolution has been used in the past to effectively override a Security Council veto and, other than disfavor among P-5 states, nothing limits its applicability.

A. *Obligatory Abstention*

1. Defining Obligatory Abstention

Although the veto power grants P-5 members a great deal of power, the Charter does include a limit on its use known as the obligatory abstention, found in Article 27(3) of the Charter. Under Article 27(3) of the U.N. Charter, when dealing with substantive matters, a Security Council member who is a party to a dispute shall abstain from voting "in decisions under Chapter VI, and under paragraph 3 of Article 52."[66] The requirements of Article 27(3) boil down to three main elements: first, that it is a substantive matter; second, that a member of the Council is a party to the dispute; and, third, that the decision falls under either Chapter VI, dealing with pacific settlement of disputes, or Article 52(3), governing pacific settlements of disputes through regional agreements or agencies.[67]

Despite its apparent promise in limiting the veto power, all three of these elements are less than concrete and provide P-5 members the opportunity to change the characterization of a set of circumstances in

66. U.N. Charter art. 27, para 3.

67. Suyash Paliwal, Note, *Reviewing and Reconsidering* Medellín v. Texas *in Light of the Obligatory Abstention from Security Council Voting*, 48 COLUM. J. TRANSNAT'L L. 541, 548–49 (2010).

order to prevent application of the abstention. For instance, whether an issue is a substantive or procedural issue can be considered a substantive question subject to a Security Council vote, and therefore also a P-5 veto.

Another way states aim to circumvent the application of the abstention is by avoiding the labels of "party" or "dispute." States have often disagreed as to what level of involvement is required in order to make one a "party," which eventually resulted in the International Court of Justice (ICJ) weighing in on the issue and creating a decision mechanism.[68] States similarly avoid the term "dispute," instead using the term "situation."[69] No definition was ever established for either term, although there was an early effort to clearly define what constituted a "dispute."[70] Therefore, states continue to use this alternate terminology to prevent its application. Finally, whether the requirement that the dispute is one dealt with under Chapter VI is met is often difficult to discern as the Security Council rarely makes clear which chapter it is acting pursuant to. However, forcible measures are typically viewed as falling under Chapter VII of the Charter and therefore are not impacted by the obligatory abstention.[71]

2. Practical Application of the Obligatory Abstention

At the outset of the United Nations, Member States were respectful of the obligatory abstention and refrained from voting on matters which were implicated, often citing specifically to Article 27(3).[72] However, states have since progressed away from this voluntary enforcement of the abstention and often when a state does abstain from a vote, it claims to do so voluntarily and not due to any obligation under Article 27(3).[73] Because the obligatory abstention is rarely mentioned during Council debates, its discussion when several countries questioned the ability of

68. Paliwal, *supra* note 67, at 560; Legal Consequences for States of the Continued Presence of South Africa in Nambia Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 25 (June 21). If there is a disagreement as to whether a Council member is a party to a dispute, the International Court of Justice (ICJ) has stated that the Council must make a prior determination that (1) there is a dispute and that (2) a member of the Council is a party to that dispute. 1971 I.C.J. Rep. 16, ¶ 24. This can be decided through either a Council vote, or a Presidential ruling. Paliwal, *supra* note 67, at 560–61. While this preliminary finding requirement is not found in the Charter, and therefore subject to criticism, one commentator praised the ruling as taking account of the practical need for a clear rule. Kirgis states that this rule will allow a "straightforward Council determination, on a case-by-case basis" and will reduce the chance that a permanent member would then ignore a Council decision under Chapter VI if they did not feel they needed to abstain. Kirgis, *supra* note 1, at 511.

69. Kirgis, *supra* note 1, at 511.

70. *Id.*

71. Paliwal, *supra* note 67, at 548.

72. Kirgis, *supra* note 1, at 511.

73. WOUTERS & RUYS, *supra* note 18, at 13.

France to veto a resolution proved insightful. France, in response to the allegation it should abstain from voting because of Article 27(3), stated that it could present a list of situations where a state in a similar situation to France had used their veto without challenge from anyone within the Council.[74] This interchange suggests that P-5 members are often wiling to turn a blind eye when a fellow P-5 member chooses to exercise its veto although it is arguably prohibited by the obligatory abstention.

3. Evaluation of Obligatory Abstention as a Solution to Security Council Inaction

The numerous grey areas present in defining when the obligatory abstention applies in practice mean that it is presently more of an illusory than actual limit on the veto power. However, despite its limitations, Article 27(3) does present a rare situation where a P-5 power would be prevented from vetoing a substantive vote and therefore should not be overlooked. Once the threat of the veto from that state is gone, it is possible for the Council to then recommend procedures for settlement under Article 36 with the hope that the P-5 member would feel pressure to abide by the recommendations.[75]

Therefore, it is worth the effort to push for a more concrete definition of these elements in order to make the abstention a real check on the veto power. Although the chances of convincing the P-5 to agree to a limit on their own veto power may be slim, many would have made the same argument regarding the Security Council supporting the idea of R2P not too long ago. Considering the fact that the international community is growing tired of being rendered ineffective by the Security Council's failure to act, there is no better time to make this effort.

B. *The Uniting for Peace Resolution*

1. Justification for the Uniting for Peace Resolution

Frustrated with the deadlock in the Council during the Cold war period due to systematic vetoes by the Soviet Union, the General Assembly (Assembly) passed Resolution 377A(V), the *Uniting for Peace Resolution* (Resolution) in 1950.[76] The Resolution was introduced by the United States and sponsored by seven states.[77] It passed on November 3,

74. *See id.* at 14.

75. Kirgis, *supra* note 1, at 508.

76. James E. Hickey, Jr., *Challenges to Security Council Monopoly Power Over the Use of Force in Enforcement Actions: The Case of Regional Organizations*, 10 IUS GENTIUM 77, 96–97 (2004).

77. Harry Reicher, *The Uniting for Peace Resolution on the Thirtieth Anniversary of Its*

1950 with a vote of fifty-two to five, with two abstentions.[78]

At the time, there was debate over whether the Resolution was a legitimate delegation of power to the Assembly under the Charter.[79] The argument in support of the Resolution was that Article 41(1) of the Charter secures to the Security Council the *primary responsibility* for the maintenance of international peace and security, which left open the position for a secondary guarantor of this responsibility. The preamble of the Resolution reflects this reasoning, stating "that failure of the Security Council to discharge its responsibilities on behalf of all the Member States . . . does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security."[80]

This view was substantiated in *Certain Expenses*, which dealt with the apportionment of expenses for U.N. peacekeeping operations.[81] In this case, the ICJ found that the Council's responsibility for the maintenance of international peace and security is primary, but not exclusive.[82] Therefore the Assembly does not have to defer to the Council under Art 11(2) of the U.N. Charter unless enforcement action is necessary.[83]

2. Substance and Application of the Uniting for Peace Resolution

Although the Resolution contained several parts, the most relevant part of the Resolution, Part A, states 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

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Passage, 20 COLUM. J. TRANSNAT'L L. 1, 7–9 (1981). The seven sponsoring states were Canada, France, Philippines, Turkey, United Kingdom, United States, and Uruguay. *Id.*

78. *Id.*

79. James Fergusson Hogg, *Peace-Keeping Costs and Charter Obligations-Implications of the International Court of Justice Decision on Certain Expenses of the United Nations*, 62 COLUM. L. REV. 1230, 1234 (1962).

80. Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 10 (1950).

81. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 168 (July 20).

82. *Id.*; Kirgis, *supra* note 1, at 533; David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 931 (1996).

83. Kirgis, *supra* note 1, at 534.

> armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.[84]

Other parts of the Resolution calling for a Peace Observation Commission, Collective measures Committee, and national armies for use "for services on behalf of the United Nations" were considered a dead letter by the 1950s.[85] Therefore, I will focus on Part A, which remains in full force.

The Resolution spells out four preconditions required in order for the Assembly to act pursuant to the Resolution.[86] First, the Security Council must have failed "to exercise primary responsibility for the maintenance of international peace and security."[87] Second, the Council's "failure" must have been due to a "lack of unanimity of the permanent members."[88] Third, there must "appear[ ] to be a threat to the peace, breach of the peace, or act of aggression."[89] And finally, as inferred from the above requirements, the Council must have dealt with the issue before the Assembly can take any action on the matter.[90]

Once these conditions are met, the Resolution is available for use. The Assembly can consider a matter pursuant to the Resolution under either of two referral procedures. First, the matter can be referred by the Security Council, with a vote of nine members.[91] Because the vote of the Security Council on whether to refer the matter is a procedural one, it is not subject to the veto under Article 27(2) of the Charter.[92] Second, the Assembly can consider a matter through a majority vote of the Member States of the United Nations. A vote by the Assembly can be triggered at the request of any Member State to invoke the Resolution.[93] Once the

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84. This vote now requires nine votes as with any procedural Council vote. Morriss, *supra* note 82, at 805 n.8. Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 10 (1950).

85. Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 11 (1950).

86. Reicher, *supra* note 77, 9–20

87. Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 10 (1950).

88. *Id.*

89. *Id.*

90. Reicher, *supra* note 77, at 9–20.

91. Morriss, *supra* note 82, at 805 n.8.

92. *Id.*

93. Marjorie Cohn, *Human Rights: Casualty of the War on Terror*, 25 T. JEFFERSON L.

referral has the requisite number of votes, the matter can be considered by the Assembly while it is in session, or, in the case that it is not, at an emergency meeting with 24-hour notice.[94]

While there are grey areas within these requirements, such as who decides what constitutes a "failure" of the Security Council or what constitutes the appearance of a threat to the peace, breach of peace, or act of aggression,[95] it is considered well-settled that a veto by a P-5 member of the Council constitutes a failure to act.[96] This has momentous implications in that it means that when a P-5 member vetoes a Council vote, the matter can then be referred to the General Assembly, which can hold an emergency meeting and, with a 2/3 vote, effectively override the veto with an Assembly resolution on the matter.[97]

The *Construction of a Wall Case* provides a clear example of how the Resolution can be used as a work-around to a Security Council veto, and perhaps also why the Resolution fell out of favor with the United States. In response to two failed attempts of the Security Council to pass a Resolution responding to a dispute over the legality of an Israeli wall in the West Bank due to a veto by the United States, the General Assembly convened an emergency session pursuant to the Resolution in May 1997.[98] This emergency session was re-convened repeatedly throughout the following years, and eventually resulted in Resolution ES-10/14 in December 2003, in which the Assembly requested an advisory opinion from the ICJ on the matter.[99]

In deciding the case, the ICJ first had to evaluate whether it had proper jurisdiction of the matter, which meant that it had to decide whether a referral from an emergency session pursuant to the Resolution was legitimate. The Court, in a press release issued on the opinion, summarized its findings in the area, stating:

REV. 317, 435–56 (2003); Robert D. Powers, Jr., *Voting in the United Nations*, 17 JAG J. 67, 82 (1963).

94. Powers, *supra* note 87, at 82.

95. Reicher, *supra* note 77, at 9–20.

96. Rebecca Kahan, *Building A Protective Wall Around Terrorists - How the International Court of Justice's Ruling in the Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations*, 28 FORDHAM INT'L L.J. 827, 847 (2005); Morriss, *supra* note 81, at 931. However, this conclusion has recently been called into question. *See* Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SECURITY L. 1, 17 (2013). Carswell argues that because a veto power is conferred on the P-5 by Article 27(3) of the Charter, its use is not necessarily a failure. Instead, he asserts that a veto "is a necessary, but not a sufficient prerequisite" for the GA to act under the Resolution.

97. L.H. Woolsey, *The "Uniting for Peace" Resolution of the United Nations*, 45 AM. J. INT'L L. 129, 133 (1951).

98. Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).

99. G.A. Res. ES 10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003).

> The Court further refers to the fact that the General Assembly adopted resolution ES-10/14 during its Tenth Emergency Special Session, convened pursuant to [The Uniting for Peace Resolution], which provides that if the Security Council fails to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly may consider the matter immediately with a view to making recommendations to Member States. The Court finds that the conditions laid down by that resolution were met when the Tenth Emergency Special Session was convened; that was in particular true when the General Assembly decided to request an opinion, as the Security Council was at that time unable to adopt a resolution concerning the construction of the wall as a result of the negative vote of a permanent member.[100]

The Court, proceeding to the substance of the opinion, found that the Israeli-constructed wall was contrary to international law.[101] In response to the ICJ ruling, the Assembly reconvened the emergency session and passed Resolution EC-10/15, which demanded that Israel comply with the ICJ opinion. This chain of events shows exactly how the Resolution can, in effect, allow the General Assembly to veto the veto.[102] Unfortunately, while this opinion served to legitimize the Resolution, it has not been invoked since. Of the ten times the Resolution has been used, the Assembly has recommended military force only once.[103] This is likely because while the Resolution appears to still be a viable option for the Assembly to speak in the face of a Council deadlock, there are some impediments to its use and limitations on its reach.

3. Limitations on the Uniting for Peace Resolution

The first and most significant limitation is that the General Assembly is limited to making nonbinding recommendations under the Resolution.[104] Therefore, a recommendation for the use of force by the Assembly under the Resolution does not itself justify the use of force by a state.[105] However, a recommendation by the Assembly may still carry significant force as a strong statement on the view of the majority of

100. Press Release, International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Press Release 2004/28 (July 2004).

101. G.A. Res. ES 10/14, U.N. Doc. A/RES/ES-10/15 (Aug. 2, 2004).

102. Gregory Khalil, Op-Ed, *Just Say No to Vetoes*, N.Y. TIMES (July 19, 2004).

103. Carswell, *supra* note 95, at 7.

104. Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469, 503 (2010).

105. *Id.*

Member States, or through a recommendation of other action, such as economic sanctions.[106]

However, any action taken directly in opposition to a veto of one or more P-5 members could cause serious political tensions. This becomes even more of an issue should military action be seen as necessary despite the lack of Council approval. Because the United Nations does not have its own military forces, any action relies on the military and financial support of the major powers, in essence the P-5.[107] When action is taken by some of the P-5 members directly in opposition to the veto of fellow P-5 members, it weakens the authority of the Council as being the sole body capable of authorizing the use of force. This could serve to undermine the preeminence of this international body as P-5 members are less likely to view it as the ultimate authority if, upon failing to get its resolution passed, other P-5 states will ignore that veto and choose to act anyway.

Finally, and arguably most influentially, some P-5 members have come to disfavor the Resolution. The United States, once its champion, is now its biggest critic. When the Resolution was passed, there were only 60 Members States of the United Nations, meaning that the United States could count on being able to refer a situation to the Assembly and secure a vote in favor of the action it wanted. However, with 193 current members of the United Nations, a vote in favor of U.S. interest is no longer a guarantee, and presents a risk the United States would rather not take.[108]

Most recently, when the United States threatened military action in Iraq, there was a push to make use of the Resolution to pressure the United States not to take action.[109] In response, the United States engaged in a proactive campaign to prevent the use of the Resolution, sending messages to other Member States, which stated that "[g]iven the current highly charged atmosphere, the United States would regard a General Assembly session on Iraq as unhelpful and as directed against the United States."[110] The Resolution was never invoked.

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106. *Id.*

107. Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT'L L. 341, 355 (2009).

108. Carswell, *supra* note 95, at 25.

109. Michael Ratner & Jules Lobel, *A UN Alternative to War: "Uniting for Peace,"* JURIST (Feb. 10, 2003); Mike Billington, *UN 'Uniting for Peace' Resolution Could Demand End to U.S. War on Iraq*, 30 EXECUTIVE INTELLIGENCE REV., Apr. 11, 2003, at 42.

110. Billington, *supra* note 108; Cohn, *supra* note 92, at 347.

4. Evaluation of the Uniting for Peace Resolution as a Solution to Security Council Inaction

The Uniting for Peace Resolution presents a rare instance where the Assembly can take action in direct response to the failure of the Security Council to do so. This resolution applies in all situations where the Council has considered the issue, which is considerably broader in application than the obligatory abstention provision. Nevertheless, the fact that the Assembly is limited to non-binding resolutions and may not authorize force is a critical limitation. In instances where a humanitarian crisis is under way and military intervention is needed, even an Assembly statement contrary to that of the Council would not be enough to provide authorization for such intervention in a manner consistent with the Charter.

However, it arguably could provide a more legitimate way of undertaking the type of military action which has been taken under the authority of R2P. Because the Security Council is the only United Nations body which can authorize the use of force, when it fails to take action, it is as though the entire United Nations fails to take action. However, under the Resolution, the Assembly can call a session in response to this failure and speak as a unified body, calling for action. Although this wouldn't be considered a legal authorization of force under the Charter, neither have some of the other interventions taken despite a Security Council veto. For example, Kosovo, where NATO decided to take action without Council authority. Public opinion widely supported this action despite its illegality, with even a United Nations commission conceding that although it was illegal, it was legitimate. Therefore, at a minimum, this resolution provides a way to shore up a clear statement of support for actions taken under the principles of R2P but without Council approval.

V. CONCLUSION AND RECOMMENDATIONS

It is clear that these three potential responses to Security Council inaction are incredibly varied. For starters—their legal basis, with one found in the Charter, one found in a resolution, and one without a clear legal basis. On this ground, it is clear that the obligatory abstention found in the Charter and the Resolution have the advantage of being established international law, which eliminates controversy over the legitimacy of their use.

Looking to the scope of each, the obligatory abstention applies in a narrower set of circumstances than either R2P or the Resolution, meaning its potential for impact on this issue is limited. The extent of situations in which R2P could apply is still subject to debate, with the version passed

by the World Summit being limited to the four crimes of genocide, ethnic cleansing, war crimes, and crimes against humanity. Arguably, despite the allowance of R2P in the case of these crimes, there will be disagreement over when the threshold of any of them has been met so as to warrant R2P action. The Resolution, on the other hand, has no limit other than that the Security Council has considered the issue. Granted, the Security Council could avoid hearing the issue, as is sometimes accomplished through the hidden veto. However, because the threat of a veto is usually what prevents such a referral, the potential for action despite a veto would encourage a referral even with a veto threat. This allows the Resolution to be directly responsive to every case which has ended with Council inaction.

The result of the use of these three tools also differs. The obligatory abstention prevents the exercise of a veto, but does not guarantee action by the Council. It is very possible that when an interested state is unable to veto action, the only impediment to action is thereby removed. Under R2P, the authorized action is, again, unclear. Although the ICISS formulation supported military intervention as a last resort, this view was not adopted at the World Summit and has been increasingly disfavored with its increasing use as a justification for questionable military action.

Finally, the roadblocks standing in the way of the effective use of these methods as a solution to Council inaction are important considerations. For R2P, the increasingly common interpretation of the doctrine authorizing action only through the Security Council is a critical limitation in allowing it to respond to inaction in that very body. Further, its developing legal basis and controlling principles are cause for many states to be uncomfortable with its use as it is subject to being manipulated to each state's own political goals. On the other hand, the obligatory abstention and the Resolution are already established and defined, although with the abstention the lack of clarity in definition has led to its decreasing applicability. For the Resolution, the biggest challenge is likely in finding an Assembly willing to speak with one voice against P-5 members who have expressed their opposition to U.N. action.

Considering the strong support behind the developing R2P doctrine despite its many unclear aspects, there is no reason that this could not also provide the impetus to finally nail down the details of the obligatory abstention and overcome the stigma of utilizing the Uniting for Peace Resolution.