UNITING FOR "PEACE" IN THE SECOND COLD WAR: A RESPONSE TO LARRY JOHNSON

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Larry Johnson's timely and important essay[1] challenges both utopian and realist accounts of UN law and practice by reviving the debate over the nature and functions of the UN General Assembly, particularly the General Assembly's power to deploy certain legal tactics not only to influence collective security deliberations in the UN Security Council, but also, more significantly, to provide some legal justification for multilateral military "collective measures" in the event of Security Council gridlock. One vehicle by which the General Assembly may assert its own right to intervene in defense of "international peace and security" is a "Uniting for Peace" (UFP) resolution, authorized by resolution 377(V)[2] (1950). At its core, a "uniting for peace" resolution is an attempt to circumvent a Security Council deadlock by authorizing Member States to take collective action, including the use of force, in order to maintain or restore international peace and security. General Assembly resolution 377(V) does not require resolutions to take specific legal form—language that echoes the preambular "lack of unanimity of the permanent members [that results in the Security Council failing to] exercise its primary responsibility for the maintenance of international peace and security" is sufficient to render a given resolution a UFP, provided the General Assembly resolution calls for concrete "collective [forceful] measures." For this reason, experts disagree[3] on precisely how many times a UFP has indeed been invoked or implemented, although informed analysts suggest UFP has been invoked in slightly more than ten instances since 1950.

UFP retains purchase in the professional vernacular of international lawyers, activists, and diplomats despite confusion among key constituencies regarding its legal force and likely effectiveness in particular policy contexts, whether with respect to the issue of Palestinian[4] statehood.[5] The March 27, 2014 General Assembly resolution 68/262[6] on the Territorial Integrity of Ukraine (arising from the March 16, 2014 Crimean referendum on independence and subsequent March 21, 2014 accession of Crimea to the Russian Federation) is but the latest illustration of the problems occasioned by a P5 member's veto on a matter claimed central to its national interests. Following eight Security Council meetings[7] on the situation in Ukraine, Russia vetoed a draft resolution that would have urged Member States to not recognize the results of the referendum in

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[1] Larry D. Johnson, *"Uniting for Peace": Does It Still Serve Any Useful Purpose?*, 108 AJIL Unbound 106 (2014).

[2] Uniting for Peace, GA Res. 377A(V) (Nov. 3, 1950).

[3] Security Council Report, Security Council Deadlocks and Uniting for Peace: An Abridged History (2013).

[4] Joe Lauria, *Palestinian Options at U.N. Lead to Legal Threat to Israel's Military*, WALL ST. J. (Sept. 17, 2011).

[5] *See, e.g.*, a recent example with respect to the crisis in Ukraine, Edith M. Lederer & Peter James Spielmann, *Ukraine May Turn to UN General Assembly*, AP NEWS (Mar. 7, 2014).

[6] GA Res. 68/262, UN Doc. A/RES/68/262 (Mar. 27, 2014).

[7] *Backing Ukraine's Territorial Integrity, UN Assembly Declares Crimea Referendum Invalid*, UN NEWS CENTRE (Mar. 27, 2014).

Crimea. Following the Security Council veto, Canada, Costa Rica, Germany, Lithuania, Poland and Ukraine introduced a similar resolution at the General Assembly, which passed with 100 votes affirming, 11 votes against, and 58 abstaining.

Because it has been so often invoked and is likely to be increasingly implemented as a tactic in the lawfare of the Second Cold War, a critical reexamination of UFP is urgently needed, both along formalist-positivist lines as well as in a broader political and historical context. In Johnson's view, UFP is no longer needed to provide a basis for General Assembly collective security measures because emerging norms on individual or collective self-defense under Article 51 empower the General Assembly to deploy military force. Framed this way, the argument fits within established debates on, say, the doctrine of sources (whether emerging CIL norms like 'humanitarian intervention' can trump positive law sources like the Charter), or broader theoretical debates on the right of individual or collective self-defense in the context of the Charter (fought from Kelsen to Franck through today). The fact that states routinely take unilateral or multilateral action with "no UN cover"—and couch their interventions in elaborate legal lattices—is, by itself, descriptively and normatively uninteresting. The most fascinating aspect of Johnson's argument, however, is the tension between a rigorous positivist deduction (outside the self-defense context and where Article 2(4) remains the "main legal obstacle" to Assembly "use-of-force" recommendations, UFP resolutions are, essentially, unnecessary and legally suspect) and his realist intuition that UFP continues to matter, and will provide "inspiration" for new forms of Assembly action in the face of future Security Council veto(s). For me, the best way to understand this tension and move beyond it remains Martti Koskenniemi's *The Place of Law in Collective Security*,[8] not merely for its near-prophetic policy predictions on Ukraine but much more so for its political commitment to opening conceptions and practices of 'security' to genuine public, and not just General Assembly, debate.

In the short response that follows, I would like to explore the implications of this tension by raising three points. First, it is critical to examine the political context of the adoption of a uniting for peace resolution in both historical and contemporary frames. Second, it is important to understand the Soviet position on uniting for peace. This is important because despite significant reorientation in post-Soviet Russian international theory (i.e., the shift away from dualism to monism; embrace of liberal international trade law regimes), contemporary Russian conceptions of United Nations law directly parallel prior Soviet theory and practice. Third, to the extent that UFP resolutions are likely to proliferate, it is imperative that we sketch several transformations in the exercise of power relations in the 21 century that challenge not merely existing international legal frameworks, but also international lawyers' often ambivalent attitudes towards emerging non-state actors.

I. UN Realism vs. Utopia in the Context of the Cold War

Uniting for Peace cannot be understood outside of the context of the Cold War. The "Acheson plan," as UFP was called during its drafting, was a U.S.-led plan to fundamentally restructure the political and constitutional order of the UN. It was drafted in a sober acknowledgement that the fragile post-WWII peace could quickly collapse into a third world war. Events in Czechoslovakia, Romania, and Albania from 1945 to 1950 showed the allure of communism as populist ideology and proved that the Soviet Union would exert its vast military, economic, and political pressure on newly liberated states in order to form powerful military, economic, and political blocs.

[8] Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455 (1996).

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The official records of the fifth session of the General Assembly concerning UFP are stark memorials of the stakes between the powerful post-war blocs. On the one hand, the United States claimed[9] the torch of freedom, arguing that if the Member States actually established a UFP system "which ensured that aggression will be promptly exposed, if they maintain a collective strength, and if they have both the will and the way to use that strength promptly in case of need," then a third world war could be permanently avoided. The USSR, in the eyes of America's foreign policy elite, was the chief post-war aggressor—fomenting communist revolutions, stamping out freedom, and willing indigenous political elites into "enforced conformity with the pattern of Soviet totalitarianism." In the utopian vision of John Foster Dulles,[10] UFP was necessary to "move nearer and nearer to the Charter ideal, the ideal of impressing armed force, with a trust, so that it will not be used, as our Charter says, save in the common interest, a common interest as found by *a body that is responsive to the moral judgment of mankind*." (emphasis added).

On the other hand, the socialist bloc dismissed Dulles's characterizations as "venomous fantasy."[11] Or, as Michalowski[12] (Poland's representative) argued, it was the "American witch doctors" who were prescribing (with no less pressure than was impugned to the Soviets) their own "black magic"—an ostensibly liberal vision in the form of the Marshall Plan, with its own political conditionalities designed to impose the "American way of life" upon all the nations of the world.

The existential stakes for the 'blocs' at that time were significant. But we should not lose sight of the stakes for the nominal beneficiaries of UFP, the great multitude of Member States outside the P5 in the United Nations of 1950, which comprised sixty nations. For elites in states other than the P5, UFP may have represented a genuine attempt to build a practical global system of collective security. In the words of Uruguay's representative, Enrique Armand-Ugón,[13] UFP could also finally fulfill the utopian dream of perpetual peace:

> Lacking in strong military forces, but likewise lacking in designs for conquest and aggrandisement, the small countries represent an untapped force for peace and international justice, since all of them hope for the reign of law and cannot but reject aggression, threats and violence. It follows that, in the organization of world security, these nations without designs or plans for conquest can and must be regarded as a powerful force serving the peaceloving community of nations, the rules of international law, and the ethical and legal principles of civilization. As between, what is just and what is unjust, *they* will choose justice; as between what is legitimate and illegitimate, *they* will choose law and as between violence and security, *they* will choose the maintenance of peace. (emphasis added).

Several intuitions follow from this brief sketch. First, this vision of a politically neutral Assembly representing the world's nations was not merely a utopian ideal. It was also a programmatic vision of a majoritarian, statist, political order, enforcing *its* moral/normative vision in complementarity to the Security Council. In the debate between competing communistcapitalist universalisms, UFP gave voice to a third way, the political mobilization of former colonies and other burgeoning states. Moreover, Armand-Ugón, a powerful centrist figure in Uruguay prior to his UN work, and who would go on to serve in the International Court of Justice and serve as an *ad hoc* judge in *Barcelona Traction*, was not merely articulating the demands of a budding non-aligned movement. By endorsing the Acheson plan, elites in the "small countries" arguably

[9] UN GAOR, 5th Sess., 299th plen. mtg. at 294, para. 38, UN Doc. A/PV.299 (Nov. 1, 1950).

[10] UN Audiovisual Library of International Law, *John Foster Dulles on General Assembly Resolution "Uniting for Peace" – 1950*, YOUTUBE (June 14, 2013).

[11] UN GAOR, 5th Sess., 300th plen. mtg. at 310, para. 34, UN Doc. A/PV.300 (Nov. 2, 1950).

[12] *See* UN GAOR, 5th Sess., 299th plen. mtg. at 305, para. 148, UN Doc. A/PV.299 (Nov. 1, 1950).

[13] *Id.* at 293, para. 27.

expanded their own political capital—in the august halls of the United Nations as well as in domestic settings—in terms of greater negotiation leverage for their states and other constituencies. Third, UFP may have paradoxically served as an impetus for subsequent Soviet support for decolonization and national liberation struggles in that it incentivized "Assembly-packing," or recognition of states to skew not just the global geopolitical race, but actual political balance[14] at the United Nations.

II. Soviet and Post-Soviet Russian Outlooks on Uniting for Peace

The Acheson-Dulles plan was an obvious and audacious attempt to dilute the power of the Soviet Union at the United Nations. The context that gave rise to UFP—fortuitous Soviet absence from the Security Council during votes on two resolutions authorizing assistance in Korea, and subsequent Soviet vetoes—naturally meant that Soviet leadership would view with suspicion any attempts to use UFP to authorize force or other "assistance." Indeed, the official reports of the 299–302nd plenary meetings are replete with references to mutual mistrust—a jarring contrast to the idealized, almost romantic, visions advanced by representatives of the roughly three "blocs" (U.S.-led, Soviet-led, neutral).

Soviet opposition to UFP was not merely political, however, but was grounded in elaborate legal argumentation. Even opponents of the USSR, like the Philippines' General Romulo, praised the "great force and skill" with which Soviet Minister of Foreign Affairs, Andrey Vyshinsky, developed the legal argument against UFP. No special skill or eloquence was required for that argument, however, insofar as it rested on then-and-still prevailing principles of treaty interpretation. The Soviet position was essentially a re-articulation of a doctrine of sources which gave primacy to positive treaty law over other sources, a position not remotely unique to Soviet theory at the time. The opposition to Uniting for Peace (***единство в пользу мира***) was raised in leading Soviet treatises, including by Ushakov (1962)[15] and Tunkin (1970).[16] More significant, perhaps, was the opposition to the revival of UFP in the 1980s by Soviet international lawyers who strenuously argued against the invocation of UFP by developing states to advance agendas in the closing days of the Cold War. The 1985 Soviet Yearbook of International Law dismissed outright attempts by "third world" states to restructure the United Nations order to reflect changes in the composition of the United Nations as well as broader geopolitical transformations.

The post-Cold War era, particularly in the immediate wake of the collapse of the Soviet Union, revived hope that the United Nations would finally emerge as the institutionalized consciousness of global security. There is vast literature on the momentous shift within the United Nations in response to Iraq's occupation of Kuwait in 1990–91, and the potential that Soviet endorsement of collective security offered. But two important avenues for research and policy engagement remained underdeveloped.

First, post-Cold War triumphalism in the West occluded important transformations in Russian, and to a lesser extent, Chinese and other approaches to international law and broader issues of global governance, especially studies of regional integration and regional security. In the immediate context of UFP, for instance, there is remarkable continuity between Soviet theory and practice and contemporary Russian approaches to collective security vis-à-vis the United Nations. Russia's recent attempts to operationalize, yet again, the collective security function of the Security Council on issues like the "no-fly zone" in Libya,[17] followed by supposedly principled opposition to humanitarian intervention in Syria, are often seen as crude instrumental-

[14] *Member States, Growth in United Nations Membership, 1945-Present*, UNITED NATIONS.

[15] VG USHAKOV, THE SOVIET UNION AND THE UNITED NATIONS (1962).

[16] GREGORY IVANOVICH TUNKIN, THE THEORY OF INTERNATIONAL LAW (1970).

[17] *Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions*, UN Press Release SC/10200 (Mar. 17, 2011).

ism in defense of particular narrow foreign policy objectives. A deeper analysis—looking at Russia's attempts to rebuild not Soviet domains, but Soviet-style institutional networks (not just in the ever-curious battle space of UN "abstentions," but also, for example, in regional trade and security partnerships)—could actually unlock strategic considerations and new normative visions.

Second, post-Cold War triumphalism naturalized and reified normative conceptions of a global order premised on the nation-state as the central subject of international law, with a security framework guaranteed by a sole superpower—the United States. As Martti Koskenniemi and several other prominent international lawyers cautioned in various "dissent channels," the failure to examine the role of "normative considerations, including law, in the production or construction of collective security" would only lead to further frustration of the same.

III. Uniting for "Peace" in the Second Cold War

The return to Cold War rhetoric in the wake of the Ukraine crisis has meant that antagonism between the United States and Russia is likely to further alienate Russia and the United States in voting postures at the Security Council. The United States, for instance, has openly accused Russia of launching a misinformation campaign over the crisis in Ukraine. As Samantha Power, America's permanent representative to the United Nations, stated before the Security Council[18] on June 24, 2014: "Russia has attempted, erroneously, to characterize the events unfolding in eastern Ukraine as a humanitarian crisis." Speaking to the Russian diplomatic corps at the Ministry of Foreign Affairs on July 1, 2014, Vladimir Putin evoked[19] what he perceives as continuations of Western policies of containment and explicitly claimed[20] a legal right to "humanitarian intervention in self-defense," presumably, and critically, in Ukraine in order to defend Russian compatriots and national interests. Aside from the erosion of basic diplomatic decorum in Russian-U.S. relations, both sides appear to be fighting aggressively for control over the factual narrative relating to Ukraine, let alone a legal one. Many policy experts[21] sense that the pragmatic rapprochement between Russia and the United States—the much-lauded Obama-Medvedev 2009 "reset"—has been severely set back. Voting postures at the United Nations will likely continue to reflect these rifts in the immediate and longer-term future. At the same, as in the twentieth century's Cold War, new states, revanchist state groupings, and increasingly powerful non-state actors will likely vie for stronger voices at the United Nations and peer institutions. Therefore, UFP and progeny will remain in uneasy complementarity with and within the existing sites of global power.

Nevertheless, several significant transformations in global economic and military power weigh in favor of a vigorous public debate on the nature and limits of security action and the future institutional structure of global governance. By way of example, we can consider four areas traditionally thought of as settled matters of international law, but which have suddenly become open for *de novo* consideration: (1) further militarization of space; (2) exploitation of marine resources versus protection of natural habitat; (3) rapid expansion of private military contracting practices, along with their attendant plausible deniability and uncertain command-and-control linkages; and (4) cyber warfare and cyber-surveillance. In each of these contexts, it would appear, international law either provides a comprehensive treaty regime (e.g., Outer Space Treaty, UNCLOS) or settled norms for regulating rogue behavior in each context.

[18] Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, Remarks at a Security Council Meeting on the Situation in Ukraine (June 24, 2014).

[19] Ministry of Foreign Affairs of Russia, *Vladimir Putin's speech at the Conference of Ambassadors and Permanent Representatives*, YOUTUBE (July 1, 2014).

[20] *Id.*

[21] WindRose Drive, *U.S. Russia Forum 061614*, YOUTUBE (June 27, 2014).

At first glance, the role of international law and international lawyers in these settings seems functionally indistinguishable from the role international lawyers have always played in foreign affairs, whether that task is drafting treaties, constitutive UN documents, or sourcing/interpreting/articulating precedent. International lawyers with particular substantive or linguistic expertise will engage with policymakers in search of neat descriptive accounts; theorists or those with proclivities for international relations or deeply contextualized historical analysis will continue to flirt with causality; different "schools" or approaches to international law will continue shifting attention to one set of matrices or another. The rhetoric concerning each of the aforementioned battlefields in the new Cold War may seem especially virulent. However, a most cursory review of Cold War-era official records shows that suspicions regarding propaganda campaigns, covert wars, and 'fifth columns' were as deep then as they are now. Proof of military excesses, diplomatic mendacity, and clandestine legal orders have existed long before the onset of the Manning/Assange/Snowden-era. Now, the only question appears not to be whether the Security Council or General Assembly is "in a position to enforce the public morals of a new order" (Koskenniemi)[22] or whether "force might be used to promote distinctly national ambitions" (J. F. Dulles), but whether and how a mobilized, professionalized cadre of international lawyers would institutionalize a vocabulary of peace.

[22] MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW (2011).

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