

HE GOT IT ALMOST RIGHT

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Larry Johnson's answer to his own question¹ is a qualified "no." Surely he is correct when he says that the General Assembly does not need the Uniting for Peace resolution in order to consider a matter that is on the UN Security Council's agenda. The International Court of Justice made that clear in its Advisory Opinion on the Construction of a Wall. It is only when the Security Council is actively pursuing the matter that UN Charter Article 12(1) requires the General Assembly to defer to the Council.

Johnson is also correct when he says that Uniting for Peace does not serve to enhance the authority that the UN Charter itself supplies to the Assembly to adopt non-binding resolutions intended to keep or restore peace. The ICJ also made that clear in its Advisory Opinion on the Construction of a Wall.² Without relying on the Uniting for Peace resolution, the ICJ in paragraphs 27 and 28 of its Opinion approved the practice of the General Assembly to deal with matters concerning maintenance of international peace and security. The Court turned to the Uniting for Peace resolution only in the ensuing paragraphs of its Opinion, dealing with procedural matters related to the Assembly's request for an Advisory Opinion.

Nevertheless, the Uniting for Peace resolution is not entirely irrelevant to current General Assembly practice. The resolution says that if the Security Council fails to exercise its primary responsibility to maintain international peace and security because of a veto by one of the permanent members, the General Assembly "shall" consider the matter immediately with a view to making appropriate recommendations to Member States for collective measures. The language is mandatory insofar as it calls for the General Assembly to convene and consider the matter. In other words, the General Assembly would be required by its own resolution to take up the matter immediately, and not just for purposes of lively debate. This would not be difficult procedurally since, as Johnson points out, the Assembly is in session year-round these days.

Johnson may be on shaky ground where he says that an Assembly recommendation for the use of coercive force for any purpose other than individual or collective self-defense would be of dubious validity and would expose States following such a recommendation to a risk of violating Article 2(4) of the Charter. On one level, he is clearly correct. There is a risk of violating Article 2(4) almost any time a State or a combination of States uses armed force within the territory of another State. This is so even if self-defense is the asserted purpose. The real question is: how great is the risk under the particular circumstances? More particularly, how great is the risk if the purpose can legitimately be deemed humanitarian or in some other respect benign? Even more particularly, how great is the risk if the purpose is not only benign, but is formally authorized or

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

² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Summary of Advisory Opinion (July 9, 2004).

approved by at least two-thirds of the members of the UN General Assembly? The answers to these questions would not turn on whether the Assembly invokes the Uniting for Peace resolution.

Article 2(4), of course, is at the very heart of the Charter's guiding principles. That said, it is hardly a model of clarity. As is well known, it prohibits member States from threatening or using force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." Clearly, this prohibits the use of force (absent an appropriate Security Council authorization) to alter the territorial boundaries of a State or to take away its statehood. But international law scholars and commentators have debated for decades whether the use of armed force for other purposes—particularly for humanitarian purposes—falls within the prohibition of Article 2(4).

The prohibition against using force against the "territorial integrity" of a State could apply to any use of force, not in self-defense, by one or more States on the territory of another (unwilling) State, or it could apply only to a use of force in another State that is designed to alter the territorial boundaries of that State or is otherwise inconsistent with the purposes of the United Nations. Since the express purposes of the United Nations, as set forth in Article 1(3), include achieving international cooperation in solving economic, social, cultural, or humanitarian problems, and since in some situations those problems might not be solvable by negotiation, the latter interpretation of Article 2(4) is at least plausible—especially if the decision to use force is not made unilaterally by those planning to act. Thus the latter interpretation would support some General Assembly use-of-force resolutions that are not designed to alter territorial boundaries, but rather are intended solely for purposes within the ambit of Article 1(3). Those legitimate purposes would not be limited to self-defense.

This view is buttressed by the ICJ's Advisory Opinion on the Construction of a Wall. As Johnson recognizes, the Court said that the accepted practice of the General Assembly concerning the maintenance of international peace and security is consistent with Article 12, paragraph 1, of the UN Charter. Article 12(1) gives the Security Council primary responsibility for maintaining international peace and security. That responsibility includes recommending measures involving the use of force that could go beyond self-defense. It follows that the General Assembly's role in maintaining international peace and security could include recommendations (without binding effect) for the use of force, and the Assembly would not be strictly limited to recommending the use of force in self-defense. It would presumably follow, as well, that States carrying out such recommendations would not be violating other provisions of the UN Charter, such as Article 2(4), unless they go beyond what is necessary to carry out the recommendations.

Johnson's more cautious viewpoint may well be a reflection of his hands-on experience in the UN Secretariat. With that background, one might have a satchel full of reasons to doubt the purity of motives behind votes in the General Assembly to recommend the use of force in some cases and not in others. Even without such a background, one might be skeptical. Thus it is quite understandable that Johnson and others would favor tight—one might even say bullet-proof—norms denying legitimacy to malleable justifications that States could assert in order to use armed force beyond what is strictly necessary for self-defense. Regrettably, however, the UN Charter is not bullet-proof. Its armor against the aggressive use of force is penetrable, sometimes for better and sometimes for worse.