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**TESTING THE CONSTITUTIONAL LIMITS OF THE
UN CHARTER:
Applying a Contemporary Interpretation of the Uniting
for Peace Resolution in Syria**

Mickey Isakoff

TABLE OF CONTENTS

INTRODUCTION 132

I. THE WEIGHT OF THE ARAB SPRING 134

 A. The Arab Spring in Tunisia and Egypt: The Start and the Peak 135

 B. The Transition Process in Tunisia and Egypt 137

II. THE ARAB SPRING IN SYRIA: THE REVOLUTION HITS A BRICK WALL 139

 A. The Crimes of the Assad Regime 139

 B. Utilizing the IIIM 141

III. JURISDICTIONAL ISSUES: SYRIA AND THE ASSAD REGIME 143

 A. The Consequences of Security Council Gridlock 143

 1. *The International Criminal Court* 144

 2. *Ad-hoc tribunals* 144

 B. Historical Application of Uniting for Peace 145

IV. UNITING FOR PEACE RESOLUTION: SYRIA 146

 A. Interpreting Uniting for Peace 147

V. GENUINE CHALLENGES: A SOBERING REALITY 150

 A. More Practical Methods 150

CONCLUSION 152

“We are sentenced to hope”¹ – Sa’dallah Wannous

INTRODUCTION

In 2011, Syria joined the growing revolution and resistance movements across the Middle East known as the Arab Spring. But what happened in Syria in the ensuing years distinguishes it from the rest of the Arab world. Escalating confrontations between the authoritarian Bashar al-Assad (Assad) government and numerous opposition groups developed into an intra-state conflict worthy of volumes of sociological, political, and cultural analysis. Additionally relevant for purposes of this Paper are the various external players who have not only used the conflict in Syria to settle their own disputes, but have also demonstrated that political interests can—and will—stymie the constitutional mandates set forth in the United Nations Charter (UN Charter). And in that, the UN Security Council wields the power—under Chapter VII of the UN Charter—to create international tribunals, or refer situations to the International Criminal Court. For over a decade since the Arab Spring, the Syrian people have endured the unimaginable. The combination of the authoritarian Assad regime with the paralysis within the Security Council has permitted chemical weapons violations to go unpunished, thousands of human rights abuses to go unaddressed, and a refugee crisis to mutate into one of the worst humanitarian disasters in this millennium.² From terrorism and torture,³ to attacks on hospitals and healthcare,⁴ to cutting off access to humanitarian

1. Sa’dallah Wannous, *translated by Jonathan H. Shannon, THE THEATRE OF SA’DALLAH WANNOUS: A CRITICAL STUDY OF THE SYRIAN PLAYWRIGHT AND PUBLIC INTELLECTUAL* (available at: <https://www.critical-stages.org/25/the-theatre-of-sadallah-wannous-a-critical-study-of-the-syrian-playwright-and-public-intellectual/>) (quoting Syrian playwright Sa’dallah Wannous when he said “mahkumun bil-amal.”).

2. See generally SAMER N. ABBOUD, *SYRIA* (2016) (providing an in-depth analysis of the Syrian conflict and its historical and political context).

3. See Bureau of Counterterrorism, *Country Reports on Terrorism 2020: Syria*, U.S. DEPT. OF STATE, <https://www.state.gov/reports/country-reports-on-terrorism-2020/syria/> (last visited April 3, 2023) (“Over the past two decades, the Assad regime’s permissive attitude toward [Al-Qaeda] and other terrorist groups’ foreign terrorist fighter (FTF) facilitation efforts during the Iraq conflict fed the growth of [Al-Qaeda], ISIS and affiliated terrorist networks inside Syria.”); see also *End the Horror in Syria’s Torture Prisons*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/latest/campaigns/2016/08/syria-torture-prisons/> (last visited April 23, 2023) (“As many as 13,000 people have been killed in Saydnaya [a Syrian State Prison] since 2011, in utmost secrecy.”).

4. See, e.g., Lewis Sanders IV, *Syria’s Hospitals Face Systematic Attacks: Report*, DW (March 9, 2021) <https://www.dw.com/en/syrias-hospitals-face-systematic-attacks-report/a-56811097> (“[D]estroying medical facilities had formed part of a strategic campaign against rebel-held areas by the Syria regime and Russian forces . . .”).

aid,⁵ the unpunished violations of international law committed by the Assad regime highlights the worst the politics of the Security Council has to offer.⁶

This Paper contends that without accountability for the atrocity crimes committed by the Assad regime, there is no chance that the Syrian people will experience an enduring peace. And when it comes to sequencing justice and peace, justice must—at least as it pertains to Syria—be underway in some manner before a transitional peace process is implemented. In support of this theory, this Paper argues that a resurrection and fresh interpretation of UN General Assembly Resolution 377(V)—the Uniting for Peace Resolution⁷—can best-serve as an avenue for international law to prevail over international politics. In light of Russia’s 2022 invasion of Ukraine,⁸ this Paper builds off the momentum that has been gained in the debate over the balance of power in the United Nations (UN) between the Security Council and the General Assembly.⁹ Specifically, a contemporary analysis of the chemistry between the Uniting for Peace Resolution and the UN Charter has become increasingly relevant. Accordingly, a favorable interpretation of the Uniting for Peace Resolution could provide a constitutional opportunity for the General Assembly to establish a UN ad-hoc tribunal—a responsibility traditionally reserved for the Security Council—to prosecute high-powered perpetrators of atrocity crimes within the Assad regime. Not unmindful of the long-term political succession implications an international tribunal could have within Syria, this Paper nonetheless asserts that as a general matter, the UN Charter should be viewed as a “living tree”—a workable instrument whose interpretation may change over time to ensure it serves its object and purpose.¹⁰ With the ability of the Security Council to fulfill its statutory mandate

5. See, e.g., David Adesnik, *A Strategy to End the Systemic Theft of Humanitarian Aid in Syria*, FOUNDATION FOR DEFENSE OF DEMOCRACIES (Mar. 15, 2023) <https://www.fdd.org/analysis/2023/03/15/a-strategy-to-end-the-systematic-theft-of-humanitarian-aid-in-syria/> (“Aid poured into Syria after an earthquake on February 6 [2023] that registered 7.8 on the Richter scale. Reports emerged within days—frequently on social media—of government personnel diverting aid or manipulating relief efforts in other ways.”).

6. See Michael P. Scharf, *Power Shift: The Return of the Uniting for Peace Resolution* 55 CASE. W. RES. J. INT’L L. 1, 2 (2023) (“During the Syrian conflict, Russia vetoed thirteen Security Council Resolutions that would have condemned the Syrian government’s atrocities, created a commission to investigate Syria’s use of chemical weapons, and referred the matter to the international Criminal Court.”).

7. GA Res. 377 A (V), Uniting for Peace (Nov. 3, 1950).

8. Center for Preventative Action, *War in Ukraine*, COUNCIL ON FOREIGN RELATIONS (Mar. 16, 2023) <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine/> (“[O]n February 24, 2022, [] Russian forces invaded a largely unprepared Ukraine after Russian President Vladimir Putin authorized a ‘special military operation’ against the country.”).

9. See Scharf, *supra* note 6, at 3–4 (“Together . . . the General Assembly’s creation of the IIM in 2016, the use of the Uniting for Peace process to condemn Russia’s aggression in 2022 represented a shift in power away from the Security Council and to the General Assembly, with potentially broad and long-term implications.”).

10. Additionally, this Paper advocates for a legal avenue which permits the judicial

under the highest levels of scrutiny by the international legal community, now is time to revive the Syrian accountability conversation.

Part II begins with a general review of the Arab Spring and the motivation underlying the uprisings in the Middle East. This Part distinguishes the events and consequences of the uprisings in Tunisia and Egypt from that of Syria. Part III briefly examines the Syrian civil war and provides a thorough review of the crimes committed by the Assad regime. Part IV includes an analysis of the jurisdictional options for accountability in Syria. In eliminating many of the traditional mechanisms, it is here that the stage is set for a subsequent interpretation of the UN Charter and the Uniting for Peace Resolution (the Resolution). Part V argues that the Resolution should be re-examined in the modern context as a possible means of mitigating bad-faith Security Council vetoes. This Part analyzes the Resolution in coordination with the UN Charter and argues that under a liberal interpretation of each, the General Assembly can lawfully serve as a substitute for roles typically reserved for the Security Council. It is also here, that the evidence collected and preserved by the International, Impartial and Independent Mechanism for Syria is discussed. Part VI considers drawbacks and practical challenges associated with the creation of an UN ad-hoc tribunal for crimes committed in Syria. Part VII concludes that while a liberal interpretation of the statutory language may be idealistic, such interpretation nonetheless could have lasting effects in shaping a currently broken system. Such developments would, in the long run, help to promote human rights, deter future authoritarian regimes from attacking their own population, and ultimately strengthen the UN's ability as a whole to promote humanity and justice in the international system.

I. THE WEIGHT OF THE ARAB SPRING

The idiosyncrasies of the reasons—cultural, religious, and social to name a few—behind the uprisings are well-beyond the scope of this Paper. But it is important to distinguish the protests, regime responses, and resolution options in Syria from that of other Arab states such as Tunisia and Egypt.¹¹ Rather than attempt to

body to prosecute the highest level perpetrators within the Assad regime. And operating under the assumption that a General Assembly-created tribunal would qualify as an “international court” *ala* the Belgian Arrest Warrant Case, as it pertains to the tribunals jurisdiction and its ability to prevail of an assertion of immunity. Bearing in mind that there are, of course, other accountability measures available—and likely more practical—to prosecute lower-ranking perpetrators within the Assad regime in which head of state immunity would not be at issue, such as universal jurisdiction or the establishment of a hybrid-tribunal.

11. See generally ABBOUD, *supra* note 2 at *Introduction* 5 (As a general matter, “Syria is an extremely heterogeneous society, with Sunnis, Alawi, Ismailis, Druze, Shi’a, Greek Orthodox, Maronite, and other Christian sects. Population breakdowns by religion are not entirely accurate, but chose to 10 percent of the population was Christian and the remaining 90 percent Muslim, the majority of which are Sunni Muslims”). Additionally, the author of this Paper is aware that there are many other Arab States, and even some African States—in addition to Tunisia and Egypt—that saw political and cultural shifts as a result of the Arab

dissect the contrasts of the peculiarities of the protests themselves, this Part will, instead, introduce a review of the consequences of the Arab Spring in each of the aforementioned states—one that sets the foundation for an understanding for why a justice seeking response is most appropriate avenue to achieving enduring peace in Syria. This Part distinguishes the Arab Spring in Syria from that of Tunisia—where the movement got its start,¹² and Egypt—where it appeared to reach its height.¹³ In contrast, to Syria, where the movement seemingly hit a brick wall.¹⁴ In the end, the Arab Spring yielded less-than-fruitful results across the Middle East, most glaringly in Syria.¹⁵ On one end of the spectrum, some semblance of achievement can be pointed to in Tunisia and Egypt—in that some political change and reconciliation occurred.¹⁶ On the other end, Syria has proved to be a different beast, as demonstrated by prolonged and devastating humanitarian violations by an oppressive regime which still has a firm grip on power.¹⁷

A. The Arab Spring in Tunisia and Egypt: The Start and the Peak

The wave of revolutions that became known as the Arab Spring began in Tunisia in late 2010.¹⁸ Arabs across the Middle East mobilized in the millions in collective calls for democracy, justice, and freedom of expression.¹⁹ Governments fell,²⁰ and autocrats by the likes of Tunisian President Zine El Abidine Ben

Spring, and they could also serve as useful comparisons to Syria. But the author has selected Tunisia and Egypt in particular because of where each respective State is, in the transition process.

12. Kali Robinson & Will Merrow, *The Arab Spring at Ten Years: What's the Legacy of the Uprisings?* COUNCIL ON FOREIGN RELATIONS (Dec. 3, 2020 9:00 AM) <https://www.cfr.org/article/arab-spring-ten-years-whats-legacy-uprisings> (In December 2010, Tunisian street vendor Mohamed Bouazizi set himself on fire in protest outside a government office in the little-known town of Sidi Bouzid. In a matter of days, his act of defiance set off a revolutionary movement that rippled across the Middle East and North Africa . . .”).

13. *What is the Arab Spring and How Did it Start?* ALJAZEERA (Dec. 17, 2020) <https://www.aljazeera.com/news/2020/12/17/what-is-the-arab-spring-and-how-did-it-start>.

14. See, e.g., Leila Nadya Sadat, *Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will*, 5 IMPUNITY WATCH L.J. 1 (2014–2015) (In Syria “[p]eaceful protests were met with repressive government action; the failure of peace negotiations led to civil war, civil war led to credible allegations that war crimes and crimes against humanity have been committed.”).

15. PHILLIPP O. AMOUR, MIDDLE EAST RELOADED: REVOLUTIONARY CHANGES, POWER DYNAMICS, AND REGIONAL RIVALRIES SINCE THE ARAB SPRING (2018) 199 (“[T]he Arab Spring has had a virulent history. Arab Spring revolutionary outcomes are meek according to both qualitative and quantitative measurements. Most transitions towards democracy failed; authoritarianism is still persistent, with an even stronger nature.”).

16. See *infra* Part II, section A.

17. See *infra* Part II, section A.

18. See generally ABBOUD *supra* note 2.

19. See, e.g., Clea Simon, *10 Years Later: Was the Arab Spring a Failure?*, HARVARD GAZETTE (Feb. 3, 2021) <https://news.harvard.edu/gazette/story/2021/02/ten-years-later-was-the-arab-spring-a-failure/>.

20. Liz Sly, *The Unfinished Business of the Arab Spring*, WASHINGTON POST (Jan. 24, 2021)

Ali (Ben Ali), Egyptian President Hosni Mubarak (Mubarak) fell with them.²¹ Although the protests shared a common call for personal autonomy and responsive government, the protests in Tunisia and Egypt are different from that of other Arab states—certainly Syria—in that they saw substantive change in their respective leadership positions.

Protests in Tunisia were rooted in economic distress, government corruption and social repression.²² The momentum of the protests in Tunisia quickly spread to Egypt and influenced similar calls for regime change and freedoms. Egypt followed a generally similar pattern to the protests seen in Tunisia, however, there was a noticeable difference. In addition to the greater scale and duration of the protests, protesting Egyptians experienced the military play a significant role in the uprising.²³

What's important to pull from Tunisia and Egypt—for purposes of this Paper—is not the nature of the uprisings themselves, but what happened in the countries as a result. In Tunisia, Ben Ali relinquished his position and fled, leading to a transition away from an authoritarian regime.²⁴ Egypt saw a similar political shift. Mubarak—who had been in power for nearly 30 years—resigned at the influence of the military, in a peaceful transition of power and Egypt held its first free and fair elections in 2012.²⁵

<https://www.washingtonpost.com/world/interactive/2021/arab-spring-10-year-anniversary-lost-decade/> (“Only in Tunisia, where the protests began, did anything resembling a democracy emerge from the upheaval . . . In Egypt, President Abdel Fatah al-Sissi [sic] . . . ousted the elected government that had emerged out of the Arab Spring. Demonstrations that toppled the longtime presidents of Algeria and Sudan in 2019 and subsequent protest movements in Iraq and Lebanon have been hailed as a second Arab Spring.”).

21. Tunisia and Egypt were not the only states to see regime change during this period. Libya also saw the fall of Moammar Gaddafi. A political change that has led to a less-than-stable situation. See generally, Peter Finn, *The Rise and Fall of Libyan Leader Moammar Gaddafi* WASHINGTON POST (Aug. 25, 2011) https://www.washingtonpost.com/world/national-security/the-rise-and-fall-of-libyan-leader-moammar-gaddafi/2011/02/21/gIQA32NsdJ_story.html (discussing the ousting of Libyan president, Moammar Gaddafi).

22. See, e.g., Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences between Tunisia, Egypt, and Libya*, 90 FOREIGN AFF. 2, 3 (2011) (“Tunisia has long enjoyed the Arab world’s largest middle class, and strongest organized labor movement. Yet behind those achievements, Ben Ali’s government tightly restricted free expression and political parties . . . Ben Ali’s family was also unusually personalist and predatory in its corruption. As the whistleblower Web site WikiLeaks recently revealed, the U.S. ambassador to Tunisia reported in 2006 that more than half of Tunisia’s commercial elites were personally related to Ben Ali . . .”).

23. See e.g., Abuakr Al-Shamahi, *Egypt’s Military Dominates 10 Years After Revolution*, ALJAZEERA (Jan. 26, 2021) <https://www.aljazeera.com/news/2021/1/26/egypt-revolution-anniversary> (“The Supreme Council of the Armed Forces (SCAF), a body of 25 senior members of Egypt’s military, decided to step in and ostensibly support the revolution against Mubarak . . .”).

24. Anderson, *supra* note 22 at 3.

25. *2012 Egyptian Parliamentary Elections*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Jan. 22, 2015) <https://carnegieendowment.org>.

B. The Transition Process in Tunisia and Egypt

Tunisia saw a transitional justice process relatively soon after the beginning of the Arab Spring. In 2013, the truth and reconciliation process began with the establishment of the Truth and Dignity Commission (TDC). The TDC was created by law, passed by the Tunisian Constituent Assembly.²⁶ Under law, the TDC was to undertake efforts aimed at addressing human rights violations committed in Tunisia during the Ben Ali regime (1955—2013).²⁷ Foremost, the TDC providing an opportunity for victims to make formal complaints of human rights abuses—of which 62,000 were filed.²⁸ Many of the complaints included firsthand testimony to the torture, summary executions, and forced disappearances. The findings were made public and public hearings were held in an effort to make formal recommendations for legal reform. The TDC operated for four years, publishing its final report in 2019.²⁹

Given a regime change took place, as well as an establishment of a—moderately—stable democracy, it was logical, at least in 2013, for Tunisia to enact transitional justice measures which prioritized rehabilitating the country, more so than accountability measures of perpetrators from the Ben Ali regime.³⁰ And there is evidence to show that Tunisia had retained *some* semblance of improved freedoms in the aftermath, that is, until the assumption of power by President Kais Saied in July 2021.³¹

org/2015/01/22/2012-egyptian-parliamentary-elections-pub-58800.

26. *Organic Law No. 2013–53 Establishing and Organising Transitional Justice, 2013*, ICRC (Dec. 24, 2013) <https://ihl-databases.icrc.org/en/national-practice/organic-law-no-2013–53-establishing-and-organising-transitional-justice-2013> (“On 15 December 2013, Tunisian National Constituent Assembly adopted a law establishing a range of mechanisms to deal with past human rights violations committed since 1 July 1955. Its purpose is to seek the truth about these violations, address accountability and pursue national reconciliation and non-recurrence. By ‘violation,’ the Law means any serious infringement of a human right, committed by the State or any group of individuals acting in its name as well as by other organized groups.”).

27. *Tunisia: Truth Commission Outlines Decades of Abuse*, HUMAN RIGHTS WATCH (Apr. 5, 2019 4:00 AM) <https://www.hrw.org/news/2019/04/05/tunisia-truth-commission-outlines-decades-abuse>.

28. *See id.*

29. *After the Truth Commission, Tunisia Must Pursue Inclusive Transitional Justice*, ICTJ (July 10, 2020) <https://www.ictj.org/news/after-truth-commission-tunisia-must-pursue-inclusive-transitional-justice>.

30. Robins et. al, *supra* note 23 at 3 (“Transitional justice is conceptualized in temporal terms, engaging with a before and after, and perceived as both backward- and forward-looking. As a result, it engages with the political, historical and social . . . natural context in which culture and history occurs.”).

31. *See Tunisia Events of 2019*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2020/country-chapters/tunisia> (last visited Apr. 10, 2023) (“In 2019, Tunisia witnessed its second legislative and presidential elections since adopting a new constitution in 2014. During the campaign, candidates focused on debating reforms to the economy and government social programs”); *but see The Current Situation in Tunisia*, UNITED STATES INSTITUTE OF

Nevertheless, the situation in Tunisia post-uprising was much different than that seen in Syria, a discussion for Part III. The circumstances in Tunisia and the timing of the TDC allowed for the TDC to play an important role in recognizing the victims and victimhood, giving a sense of legitimacy to the transitional justice process.

There has been no such objective transitional justice process in Egypt. After the ousting of Mubarak, he and his sons immediately stood trial before the Egyptian Court of Cassation, charged with *inter alia*, corruption and unlawful killing of protestors.³² Egypt held its first free elections in its history in 2012 which saw the election of Mohamed Morsi as the new President of Egypt.³³ But Morsi's reign was short-lived, as his campaign promises never came to be, and he was overthrown by the military in 2013.³⁴ Since then, the military-backed rule of Abdel Fattah el-Sisi has cracked down on political opposition and civil society, leading to the imprisonment of tens of thousands of activist, journalists, and political opponents.³⁵

Egypt finds itself in a peculiar position of transitional limbo: the old autocratic regime is gone, elections have taken place,—unsuccessfully as it turns out—a new regime has taken over. The situation in Egypt, like seen in Tunisia, isn't primed for either a reconciliation process, nor a accountability mechanism.³⁶ Additionally, Egypt is positioned differently than that of Syria on a grander scheme, as Syria is a country that not only has less of a global economic influence, the original perpetrators remain in power.

PEACE (Dec. 14, 2022) <https://www.printfriendly.com/p/g/aKVGug> (“Tunisia’s transition to democracy remains incomplete and under stress. Since the presidential measures to suspend parliament, dismiss the government and draft a new constitution were enacted in 2021, socioeconomic conditions have continued to deteriorate, and risks of unrest have increased.”).

32. See Paul Owen & Jack Shenker, *Mubarak Trial – The Defendants and the Charges*, GUARDIAN (Aug. 3, 2011 11:42 AM) <https://www.theguardian.com/world/2011/aug/03/mubarak-trial-defendants-charges>.

33. *The 2012 Egyptian Elections: A Democratic Dilemma*, ADST (Aug. 26, 2022) (“Prior to 2012, elections under Mubarak’s rule followed authoritarian patterns, since he often ran unopposed. This made the 2012 elections the first democratic election in Egypt’s history.”).

34. See *id.*; see also Eric Schewe, *Why Did Ousted Egyptian President Morsi Lose Power?*, JSTOR (June 27, 2019) <https://daily.jstor.org/why-did-ousted-egyptian-president-morsi-lose-power/> (“The military also murdered more than 800 protestors in Cairo’s Rabi’a al-Adawia Square in August of 2013 and imprisoned thousands of activists from different ideological backgrounds.”).

35. See generally Mohamed Arafa, *The Tale of Post-Arab Spring in Egypt: The Struggle of Civil Society against a Janus-Faced State*, 27 IND. INT’L & COMP. L. REV. 43 (2017).

36. Egypt is not a party to the Rome Statute, and is an important player in world economics. It is likely that there is little, if any, appetite for the international community to pursue retroactive justice on past Egyptian regimes. Additionally, a mechanism for establishing the truth about the past likely is not appealing to the sitting regime in that a truth and reconciliation process could demonstrate the similarities between the Mubarak regime and the el-Sisi regime.

II. THE ARAB SPRING IN SYRIA: THE REVOLUTION HITS A BRICK WALL

What began as a movement of sustained protests—similar to those in Tunisia and Egypt—demanding regime change and political reformation in Syria has morphed into one of the most brutal and horrific conflict in the Post-World War II era.³⁷ Prior to the Arab Spring, Syria did not have an autonomous civil society in any regard, and there was little room left for the expression of political dissent.³⁸ Instead, political expression and dissent in Syria was, and is, left for those who are willing to risk their lives to make basic demands. While the Syrian uprising took place within the larger context of the Arab Spring, the result of the Syrian uprising is distinguishable from the situations discussed above. And thus, the country is not in any position for a reconciliation process. At least not until there is some sort of regime change.

A. The Crimes of the Assad Regime

The Assad regime's³⁹ violations of international law have been widely documented and condemned by the international community. There has been widespread reports of torture of both civilians—and combatants—in violations of the Geneva Convention;⁴⁰ the use of chemical weapons in violation of the

37. See e.g., Nepstad *supra* note 24 at 487 (“Just as the Egyptian revolt erupted, Syrians began protesting high unemployment rates, declining standards of living, human rights abuses, and nearly 50 years of emergency rule that had severely restricted political freedoms.”).

38. ABBOUD, *supra* note 2 at 49–50 (“In the forty years of Ba’athist rule the domestic political oppression was severely suppressed. Political parties were essentially forbidden. Except for those who accepted the leadership of the Ba’ath Party in the National Progressive Front, a coalition of parties represented in the ineffectual Syria parliament.”).

39. ABBOUD, *supra* note 2 at 13 (“During the period of Hafiz al-Assad rule, a patrimonial state emerged whose stability rested on key pillars of authoritarian control, mainly the security apparatus [and] the army . . .”).

40. See Geneva Convention relative to the Protection of Civilian Persons in Time of War (2nd part) 12 August 1949 art. 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Chemical Weapons Convention;⁴¹ indiscriminate use barrel bombs and incendiary weapons in civilian-populated areas; preventing humanitarian aid to civilians;⁴² and the forced displacement of millions of Syrian refugees in violation of customary international law.⁴³ Not unmindful of the violations of *jus in bello* norms against opposition fighters, the subject of this Paper is to address the atrocities committed against civilians. When such incidents against a civilian population are widespread and systematic, they can constitute crimes against humanity and war crimes under customary international law.⁴⁴

In August 2013, in response to civilian protests against the Assad regime, the regime launched a chemical weapons attack in Ghouta—a suburb of Damascus—killing hundreds of civilians.⁴⁵ The use of sarin gas against civilians prompted a UN investigation, which ended with a Security Council Resolution calling for Syria to destroy its chemical weapons stockpile.⁴⁶ While seemingly complying with the UN order, chemical weapons were subsequently launched in 2017 and 2018.⁴⁷ Notably, on April 4, 2017, Assad regime warplanes carried out an air attack the Syrian town of Kahn Sheikhoun—reportedly causing hundreds of civilian casualties as a result

41. In 2013, the Assad regime said Syria would observe its Chemical Weapons Convention obligations. This of course, has proven not to be true. A list of parties to the Chemical Weapons Convention—of which Syria is a party—is available at the Arms Control Association website. *See generally Chemical Weapons Convention Signatories and States-Parties*, ARMS CONTROL ASSOCIATION (June 2018) <https://www.armscontrol.org/factsheets/cwcsig>.

42. *See, e.g.,* Beth Van Schaak, *Mapping War Crimes in Syria*, 92 INT'L L. STUD. 282, 321 (2016) (“The Syrian regime has been accused of engaging in overt and constructive obstruction (e.g., through burdensome administrative procedures) of humanitarian aid to civilian populations on discriminatory grounds.”).

43. A fundamental Principle of international law that is accepted by the international community as a norm from which no derogation is permitted. To that end, see Leila Nadya Sadat, *Genocide in Syria: International Legal Options, International Legal Limits, and the serious Problem of Political Will*, 5 IMPUNITY WATCH L. J. 1, 5 (2014–2015) (“International law imposes limits on the behavior of the States directly affected by the civil war in Syria. Even without specific treaty obligations imposed upon it, the Syrian government and other States in the region are bound to respect customary international law, including the customary international law of war, international criminal law and international human rights law. This includes, at a minimum, the prohibition against torture, the requirements of proportionality and distinction in war, and, as we have seen, the prohibition against the use of chemical weapons.”).

44. SCHARF ET. AL., *supra* note 46 at 18.

45. Ned Price, Press Statement, Syria: Eighth Anniversary of the Ghouta Chemical Weapons Attack, U.S. Dept. of State (Aug. 21, 2021) (available at <https://www.state.gov/syria-eighth-anniversary-of-the-ghouta-chemical-weapons-attack/>) (“[O]n the early morning of August 21, 2013, the Assad Regime released the nerve agent sarin on its own people in the Ghouta district of Damascus, killing more than 1,400 Syrians, many of them children.”).

46. S.C. Res. 2118 S/Res/2118 (Sept. 27, 2013).

47. *See, e.g.,* Ben Hubbard, *Syria Used Chemical Weapons 3 Times in One Week Watchdog Says*, NTY (Feb. 23, 2021) <https://www.nytimes.com/2020/04/08/world/middleeast/syria-assad-chemical-weapons.html>.

of exposure to sarin gas, or a sarin-like substance.⁴⁸ And on April 7, 2018, the Assad regime carried out a chemical attack in Douma, dropping barrel bombs containing chlorine gas on civilians below.⁴⁹ The World Health Organization (WHO) and Organization for the Prohibition of Chemical Weapons (OPCW) investigated the barrel bomb incident in Douma and reported forty-three civilian deaths.⁵⁰ The director general of the OPCW reaffirmed the breach of *jus cogens* norms by the Assad regime asserting that “[t]he use of chemical weapons in Douma—and anywhere—is unacceptable and a breach of international law.”⁵¹

Despite the violations, crimes and outcry, the Security Council’s response to Syria has been null. Not only did Russia veto a Security Council resolution that would have referred the situation to the International Criminal Court (ICC),⁵² it has also vetoed 12 additional Security Council resolutions seeking peace or accountability of the Assad regime for its unlawful acts since the start of the Arab Spring.⁵³ To that end, efforts to achieve justice and accountability have been halted before they begin. There are inevitably significant hurdles to achieving accountability, and the peculiarities of Syria make the situation all the more complicated. Nevertheless, the establishment of an international tribunal, rooted in factfinding and accountability, is the best mechanism to foster change and achieve peace.⁵⁴

B. Utilizing the IIIM

The IIIM was established by the General Assembly in 2016 to investigate individuals, preserve evidence, and make official record of atrocity crimes committed in Syria since the Arab Spring.⁵⁵ The IIIM’s purpose is to gather and

48. *Syria Chemical ‘Attack’: What We Know*, BBC NEWS, <https://www.bbc.com/news/world-middle-east-39500947> (April 26, 2017).

49. Press Release, ‘Reasonable Grounds to Believe’ Syrian Government Used Chlorine Gas on Douma Residents in 2018, Head of Chemical Weapons Monitoring Organization Tells Security Council, 9255th Meeting (AM) SC/15194 (Feb. 7, 2023) United Nations, <https://press.un.org/en/2023/sc15194.doc.htm>.

50. SCHARF, ET. AL., *supra* note 6, at 15.

51. Martin Chulov, *Syrian Regime Found Responsible for Douma Chemical Attack*, GUARDIAN, <https://www.theguardian.com/world/2023/jan/27/syrian-regime-found-responsible-for-douma-chemical-weapons-attack> (Jan. 27, 2023 2:20 PM).

52. Press Release, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, UN (May, 22, 2014) <https://press.un.org/en/2014/sc11407.doc.htm>.

53. *See, e.g., Russia’s 12 UN Vetoes on Syria*, RET (Apr. 11, 2018 7:47 PM) <https://www.rte.ie/news/world/2018/0411/953637-russia-syria-un-veto/>.

54. *See* PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE?: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 12 (2002) (“In the context of peace-building, truth relates to an accurate understanding and recording of the causes of a conflict, as well as which parties are responsible for which actions, and which parties, including individuals may be characterized as the victims or the aggressors . . . An example of the use of truth to influence the peace process is the report of the War Crimes Commission created by the United Nations in 1993 to assess the nature of the conflict in Yugoslavia . . .”).

55. G.A. Res. 71/248, ¶1 (Dec. 21, 2016) (“Emphasizes the need to ensure accountability

evidence and testimony of such crimes for the purposes of preservation for future prosecutions.⁵⁶ And the processes of evidentiary collection IIIM is rooted in principles of impartiality, objectivity and transparency.⁵⁷ The IIIM has produced a number of reports and findings since its establishment, which have provided valuable insights into the nature and scope of crimes committed in Syria.⁵⁸ Additionally, the IIIM has found that the Assad government, as well as its security and military forces have been responsible for the majority of the crimes committed in Syria.⁵⁹ All that to say, the findings of the IIIM demonstrate that there is an urgent need for accountability for the crimes committed in Syria, including the need for a fair and impartial tribunal for perpetrators of such crimes.

The recent precedent set in the Syria situation—as exemplified by the creation of the IIIM—demonstrates that the General Assembly wields the power to establish commissions to prepare case files of persons suspected of committing international crimes, which facilitates future investigations and prosecutions.⁶⁰ Since a Security Council-created tribunal is out of the question,⁶¹ it is appropriate for the General Assembly—acting under Uniting for Peace—to supplement the steps already taken by the IIIM, and create an ad-hoc tribunal with jurisdiction over the crimes investigated by the IIIM.

for crimes involving violations of international law, in particular if international humanitarian law and international human rights law, some of which may constitute war crimes, or crimes against humanity, committed in the Syrian Arab Republic since March 2011 through appropriate, fair and independent investigations and prosecutions at the domestic or international level, and stresses the need to pursue practical steps towards this goal to ensure justice for all victims and to contribute to the prevention of future violations . . .”).

56. *Id.*

57. *Frequently Asked Questions*, IIIM, <https://iiim.un.org/who-we-are/faqs/> (last visited May 5, 2023) (“Upholding independence means that the IIIM will not act on instructions from any entity in performing its work, nor will it be influenced by the agendas of any external actor. The IIIM will not import any conclusion drawn by other bodies regarding the material it collects from various sources. Instead, it will make its own objective assessment of the material received and draw its own conclusions, applying a criminal law standard.”).

58. *See generally* Reports to General Assembly, IIIM, <https://iiim.un.org/who-we-are/reports-to-general-assembly/> (last visited May 5, 2023).

59. Catherine Marchi-Uhel, Message from the Head of the IIIM: Bulletin #4 (Oct 2020) (available at <https://iiim.un.org/wp-content/uploads/2022/01/IIIM-Syria-Bulletin-Issue-4-ENG-Oct-2020-v2.pdf>) (“The serious crimes under international law that have been committed in Syria, which have contributed to these high numbers include enforced disappearances, unlawful attacks, detention related crimes and killings. These crimes have all been reported to be systematically used by various actors in the Syrian conflict since 2011. It is a particularly cruel and complex tactic that creates victims in the person disappeared as well as those left behind.”).

60. *See, e.g.*, Michael Ramsden, *Uniting for Peace: The Emergency Special Session on Ukraine*, HARVARD INT’L L. J. (available at <https://harvardilj.org/2022/04/uniting-for-peace-the-emergency-special-session-on-ukraine/>).

61. *See supra* note Part IV.

III. JURISDICTIONAL ISSUES: SYRIA AND THE ASSAD REGIME

Consequential accountability for the crimes committed by the Assad regime starts at the top—many of the crimes qualify as leadership crimes, and those same perpetrators and leaders remain in their position to this day, namely Bashar al-Assad himself. Accountability measures which do not exercise jurisdiction over the leaders of the Assad regime—while admittedly far more practical and subject of discussion in Part VI—will not have the material change, or be an effective step towards enduring peace in Syria. Complicating the issue is that, while many players have been involved, the crimes of the Assad regime subject to this Paper were committed during an internal conflict.⁶² Further, the role Syria plays in world politics and its refrainment from accepting the jurisdiction of the ICC leaves few tried-and-true prosecutorial options in the arsenal. With that, Syria has become a real world exercise for creative statutory interpretation, and new international law. This section seeks to analyze the application of the all-but-forgotten Uniting for Peace Resolution.

A. The Consequences of Security Council Gridlock

The UN Charter statutorily obligates the Security Council to, in the event of “any threat to the peace, breach of the peace, or act of aggression . . . decide what measures shall be taken to . . . maintain or restore international peace and security.”⁶³ The Security Council is made up of the big five superpowers and victors from World War II holding permanent seats at the table with ten additional seats filled on a rotating basis.⁶⁴ The Permanent Members of the Security Council⁶⁵—the United States, United Kingdom, France, China, and the Soviet Union—are accorded a veto over all substantive decisions before the Security Council.⁶⁶

The General Assembly was established to be made up of every member of the UN, affording each a single equal vote.⁶⁷ The General Assembly is obligated to make recommendations to the Members of the UN or to the Security Council considering the general principles in the maintenance of international peace and security.⁶⁸ But it is important to note that facially, it is the statutory obligation of

62. SCHARF, ET. AL, *supra* note 6 at 27–28 (“In its inaugural case, the Appeals Chamber of the Yugoslavia Tribunal rendered a revolutionary decision that for the first time held that individuals could be held criminally liable for violations of Common Article 3 and Additional Protocol II of the Geneva Conventions for war crimes committed in internal conflict. This decision closed a gaping gap in the coverage of international humanitarian law and was soon thereafter affirmed by the Rwanda Tribunal and Special Court for Sierra Leone. It was codified in the 1998 Statute of the International Criminal Court, which has been ratified by 123 states.”).

63. *Id.* at art. 39.

64. UN Charter art. 23, ¶ 1.

65. *Current Members*, UNITED NATIONS, <https://www.un.org/securitycouncil/content/current-members> (last visited April 8, 2023).

66. UN Charter art. 27.

67. UN Charter art. 9.

68. UN Charter at arts. 10, 11.

the Security Council to act on situations, as opposed to the General Assembly, which is obligated to make recommendations regarding the maintenance of international peace and security.

1. *The International Criminal Court*

And as a result, leading scholars have decried the legitimacy of the Security Council.⁶⁹ This challenge to the Security Council's legitimacy is most notably revealed by its inability to successfully refer humanitarian crises situations to the ICC. The ICC can only exercise its jurisdiction over a situation in limited circumstances. The frequent use of the veto by the Permanent members—mostly Russia and the United States—has diminished the effectiveness of the Security Council to fulfill its statutory obligation.⁷⁰ Since Syria is not a party to the ICC—a treaty-based court—the ICC by itself does not have jurisdiction over crimes committed on the territory of Syria by Syrian nationals. But that is not the only way for the ICC to obtain jurisdiction. The Rome Statute—which established and governs the ICC—permits the Security Council, acting under Chapter VII of the UN Charter, to refer a situation to the ICC, regardless of the parties who have signed on to the jurisdiction of the court.

The author opines that during the dog-days of the war, the situation in Syria was primed and ready for a Security Council referral to the ICC. But on par with its recent reputation, the response—or lack thereof—by the Security Council in failing to refer the Syrian crisis has furthered the claims of its illegitimacy. For over four decades, Russia has been a close ally of the Assad regime, in part, because the Assad government permits Russia to keep its only naval base outside former Soviet territory at the Syria port of Tartus.⁷¹ Seemingly in an effort to maintain the arrangement, Russia has vetoed Security Council resolutions condemning the Regime's illegal actions against its own civilian population and most consequently, prevented the Security Council from referring the situation to the ICC.⁷²

2. *Ad-hoc tribunals*

If the ICC is jurisdictionally unavailable, the Security Council also has the power under Chapter VII of the UN Charter to create ad-hoc tribunals to prosecute

69. Scharf, *supra* note 6 at 5 (“The frequent use of the veto, especially in cases where U.N. action could halt humanitarian disasters, has eroded the legitimacy of the United Nations Security Council.”).

70. *The UN Security Council*, COUNCIL ON FOREIGN RELATIONS (Feb. 28, 2023, 11:00 AM) <https://www.cfr.org/backgrounder/un-security-council>.

71. Alexandra Roberts, *Understanding the Relationship Between Russia and Syria*, ASPEN INSTITUTE (July 1, 2019) <https://www.aspeninstitute.org/blog-posts/understanding-the-relationship-between-russia-and-syria/> (“There are long-standing ties between Moscow and Syria, particularly with the Assads The lease on the naval base in Tartus . . . is of vital strategic importance for the Russian Navy as it is their only notable facility outside the former Soviet Bloc.”).

72. SCHARF, ET. AL., *supra* note 46 at 60.

individuals responsible for atrocity crimes.⁷³ The Security Council has notably exercised this power twice in the 1990's, establishing ad-hoc tribunals with limited jurisdiction: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).⁷⁴ There is no question that the establishment of international tribunals is within the purview of the Security Council. What remains an open question however, is the power of the General Assembly to also take such measures, in the event the Security Council is unable to come to an agreement to act pursuant to its stated purpose.

B. Historical Application of Uniting for Peace

In 1956, the Egyptian government nationalized the Suez Canal, taking control over the operation of the Canal which had previously been privately owned and jointly controlled by the United Kingdom and France.⁷⁵ The nationalization elicited the United Kingdom, France, and Israel to launch attacks on Egypt seeking to regain control over the Canal.⁷⁶ In response, acting pursuant to its statutory duty, the Security Council convened to pass a resolution demanding an immediate ceasefire and withdrawal of troops from Egypt.⁷⁷ But both the United Kingdom and France—as permanent members—vetoed the resolution, halting any Security Council intervention in its tracks.⁷⁸

Enter the Uniting for Peace Resolution. As a general matter, the Uniting for Peace Resolution was passed by the General Assembly in 1950 to enable the General Assembly to act quickly—making binding decisions as opposed to recommendations—in an international crisis in the face of Security Council paralysis due to a Permanent Member veto.⁷⁹ The situation in Egypt in 1956 posed precisely the type of issue Uniting for Peace was intended to address. And using the Uniting for Peace Resolution by its design, the General Assembly adopted Resolution 997—circumventing the gridlocked Security Council—calling for an immediate ceasefire and withdrawal of all military forces, and the assignment of

73. See, e.g., Faten Ghosn & Joanna Jandali, *The Price of Prosecution: The Reality for Syrian Transitional Justice*, 8 PENN ST. J.L. & INT'L AFF. 1, 16 (2020) (“Chapter VII of the UN charter [sic] for the Security Council has evolved in its authority to create . . . prosecutorial mechanisms . . . [A] critical component of the Security Council’s authority [is] to determine how . . . such measures should be taken.”).

74. See e.g., Marie-Claude Roberge, *Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide* 321 INT'L R. RED CROSS 651 (Dec. 31, 1997).

75. Report from William R. Patterson on the Suez Crisis at the ODU Model United Nations Conference 1 (Feb. 11, 2009) (available at <https://ww1.odu.edu/content/dam/odu/offices/mun/2009/hsc/suez.PDF>) (last visited: May 7, 2023).

76. *Id.*

77. *Id.* at 2.

78. *Id.*

79. *Id.*; see *infra* Part V for an analysis and a more thorough breakdown of the text of the resolution.

UN peacekeeping forces in the area.⁸⁰ As a result, the British, French and Israeli forces withdrew from Egypt.⁸¹

Broadly, General Assembly Resolution 997 affirmed the principle of national sovereignty and the right of countries to nationalize their own resources without foreign interference.⁸² But more pertinent to this Paper, the adoption of General Assembly Resolution 997, and the acquiescing response to the demands of the General Assembly by the United Kingdom and France provide guidance as to how much power the General Assembly wields when acting under the Uniting for Peace Resolution.⁸³ In total, Uniting for Peace has been used eleven times, calling for non-use of force measures typically reserved for the Security Council. Notably, the General Assembly has successfully called for the withdrawal of foreign troops from Jordan and Lebanon in 1958, called for the withdrawal of foreign troops from Afghanistan in 1980, called for the withdrawal of Israel from wrongfully occupied territories in 1980, and called on General Assembly members to apply sanctions on Israel in 1982.⁸⁴ Typically under Chapter VII, the Security Council has the power to take measures to maintain or restore international peace and security though *inter alia*, calling for the withdrawal of troops from a particular region or country or impose sanctions. But in each of the examples above, it was the General Assembly, not the Security Council, inducing Member State acquiescence and action.

IV. UNITING FOR PEACE RESOLUTION: SYRIA

The Uniting for Peace Resolution—entered into effect in 1950⁸⁵—stipulates that either the General Assembly or Security Council can initiate an Emergency

80. *Id.*; G.A. Res. 997 (ES-I) (Nov. 2, 1956).

81. Just as the General Assembly's adoption of Resolution 977 by way of utilizing Uniting for Peace influence the troop withdraw and ceasefire, so too did the diplomatic pressure and threatened economic sanctions against the United Kingdom and France.

82. *See, e.g., Nasser Nationalizes the Suez Canal*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/nasser-nationalizes-the-suez-canal> (last visited May 6, 2023).

83. Scharf, *supra* note 6 at 8 (“General Assembly Resolution 997 demonstrated that the General Assembly could take up a matter that the Security Council had been debating despite Article 12 of the U.N. Charter . . . In the 2004 Construction of a Wall Case, the [ICJ] confirmed that the interpretation of Article 12 has evolved through state practice, and that there was no bar ‘for the General assembly to deal in parallel with the same matter as the security council concerning the maintenance of international peace and security.’”).

84. *Id.* at 10.

85. G.A. Res. 377 (V), *supra* note 7. For context on the geopolitical landscape that set the stage for the passing of the Resolution, see Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution* 18 J. CONFLICT & SECURITY L. (2013) 457 (“The framers of the UN Charter foresaw that the Great Powers would accept the privilege of the veto with a concomitant obligation to shoulder a more substantial burden for the maintenance of international peace and security . . . In 1950, five years following the signing of the UN Charter, it was abundantly clear that the treaty’s central tenant, the existence of a functional Security Council, was foundering. The Soviet Union, as the sole ideological outcast within the

Special Session where, due to a “lack of unanimity of the permanent members,” the Security Council “fails to exercise its primary responsibility for the maintenance of international peace and security.”⁸⁶ Put another way, under the authority of the Uniting for Peace Resolution, the General Assembly can make recommendations to UN member states to take action—traditionally reserved for the Security Council—to address threats and to restore international peace and security. While proponents of the Resolution have gone so far as to say the Resolution permits the General Assembly to authorize the use of force under Article 2(4) of the UN Charter,⁸⁷ the analysis below does not go so far as to make that claim. Rather, this Part claims the latitude of the Uniting for Peace Resolution grants the General Assembly the power to create an ad-hoc tribunal for the conflict in Syria.⁸⁸

A. Interpreting Uniting for Peace

A great deal has been written on the subject of the constitutionality of the Uniting for Peace resolution and how it cooperates with the role of the Security Council as laid out in the UN Charter. A logical interpretation can be made as to how each of these pieces of legislation can co-exist is derived from a review of its application in the past and the plain meaning of the text. Foundationally, Uniting for Peace establishes:

If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility to act as required to maintain international peace and security . . . the General Assembly shall consider the matter immediately with the view to making recommendations to Members . . . in order to restore international peace and security.⁸⁹

While the text may seem to permit the General Assembly to usurp the Security Council on its own *accord*, that likely isn’t altogether true. Rather,

permanent membership of the Council, exercised its negative vote 26 times between 1946 and 1949, severely undermining the Council’s authority.”).

86. G.A. Res. 377 (V), *supra* note 7.

87. The Uniting for Peace Resolution has been given new life in light of Russia’s 2022 unlawful invasion of Ukraine. While debate over the Resolution in the context of Russia has been focused on accountability options for the crime of aggression, an analysis of the Resolution concerning Syria does not need to contemplate such implications. For a detailed analysis on the Uniting for Peace Resolution as applied to Russia’s act of aggression against Ukraine, see generally Scharf, *supra* note 6.

88. The paralysis and conflict of interest issues within the Security Council that had been smoldering for decades—as demonstrated by dozens of vetoes—finally combusted with Russia’s unlawful invasion of Ukraine in 2022. Since the invasion, there have been resounding efforts to implement a power shift from Security Council to General Assembly. Recent creative interpretations of the UN Charter, resolutions, and proposed amendments demonstrate a broad consensus of the international community in support of condemnation and accountability for atrocity crimes committed against civilians by their own government. As for Syria, it is the very type of situation—similar to that of Ukraine—that has given rise to consistent calls to turn to the Uniting for Peace Resolution.

89. G.A. Res. 377 (V), *supra* note 7.

Uniting for Peace permits the General Assembly to operate in the same domain as the Security Council upon being granted permission to do so from the Security Council. Moreover, there has been mounting momentum from many states for a significant role for the General Assembly in the application of enforcement mechanisms, but the permanent five have been unwilling to expressly cede that responsibility. And it is clear, that at the time of the creation of the UN, the General Assembly was understood to be barred from entering the specific domain of maintaining collective security, as that was typically occupied by the Security Council under Chapter VII.⁹⁰

Article 24 of the UN Charter states: “Members confer on the Security Council primary responsibility for the maintenance of international peace and security.”⁹¹ Once Uniting for Peace was passed in 1950, it bestowed upon the General Assembly access to the primary domains of the Security Council, demonstrating that while the Security Council has primacy, it is not exclusive to such domains. And this notion of delegation, or secondary occupation of such territory by the General Assembly is captured by the text of the preamble Uniting for Peace:

Conscious 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 the Charter to maintain peace and security,

Recognising in particular that such failure does not deprive the General Assembly of its right or relieve it of its responsibility under the Charter in regard to the maintenance of international peace and security . . .⁹²

Andrew Carswell argues that that is exactly why Uniting for Peace was dormant for much of its existence by claiming that “once the five permanent members of the Security Council realized that the resolution was a double-edged sword—and indeed threatened their sovereign interests by potentially undermining their own respective veto powers—it was relegated to obscurity.”⁹³ But as evidenced by the dozen uses of Uniting for Peace, the General Assembly does in fact, has expanded powers which are normally beyond its purview.

The ICJ affirmed this theory in its 1962 Certain Expenses advisory opinion, when the breadth of General Assembly power was challenged.⁹⁴ There, some Member States abstained from paying their apportioned costs as Members of the UN because they believed the costs were related to UN activities that were initi-

90. K Hailbronner and E Klein, ‘Article 10’ in B Simma (ed), *The Charter of the United Nations: A Commentary* (OUP 2002).

91. UN Charter art. 24.

92. G.A. Res. 377 (V), *supra* note 7.

93. Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. OF CONFLICT & SECURITY L. 453, 456 (2013).

94. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20).

ated by the General Assembly in situations where such initiatives fell outside of the power of the General Assembly and should have been reserved for the Security Council.⁹⁵ Specifically, the Soviet Union claimed that UN expenses related to the Suez and the Congo “were not ‘expenses of the Organization,’ inasmuch as they were not dealt with exclusivity by the Security Council.”⁹⁶ The General Assembly requested an advisory opinion regarding states failure to pay their appointed amounts as Members of the United Nations.⁹⁷ “In analyzing this contention, the [ICJ] construed relevant provisions of the [UN] Charter as giving the Security Council primacy but not exclusive responsibility for the maintenance of international peace and security.”⁹⁸ Put another way, the ICJ determined that the General Assembly could exercise powers, when necessary, consistent, or equivalent to those of the Security Council. Andrew Carswell argues that “the interpretation of the ICJ, reinforced by consistent practice, recognizes that the [UN] Charter is not a static instrument and must be interpreted in such a way as to further its essential object and purpose.”⁹⁹

Additionally, Uniting for Peace resolution has been critiqued in that it violates Article 12 of the UN Charter, which states “[w]hile the Security Council is exercising in respect of any dispute or situation . . . the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”¹⁰⁰ However, as pointed out by scholars, in its 2004 Wall Advisory Opinion, the ICJ recognized that “four decades of practice had modified Article 12(1) so as to permit the General Assembly to deal with a matter in parallel with the Security Council. The Court accepted that in practice: ‘It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to the international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.’”¹⁰¹ It is worth noting that of course, the exercise of a veto does not necessitate the use of the Uniting for Peace resolution. The veto is one of two requirements in order to trigger the Uniting for Peace Resolution. The second, is a request from the Security Council to the General Assembly to invoke Uniting for Peace. It is only when both elements have been met that it

95. *Id.*

96. *Certain Expenses of the United Nations: Advisory Opinion* 1963 DUKE L. J. 304, 305 (1963).

97. *Overview of the Case*, INT’L COURT OF JUSTICE, <https://www.icj-cij.org/case/49> (last visited May 5, 2023).

98. *Certain Expenses of the United Nations: Advisory Opinion*, *supra* note 109 at 305.

99. Carswell, *supra* note 106 at 463.

100. UN Charter art 12(1).

101. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 149–50; *see also* Carswell, *supra* note 106 at 469.

can be concluded that the General Assembly is able to take action as expressed by Uniting for Peace.

Accordingly, then, in the Syrian context, it is critical for the Security Council to recognize that the Russian exercise of the veto constitutes a permanent member's failure to exercise their primary responsibility, and thus, the General Assembly—acting under Uniting for Peace—should be triggered via a request from the Security Council, to uphold not only the Security Council's object, but also that of the UN Charter as a whole. In doing so, the General Assembly would be granted power to create of an ad-hoc tribunal—Just as the Security Council did with the ICTY and ICTR—to prosecute perpetrators of the atrocities in Syria. In doing so, the tribunal then could productively apply the work and research of the already-established International, Impartial, and Independent Mechanism for Syria (IIIM).

V. GENUINE CHALLENGES: A SOBERING REALITY

A problem common to all states transitioning away from oppressive authoritarian regimes is how to deal with former leaders and collaborators responsible for atrocity crimes or human rights abuses. Before any kind of transitional justice measure, or prosecutorial measure—such as an ad-hoc tribunal—could be implemented, a governmental succession plan needs to be agreed to and arranged. The outcomes in Tunisia after Ben Ali, Saddam Hussein in Iraq, and Muammar Gaddafi in Libya exemplify various levels of success on this front.¹⁰²

Seeing as the proposed solution of utilizing the Uniting for Peace Resolution would certainly be pushing the constitutional limits of the UN Charter, there needs to be significant appetite from the international community to pursue such measures. Unfortunately for the victims and citizens of Syria, that time may have come, and gone. Not only have accountability efforts for the Syrian conflict been overshadowed by Russia's 2022 invasion of Ukraine, but there has also been a shift in the regional attitude towards the Assad Regime, signaling that the motivation to hold perpetrators accountable has begun to dissipate. Seemingly, in 2023, enough time has passed that the near-universal condemnation of Syria by the Arab region and Arab League has begun to ease.

A. More Practical Methods

There are substantial long-term risks with associated with the prospect of prosecutions and imprisonment of Assad and high-level leaders within the Assad government. There are examples in recent memory which serve as useful forewarnings to the establishment of a tribunal that exercises jurisdiction over heads of state in Syria. After the ousting of Saddam Hussein in Iraq, there was

102. See *infra* Part VI A.

significant sectarian violence and civil war in Iraq.¹⁰³ Similar to the Assad regime, Hussein's rule was marked by repression, authoritarianism, and sectarianism.¹⁰⁴ And oddly enough, just as the Assad regime is the Arab minority (Alawite) in Syria,¹⁰⁵ the Hussein regime was also the Arab minority (Sunni), in Iraq.¹⁰⁶

Even more on point to a prospective regime change in Syria is that of the failed power transition in Libya after the ousting of Muammar Gaddafi in 2011.¹⁰⁷ Since the overthrowing of the Gaddafi government, the country has faced significant instability, seen a rise in extremist groups, witnessed power struggles that have resulted in armed conflicts, and fragmentation of numerous political factions.¹⁰⁸ All of which demonstrate that with regime change, comes significant risk. As such, a thorough transitional government plan would need to be established prior to any sort of prosecutorial measures in Syria. If Assad were to be removed from his position as a result of a legal judgment, a process would need to be preemptively established to situate someone to take his place. And to that end, the head of state, or regime that would replace Assad ideally would be a regime that could restore peace.

With the aforementioned examples in mind, there is perhaps are alternative justice seeking options available which are more practical than a full blown

103. Harith Hasan Al-Qarawee, *Iraq's Sectarian Crisis, A Legacy of Exclusion*, CARNEGIE MIDDLE EAST CENTER 3 (2014) ("Rivalry between the Shia majority and the Sunni minority in Iraq has been at the center of political conflict in the state since then president Saddam Hussein fell in 2003. Sectarian tensions have hindered state-building processes and destabilized the country. But the Iraqi government has not made a clear attempt of overcome these divides and build a common national identity. In fact, many actions taken to date have only served to further fragment the struggling state.").

104. *Episode 2: Saddam Hussein*, IDEASTREAM PUBLIC MEDIA, [https://www.pbs.org/tpt/dictators-playbook/episodes/saddam-hussein/#:~:text=He%20used%20his%20policing%20powers,even%20that%20was%20not%20enough](https://www.pbs.org/tpt/dictators-playbook/episodes/saddam-hussein/#:~:text=He%20used%20his%20policing%20powers,even%20that%20was%20not%20enough.). (last visited May 12, 2023) ("[Hussein] used his policing powers to pursue the enemies of the regime and brutally consolidate his own control. [Hussein] ruled Iraq with an iron fist for almost 30 years. To maintain power for so long, he used fear, intimidation and violence like few other dictators in history . . .").

105. See, e.g., Olga Khazan, *Who's Fighting Whom in Syria*, WASHINGTON POST (Oct. 18, 2012, 8:58 AM).

106. See, e.g., Andrew Cockburn, *Iraq's Oppressed Majority*, SMITHSONIAN MAGAZINE (Dec. 2003) <https://www.smithsonianmag.com/history/iraqs-oppressed-majority-95250996/>.

107. See, e.g., Martin Asser, *The Muammar Gaddafi Story*, BBC NEWS (Oct. 21, 2011) <https://www.bbc.com/news/world-africa-12688033>.

108. Jacob Mundy, *A Decade Later, No End in Sight for Libya's Political Transition*, THE CONVERSATION (Jan. 25, 2022, 12:11 PM) <https://theconversation.com/a-decade-later-no-end-in-sight-for-libyas-political-transition-175531> ("Libya's current civil war emerged in 2014 following divisive elections for a new interim authority. In the wake of the 2011 armed uprising that ousted the longstanding regime of Muammar Gaddafi, the political, economic, and security challenges confronting Libya's transitional leaders proliferated beyond their control. Terrorism had taken root . . . while militias of all political stripes laid claim to key state assets and institutions. Meanwhile, the country was riven by ideological differences over the role of former regime officials and the extent to which the aim of the 2011 revolution was to radically transform Libyan society.").

UN-created ad-hoc tribunal: a hybrid-tribunal, or domestic trials of lower level perpetrators.¹⁰⁹ Both a hybrid tribunal and domestic trials—if Syria were to accept their establishment—could be structured to steer clear of threatening the rule of the Assad regime or make the situation more vulnerable to regime change. Indeed, the prospect of prosecuting the highest level perpetrators is merely one aspect of a multi-layered justice seeking process to be considered.

CONCLUSION

The Arab Spring gave rise to regime change, democratic reforms, continued authoritarianism, and conflict and instability. Tunisia established a relatively successful truth and dignity commission. But the truth commission included abuses of a previous regime. And Egypt, while not a beacon of democracy and human rights, is in a far different position than that of Syria. In Syria, Bashar al-Assad remains in power, and Syria is not ready for such a commission, and Assad will not willingly relinquish his throne. While one day, a reconciliation process will influence a much needed collective coming-to-terms, it does not solve the problems Syrians face today. Accordingly, seeking justice by way of a General Assembly-created ad-hoc tribunal is the best way to achieve enduring peace for the Syrian people. To that end, the Uniting for Peace Resolution fits neatly within the Security Council gridlock surrounding Syria. While a successful application of Uniting for Peace in the Syria context may be distant, the conversation associated with this debate could have lasting effects in shaping a currently broken system. Such developments would, in the long run, help to promote human rights, deter future authoritarian regimes from attacking their own population, and ultimately strengthen the law's ability to promote humanity and justice in the international system. There are significant statutory hurdles to achieve this end, and the vulnerabilities of a Syrian succeeding regime make the situation all the more complicated. Nevertheless, using the evidence already collected by the IIIM, a corresponding tribunal is the best mechanism to influence change.

109. See, e.g., Beth Van Schaak, *Alternative Jurisdictional Bases for a Hybrid Tribunal for Syria*, JUST SECURITY (may 29, 2014) <https://www.justsecurity.org/10968/alternative-jurisdictional-bases-hybrid-tribunal-syria/> (“[O]ne option under consideration to address the commission of grave international crimes during the conflict in Syria is the creation of a hybrid tribunal within the judicial system of one or more of the border states that have been most impacted upon the Syrian War . . . [S]ome states remain squeamish about advancing the [universal jurisdiction] norm . . . As such, there is an obvious utility to identifying states that can lawfully exercise domestic jurisdiction on other, less contentious bases.”).