Concepts and Issues Around Syria Arising from the Conflict in Ukraine

1. Actions taken within the framework of the United Nations system against Russia

1. Why was Russia suspended from the Human Rights Council, and why does this not apply to Syria?

On the 8th of March 2022, a coalition of 49 civil society organisations called on states to take action at the UN General Assembly to suspend Russia's membership of the Human Rights Council (HRC). This request is based on General Assembly Resolution 60/251, which established the Human Rights Council and which contains a provision allowing the General Assembly to vote with a two-thirds majority to suspend the membership of a member of the Council that commits gross and systematic violations of human rights.

Unlike the General Assembly, not all states are members of the council at any given time. The Council is made of 47 states, which serve for a period of 3 years. Russia is currently a member of the HRC so it could be suspended from the Council if the General Assembly voted in this sense. Syria, on the other hand, has not been a member of the Council since the beginning of the conflict so it cannot be suspended from something it is not a part of.

2. Can the "Uniting for Peace" resolution be used to allow the General Assembly to replace the Security Council and issue decisions on the situation in Syria, including referring Syria to the ICC?

On the 2nd of March 2022 the General Assembly adopted a resolution demanding Russia to immediately end its invasion of Ukraine. The Resolution was adopted following a resolution by

the Security Council referring the situation to the General Assembly due to the deadlock in the Security Council under the mechanism established in the "Uniting for Peace" resolution.

The "Uniting for Peace" resolution was adopted by the General Assembly in 1950 to address situations where, in the presence of a threat to the peace or an act of aggression, the Security Council fails to act because of the exercise of the veto. The resolution allows the General Assembly to consider the matter immediately with a view to make *recommendations* for collective measures to maintain or restore international peace and security. The resolution also allows the General Assembly to call for an emergency special session if the Assembly is not in session.

It is important to note that the resolutions adopted under the "Uniting for Peace" framework, like any other General Assembly resolution and unlike Security Council resolutions, are recommendations and are not legally binding. Under international law states are not obliged to abide by such resolutions. In addition, with very few exceptions, the doctrine agrees that unlike the Security Council, the General Assembly acting under the "Uniting for Peace" framework does not have the power to authorise the use of force by states. In other words, the Uniting for Peace resolution does not allow the General Assembly to exercise the same powers as the Security Council, including the power to refer a situation to the ICC.

Moreover, it is important to note that articles 10 and 11 of the UN Charter clearly attribute to the General Assembly the power to make recommendations, including concerning collective measures to maintain and restore international peace and security without having to resort to the "Uniting for Peace" resolution. The 2016 General Assembly resolution that established the International Impartial Independent Mechanism on Syria (IIIM) is an example of this practice.

In order to fully understand the reasons why the "Uniting for Peace" resolution was adopted it is necessary to understand the context in which it was adopted. At the time, it was unclear whether the General Assembly could play any role in relation to threats to international peace and security. Article 12 of the UN Charter prohibits the General Assembly to make recommendations on disputes or situations that are being considered by the Security Council, unless the Security Council requires so. With the "Uniting for Peace" resolution, the General Assembly formally claimed a role for itself and created a mechanism which enabled it to act on matters under the consideration of the Security Council even without the Council's authorisation. Moreover, in the

early years of the UN, the General Assembly was not always in session. The "Uniting for Peace" resolution provided a mechanism to call for emergency special sessions when events threatening international peace occurred outside the ordinary session.

These two practical considerations have lost relevance since the adoption of the resolution. The argument that the General Assembly does not have competence regarding maintaining peace and security has lost its strength since the International Court of Justice advisory opinion in the *Certain Expenses* case, in which it found that the Security Council has primary, but not exclusive responsibility in this regard. In addition, the International Court of Justice in the *Wall* advisory opinion noted that the prohibition of Article 12 UN Charter had been superseded by practice since over the years there had been an increasing tendency for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. Finally, the "Uniting for Peace" resolution's function of enabling states to call for emergency special sessions of the General Assembly is obsolete since the General Assembly is now permanently in session.

In conclusion, in light of the developments in international law and practice since 1950, the "Uniting for Peace" resolution is mostly redundant from a legal point of view since it does not enable the General Assembly to exercise the same powers as the Security Council, nor it otherwise expands the General Assembly's powers. The "Uniting for Peace" resolution may provide inspiration, but it does not need to be invoked or followed for the Assembly to make recommendations regarding collective measures. At the same time, invoking the resolution may have a symbolic meaning since it would be a way to highlight the failure by the Security Council to address a threat or a breach to international peace and security.

That said, leaving aside the "Uniting for Peace" resolution, the notion that the General Assembly can exercise the powers of the Security Council when the Council unreasonably fails to do so finds support in authoritative commentators such as Dire Tladi. His argument is based on the text of article 24 of the UN Charter according to which the powers of the Security Council are conferred to it by the member states and are exercised on their behalf. As a result, if the Security Council unreasonably fails to exercise its powers, the full membership of the UN - represented by the General Assembly - can do so.

2. Actions taken within the framework of the International Criminal Court on the conflict in Ukraine

3. Can the situation in Syria be referred to the ICC by other states as it happened with Ukraine?

The situation in Ukraine was referred to the ICC by 40 states parties to the Rome Statute between the 1st and the 7th of March 2022. The ICC was able to start an investigation over the situation in Ukraine because Ukraine formally accepted the jurisdiction of the Court with two declarations in 2013 and in 2014. As a result of the declarations the ICC has jurisdiction over all crimes allegedly committed in Ukrainian territory from 21 November 2013 onwards.

Even if states parties to the Rome Statute referred the situation in Syria to the ICC, the Court would not have jurisdiction over it because the situation in Syria does not satisfy the requirements of jurisdiction and admissibility of the Rome Statute. Syria is not a party to the Rome Statute and it has not issued a declaration accepting the jurisdiction of the Court. In addition, other instances which might fall under the jurisdiction of the Court such as the international crimes committed by nationals of states parties to the Rome Statute in Syria, were considered not to satisfy the Office of the Prosecutor's policy on case selection and prioritisation.

3. Actions taken within the International Court of Justice on the conflict in Ukraine

4. Why was Ukraine able to bring Russia before the ICJ using the Genocide Convention and the same did not happen in relation to Syria?

The ICJ can hear a dispute between two states only if the two states have accepted the jurisdiction of the Court. One of the ways through which states accept the jurisdiction of the court is by becoming parties to a treaty that includes a clause attributing to the ICJ the power to settle disputes concerning the interpretation or the application of the treaty. This is exactly the situation in the dispute between Ukraine and Russia. Both states are parties to the Genocide Convention, whose article IX attributes to the ICJ the power to settle disputes between contracting parties "relating to the interpretation, application or fulfilment" of the Convention.

Ukraine disputes the Russian claim that acts of genocide have occurred in the Luhanks and Donetsk regions of Ukraine and that Russia has any lawful basis to take action against Ukraine for the purpose of preventing and punishing genocide under article I of the Genocide Convention. Ukraine also asked the court to issue provisional measures to "prevent irreparable prejudice to the rights of Ukraine and its people and to avoid aggravating or extending the dispute between the parties under the Genocide Convention". On the 16th of March, the Court ruled to have jurisdiction for the purpose of issuing provisional measures and ordered Russia to suspend the military operations in Ukraine.

The same jurisdictional basis could be used to bring a case concerning Syria before the ICJ as Syria is a party to the Genocide Convention. However, the case would have to concern the "interpretation, application or fulfilment" of the obligations arising from the Genocide Convention. Despite the breath of atrocities committed by the Syrian government, it would be extremely challenging to argue that it committed genocide or otherwise failed in its obligations arising from the Genocide Convention.

5. Why is it difficult to bring a case against the Syrian government for genocide?

Under international law genocide is defined in Article II of the Genocide Convention as the commission of certain acts, including killing and causing serious harm, with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. What characterises genocide is the specific intent of perpetrators to physically destroy a national, ethnical, racial or religious group. Mass atrocities committed without that specific intent, or with the intent to physically destroy a different type of group, such as a political group, might constitute war crimes or crimes against humanity, but cannot be classified as genocide.

In the context of Syria, certain acts committed by ISIS against members of the Yazidi community were found to constitute genocide. In May 2021 the Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (UNITAD), stated that their investigations established "clear and convincing evidence that genocide had been committed by ISIL against the Yazidi as a religious group". Furthermore, in November 2021 a court in Germany convicted a member of ISIS of genocide for enslaving two Yazidi women and killing one of them with the intent to eliminate the Yazidi as a religious group.

In light of the narrow definition of genocide, it would be extremely challenging to argue that the violations committed by the other parties to the Syrian conflict, including the regime, constitute genocide.

6. Why is the ICJ already addressing the dispute between Russia and Ukraine and the case concerning Syria has not been heard yet?

Unlike the case concerning Russia and Ukraine, the case initiated by the Netherlands against Syria in September 2020, which was later joined by Canada, concerns a dispute on the application of the Convention Against Torture. Article 30 of the Convention Against Torture attributes to the ICJ the power to settle a dispute between two member states concerning the interpretation or the application of the Convention. However, before the case can be heard by the ICJ, Article 30 of the

Convention requires states to attempt to settle the dispute through negotiations and – failing that – through arbitration. As of the 28th of April 2022, the Netherlands and Canada have not yet signalled their intention to move from the negotiations phase to attempting to organise an arbitration on the dispute.