

2020

Questioning Unlimited Veto Use in Face of Atrocity Crimes

Jennifer Trahan

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Jennifer Trahan, *Questioning Unlimited Veto Use in Face of Atrocity Crimes*, 52 Case W. Res. J. Int'l L. 73 (2020)

Available at: <https://scholarlycommons.law.case.edu/jil/vol52/iss1/7>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

QUESTIONING UNLIMITED VETO USE IN THE FACE OF ATROCITY CRIMES

*Jennifer Trahan*¹

TABLE OF CONTENTS

TABLE OF CONTENTS.....	73
DRAFTING OF THE UN CHARTER.....	74
COLD WAR VETO USE.....	75
POST-COLD WAR.....	77
VETO USE OR THREATS WHILE ATROCITY CRIMES ARE ONGOING.....	77
VOLUNTARY VETO RESTRAINT INITIATIVES.....	85
<i>The Responsibility Not to Veto</i>	86
<i>The “S5” Initiative</i>	86
<i>The French/Mexican Initiative</i>	87
<i>The ACT Code of Conduct</i>	88
EXAMINING EXISTING LEGAL LIMITS TO VETO USE IN THE FACE OF ATROCITY CRIMES.....	90
<i>The Veto and Jus Cogens</i>	91
<i>The Veto and the UN Charter</i>	95
<i>The Veto and Foundational Treaties</i>	97
CONCLUSION.....	100

This article discusses the need to re-visit—based on existing legal obligations—the problem of veto use by the permanent members of the UN Security Council while there are ongoing atrocity crimes (genocide, crimes against humanity, and/or war crimes). Specifically, the article—which previews the arguments in my forthcoming book—raises the question of whether all such veto use is consistent with international law.²

-
1. Jennifer Trahan is Clinical Professor and Director of the Concentration in International Law and Human Rights at The Center for Global Affairs, NYU-SPS. A version of these remarks first appeared in the *Proceedings of the Twelfth International Humanitarian Law Dialogs* (ASIL Studies in Transnational Legal Policy, No. 51), published by the American Society of International Law.
 2. The topics explored in this article are discussed far more extensively in JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES (forthcoming CUP June 2020).

DRAFTING OF THE UN CHARTER

If one reflects back on the early drafting of what became the UN Charter, with negotiations primarily conducted by the United States, United Kingdom, and Soviet Union at Yalta and Dumbarton Oaks,³ it was the Soviet Union that insisted on the veto power, which at that point was referred to as “the principle of unanimity.”⁴ The United States and United Kingdom did not originally insist on it, and thought there should be a carve-out if a permanent member were a party to the situation being voted on—that the permanent member should be excluded from voting (and, hence, also veto use).⁵ That concept, however, fell to the wayside, upon Soviet insistence, at least for votes under Chapter VII.⁶

In the negotiations at San Francisco, non-permanent member states mounted significant “pushback” to the concept of the veto power and suggested various limitations, but did not prevail.⁷ The sentiment seemed to be that if the permanent members were going to be the major troop-contributing countries to the newly forming UN, then they should have this extraordinary power.⁸ In the end, the permanent members quite simply would not agree to a Charter without the veto power.⁹

Thus, in 1945, while there was a broad conception of veto power, it was seen primarily as necessary for the permanent members to be

-
3. See 1943: *Moscow and Teheran Conferences*, UNITED NATIONS, <https://www.un.org/en/sections/history-united-nations-charter/1943-moscow-and-teheran-conferences/index.html> [<https://perma.cc/NSM7-6ZUH>].
 4. The Soviet Union argued that the “principle of unanimity” was critical in the negotiations. See, e.g., *The Chairman of the Council of People’s Commissars of the Soviet Union (Stalin) to President Roosevelt*, 1 FOR. REL. 806 (1944); Memorandum from Joseph Stalin to President Franklin Roosevelt (Apr. 3, 1945) (on file with Office of the Historian) (explaining that the Soviet Union argued that the “principle of unanimity” was critical in the negotiations).
 5. Frederic L. Kirgis, Jr., *The Security Council’s First Fifty Years*, 89 AM. J. OF INT’L L. 506, 507 (1995).
 6. Cf. U.N. Charter art. 27, ¶ 3 (“[I]n decisions under Chapter VI, and under paragraph 3 of Article 52 [pacific settlement of disputes through regional arrangements], a party to a dispute shall abstain from voting.”).
 7. See Kirgis, *supra* note 5, at 507.
 8. EDWARD R. STETTINIUS, JR., *SWORDS INTO PLOW SHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* 73 (Inis L. Claude, Jr. ed., 4th ed. 1971).
 9. One of the U.S. delegates famously threatened that the other states could get rid of the veto power, but they could also forget about having a Charter, and dramatically tore up his draft of the Charter. EDWARD C. LUCK, *UN SECURITY COUNCIL: PRACTICE AND PROMISE* 14, 135 n.24 (2006).

unanimous on decisions relating to the use of force under Chapter VII.¹⁰ Of course, in 1945, the field of international justice basically did not yet exist.¹¹ Accordingly, if one were to examine contemporaneous uses of the veto—for example, veto of a chemical weapons inspections regime in Syria,¹² and veto of a ceasefire in Aleppo that would have allowed for provision of humanitarian assistance¹³—these kinds of topics were simply not discussed in 1945. Keep in mind that in 1945, while there had been nascent attempts at what we now call the field of “international justice” and early developments regarding the concept of *ius cogens*,¹⁴ the International Military Tribunal at Nuremberg was just commencing its work and there was not yet the 1948 Genocide Convention¹⁵ nor the four 1949 Geneva Conventions.¹⁶ Thus, much of the law that we now have did not exist yet.

COLD WAR VETO USE

During the Cold War, there was extensive use of the veto, predominantly by the Soviet Union and the United States, related to each other’s spheres of influence.¹⁷ The General Assembly responded

-
10. See Kirgis, *supra* note 5, at 512.
 11. See *History*, INT’L COURT OF JUSTICE, <https://www.icj-cij.org/en/history> [<https://perma.cc/P4LD-995K>].
 12. See, e.g., S.C. Res. S/2017/970 (Nov. 17, 2017) (vetoed by the Russian Federation); S.C. Res. S/2017/962 (Nov. 16, 2017) (vetoed by the Russian Federation); S.C. Res. S/2017/884 (Oct. 27, 2017) (vetoed by the Russian Federation).
 13. See S.C. Res. S/2016/1026 (Dec. 5, 2016) (vetoed by the Russian Federation and China); see also U.N. SCOR, 71st Sess., 7825d mtg. at 2, U.N. Doc. S/PV.7825 (May 12, 2016).
 14. See generally Kamrul Hossain, *The Concept of Jus cogens and the Obligation Under the U.N. Charter*, 3 SANTA CLARA J. INT’L L. 72 (2005).
 15. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].
 16. See Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, 75 U.N.T.S. 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12 1949, 75 U.N.T.S. 85; Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12 1949, 75 U.N.T.S. 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter, collectively, 1949 Geneva Conventions].
 17. Emma McClean, *Hard Evidence: Who Uses Veto in the UN Security Council Most Often - and for What?*, THE CONVERSATION (July 31, 2014 1:03 PM), <http://theconversation.com/hard-evidence-who-uses-veto-in-the-un-security-council-most-often-and-for-what-29907#:~:targetText=The%20use%20of%20the%20veto,600%20resolutio>

already in the late 1940s with a series of resolutions requesting the permanent member to show moderation in veto use¹⁸ because there was a genuine fear that extensive veto use would cause the Security Council (and, hence, the UN) to fall into the paralysis that had beset the League of Nations.¹⁹

These concerns manifested in 1950 in the “Uniting for Peace” resolution, which created a procedure for an emergency special session of the General Assembly to be called to take up issues blocked at the Security Council.²⁰ The United States led this approach as it was trying to obtain authorization for the Korean War.²¹ It was, of course, also then a differently composed General Assembly, sympathetic to the U.S. position.²² This process under the Uniting for Peace resolution, however, has only been utilized a handful of times,²³ so is not seen as a full solution to paralysis caused by veto use.

The General Assembly also has other residual powers under the UN Charter to address issues,²⁴ so it can sometimes act in the face of Security Council paralysis,²⁵ but not always. There are limits to the General Assembly’s competence. Certainly, anything that would

ns%20between%201945%20%2D%201989 [https://perma.cc/FM3X-MGSH].

18. See, e.g., G.A. Res. 40(I), ¶ 3 (Dec. 13, 1946); G.A. Res. 117(II), ¶ 3 (Nov. 21, 1947); GA Res. 290(IV) (Dec. 1, 1949).
19. See Jean Krasno & Mitushi Das, *The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council*, in THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY 177 (Bruce Cronin & Ian Hurd eds., 2008) (“The failures of the League of Nations were still fresh in the minds of diplomats who did not want the newly created UN to be paralysed in the same way as the League had been.”).
20. G.A. Res. 377(V), ¶¶ 1–2 (Nov. 30, 1950).
21. David M. Malone, *International Criminal Justice: Just an Expensive Mirage?*, 63 INT’L J. 729, 733 (2008).
22. Leland M. Goodrich, *The United Nations and The Korean War: A Case Study*, 25 THE ACADEMY OF POLITICAL SCIENCE 90, 93 (1953).
23. See Dominik Zaum, *The Security Council, The General Assembly, and War: The Uniting for Peace Resolution*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, at 163 (Vaughan Lowe et al. eds., 2008) (summarizing how the Uniting for Peace resolution has been utilized).
24. See UN Charter arts. 10 and 11, ¶ 2.
25. The recent creation of the IIIM to compile evidence of atrocity crimes in Syria is one such example. See G.A. Res. A/71/L.48 (Dec. 19, 2016). IIIM stands for “The International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic Since March 2011.” *Id.*

require a force authorization would fall beyond its competence;²⁶ for example, this would include even “lesser” uses of force, such as authorizing a “no fly zone,” protecting civilians in internally displaced persons (“IDP”) camps, or creating humanitarian aid corridors.

POST-COLD WAR

In the 1990s, emerging from the Cold War, there existed a brief period of optimism that Russian and U.S. vetoes would no longer dominate and more could be accomplished at the Security Council.²⁷ During this time, sufficient political alignment existed to permit, for example, the creation of the International Criminal Tribunal for the former Yugoslavia²⁸ and the International Criminal Tribunal for Rwanda.²⁹ Yet, that time-period was limited and dynamics now appear to have returned to something more resembling echoes of the Cold War in terms of Security Council voting patterns.³⁰

VETO USE OR THREATS WHILE ATROCITY CRIMES ARE ONGOING

This article primarily discusses “veto use” in the face of atrocity crimes, but note that it is sometimes the *threat* of the veto that can act similarly, as a threat by a permanent member to use its veto can block the Security Council just as effectively as actual veto use.³¹ A parallel problem exists where, due to a permanent member’s political alignment, it is simply understood that the permanent member would veto, so no resolution is ever drafted and nothing is ever put to a vote.³² This is even harder to detect; yet, it can operate just as effectively as an actual veto or a veto threat, because certain measures or language is

-
26. See UN Charter Chapter VII, art. 42 (forceful measures).
27. Joelle Hageboutros, *The Evolving Role of the Security Council in the Post-Cold War Period*, 1 SWARTHMORE INT’L REL. J. 10, 10–11 (2016).
28. See S.C. Res. S/1993/827 (May 25, 1993).
29. See S.C. Res. S/1994/955 (Nov. 8, 1994).
30. See generally Paul Romita, (Dis)unity in the Security Council: Voting Patterns in the UN’s Peace and Security Organ (unpublished Ph.D. dissertation, City University of New York), available at https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=3689&context=gc_etds [https://perma.cc/7TUB-SZRW].
31. See *UN Security Council Working Methods: The Veto*, SECURITY COUNCIL REPORT (Sept. 30, 2019), <https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php> [https://perma.cc/V7X8-4ULS].
32. See *id.*

presumptively “off the table.”³³ In effect, the would-be-proponent(s) of the resolution and the Security Council member state charged with drafting, “the penholder,” self-censor themselves—not drafting a resolution known to have no chance of passing and/or not wishing to antagonize a particular permanent member.³⁴

In terms of veto use in the face of atrocity crimes, historically, going back to the apartheid era, there were French, U.K., and U.S. vetoes protecting the government in South Africa.³⁵ This did not, however, result in complete Security Council paralysis, as there were measures that passed, including, eventually, mandatory sanctions.³⁶

In 1994, there was no express veto use, but it was known that the U.S. and France (and, by some accounts, also the U.K.) would have vetoed any resolution recognizing the killing in Rwanda as “genocide,” or sending in more robust peacekeeping forces near the start of the genocide.³⁷ The UN Assistance Mission for Rwanda (“UNAMIR”),³⁸ led by Canadian General Roméo Dallaire, was in Kigali with a minimal force and the wrong mandate in the middle of the genocide.³⁹ States utilized awkward formulations regarding the crimes, such as saying “isolated acts of genocide may be occurring.”⁴⁰ Such terminology is essentially meaningless, as either the *dolus specialis* of genocide is met

33. *See id.*

34. Interview by Jennifer Trahan with Andras Vamos-Goldman, political coordinator and legal adviser to the Canadian Mission to the United Nations from 1997 to 2002 (June 3, 2019) (on file with author).

35. *See* Jan Wouters & Tom Ruys, *Security Council Reform: A New Veto for a New Century?*, Egmont Paper No. 9, at 15 (Aug. 2005), available at <http://aei.pitt.edu/8980/1/ep9.pdf> [<https://perma.cc/SD3Y-379N>]. *See also* S.C. Draft Res. S/12312/Rev.1 (Oct. 26, 1977) (explaining the question of South Africa (Apartheid); vetoed by the U.S., U.K., and France); S.C. Draft Res. S/12311/Rev.1 (Oct. 26, 1977) (explaining the question of South Africa, Apartheid, the South African Border War, and South Africa’s Nuclear Weapons program; vetoed by the U.S., U.K., and France); S.C. Draft Res. S/12310/Rev.1 (Oct. 26, 1977) (explaining the question of South Africa (Apartheid and the South African Border War); vetoed by the U.S., U.K., and France).

36. *See* S.C. Res. S/1977/418 (Nov. 4, 1977).

37. Ariela Blätter & Paul D. Williams, *The Responsibility Not to Veto*, 3 GLOB. RESP. PROTECT 301, 311 (2011).

38. S.C. Res 872 (Oct. 5, 1993).

39. *See generally* ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2004) (detailing a moving account of the Rwanda genocide).

40. Douglas Jehl, *Officials Told to Avoid Rwanda Killings ‘Genocide,’* N.Y. TIMES (June 10, 1994), <https://www.nytimes.com/1994/06/10/world/officials-told-to-avoid-calling-rwanda-killings-genocide.html> [<https://perma.cc/DSB6-7C22>].

or not.⁴¹ There was eventually a UN force deployment of UNAMIR II, but troops arrived only when the genocide was largely over,⁴² and the French-led “*Opération Turquoise*,” also had the effect of facilitating the escape of Hutu perpetrators into then Zaire.⁴³

The United States frequently uses the veto when Israel is at issue; sometimes these vetoes are in the face of atrocity crimes,⁴⁴ sometimes not.⁴⁵ The U.S. of course has well-known military, financial, and diplomatic ties to the state of Israel.⁴⁶

-
41. *Dolus specialis* refers to the special mental state requirement of genocide. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 498 (Sept. 2, 1998) (“Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*.”).
 42. HOWARD ADELMAN, THE INTERNATIONAL RESPONSE TO CONFLICT AND GENOCIDE: LESSONS FROM THE RWANDA EXPERIENCE 52 (David Millwood ed., 1996).
 43. Blätter & Williams, *supra* note 37, at 321 n.68.
 44. See Rodrigo Campos, *U.S. Vetoes U.N. Resolution Denouncing Violence Against Palestinians*, REUTERS (June 1, 2018), <https://www.reuters.com/article/us-israel-palestine-un-vote/u-s-vetoes-u-n-resolution-denouncing-violence-against-palestinians-idUSKCN1IX5UW> [<https://perma.cc/T57W-GT9P>].
 45. Colum Lynch, *Rise of the Lilliputians*, FOR. POL’Y (May 10, 2012, 9:49 PM), <http://foreignpolicy.com/2012/05/10/rise-of-the-lilliputians> [<https://perma.cc/GVW9-SSCQ>] (“The United States . . . has routinely used its veto power to shield Israel from Security Council measures demanding it show greater restraint in its dealings with the Palestinians.”). See also Citizen for Global Solutions, *The Responsibility Not to Veto: A Way Forward*, CITIZENS FOR GLOBAL SOLUTIONS, at 4 (2014) (suggesting that not all U.S. vetoes have been used in the face of atrocity crimes, and suggesting some vetoes may have been warranted due to “language [that] can be interpreted as unbalanced and aggressive”); *UN Security Council, US Vetoes of Resolutions Critical to Israel (1972–Present)*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/u-s-vetoes-of-un-security-council-resolutions-critical-to-israel> [<https://perma.cc/4SD4-9AJX>] (one analysis of vetoes related to Israel).
 46. See Stephen Zunes, *Why the U.S. Supports Israel*, INST. POL’Y STUD. (May 1, 2002), https://ips-dc.org/why_the_us_supports_israel [<https://perma.cc/B7FT-CFC5>]; see generally Charles D. Freilich, *Can Israel Survive Without America?*, 59 SURVIVAL 135 (2017).

China appears generally to prefer not to expressly use its veto,⁴⁷ and it is more the veto threat that is at work.⁴⁸ One sees this manifested in the minimal Security Council response during the Darfur genocide, with a UN-African Union (“AU”) hybrid peacekeeping operation (“UNAMID”),⁴⁹ very gradually deployed with the consent of the government of Sudan long after the height of the killing was over. Veto threats also weakened the sanctions regime, including eliminating any oil embargo, and weakening, initially, the arms embargo.⁵⁰ While former President Bashir of Sudan stands charged with genocide committed in Darfur,⁵¹ the current arguments also apply even if the crimes are recognized as crimes against humanity and war crimes.⁵² Of

-
47. An exception would be regarding a resolution related to Taiwan or a country that has relations with Taiwan, where China would use, and has used, an express veto. *See, e.g.*, Patrick E. Tyler, *China Asserts Taiwan's Ties To Guatemala Led to Veto*, N.Y. TIMES (Jan. 12, 1997), <https://www.nytimes.com/1997/01/12/world/china-asserts-taiwan-ties-to-guatemala-led-to-veto.html> [https://perma.cc/G7FS-Y5FL] (vetoing peacekeeping deployment to Guatemala in 1997 because of its relationship with Taiwan); Nicole Winfield, *China Vetoes*, ASSOCIATED PRESS (Feb. 25, 1999), <https://www.globalpolicy.org/component/content/article/190/33325.html> [https://perma.cc/8S3Q-Q2DU] (vetoing peacekeeping deployment regarding Macedonia in 1999).
 48. *See UN Extends Afghan Mission After China Veto Threat*, RADIO FREE EUROPE/RADIO LIBERTY (Sept. 17, 2019), <https://www.rferl.org/a/un-extends-afghan-mission-after-china-veto-threat/30169944.html> [https://perma.cc/2ZBD-QH45].
 49. UNAMID took over from AU forces on December 31, 2007. *See* S.C. Res. S/2007/1769 (July 31, 2007).
 50. *See generally id.*; *Head of Sudan Sanctions Committee Briefs Security Council as Delegates Debate Criteria for Lifting 13-Year-Old Measures, Ongoing Sexual Violence*, UNITED NATIONS (Jan. 17, 2019), <https://www.un.org/press/en/2019/sc13668.doc.htm> [https://perma.cc/GS56-FNAA].
 51. *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09, Judgment, ¶ 12 (May 6, 2019), *available at* https://www.icc-cpi.int/CourtRecords/CR2019_02593.PDF [https://perma.cc/CQ5S-P4L3] (charging former President Bashir with genocide). *See also* Jennifer Trahan, *Why the Killing in Darfur Is Genocide*, 31 FORDHAM J. INT'L L. 990 (2007).
 52. *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09, ¶ 12 (July 12, 2010). There are also outstanding arrest warrants against Ahmad Muhammad Harun, then Sudan's Minister of State for the Interior, and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), one of the most senior Janjaweed commanders. *Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, ICC-02/05-01/07 (Apr. 27, 2007), <https://www.icc-cpi.int/darfur/harunkushayb> [https://perma.cc/UZ9W-NUUW]. In 2012, the International Criminal Court (“ICC”) issued an additional arrest warrant for Abdel Raheem Muhammad Hussein, Sudan's

course, China has been strategically aligned with the Sudanese administration through significant economic ties, including Sudanese oil exports to China, and Sudanese arms imports from China.⁵³

As to Sri Lanka, again one sees very little responsiveness out of the Security Council during the mass atrocity crimes of the civil war,⁵⁴ and that pattern is repeated related to crimes against the Rohingya in Myanmar.⁵⁵ There was one resolution expressly vetoed by China and Russia, already in 2007, related to Myanmar that would have condemned the crimes being committed early on in the conflict.⁵⁶ It would have called on the Government of Myanmar to cease military attacks against civilians in ethnic minority regions and in particular to put an end to the associated human rights and humanitarian law violations against persons belonging to ethnic nationalities, including widespread rape and other forms of sexual violence carried out by members of the armed forces.⁵⁷

As with Sri Lanka, it is difficult to determine the exact number of veto threats by China related to Myanmar.⁵⁸ It appears China's support

Minister of National Defense, for activities while he was Minister of the Interior. Prosecutor v. Abdel Raheem Muhammad Hussein, ICC-02/05-01/12 (Mar. 1, 2012), <https://www.icc-cpi.int/darfur/hussein> [<https://perma.cc/ZY76-BLKH>].

53. See *Sudan, Oil, and Human Rights*, HUM. RTS. WATCH, 456–58 (2003), <https://www.hrw.org/reports/2003/sudan1103/sudanprint.pdf> [<https://perma.cc/VUE2-L6MX>]; Phillip Manyok, *Oil and Darfur's Blood: China's Thirst for Sudan's Oil*, 4 J. POL. SCI. & PUB. AFF. (2016), <https://www.omicsonline.org/open-access/oil-and-darfurs-blood-chinas-thirst-for-sudans-oil-2332-0761-1000189.php?aid=69390> [<https://perma.cc/ZM77-JBLM>]; Eric Reeves, *Partners in Genocide: A Comprehensive Guide to China's Role in Darfur* (Dec. 19, 2007), <http://sudanreeves.org/2007/12/19/partners-in-genocide-a-comprehensive-guide-to-chinas-role-in-darfur> [<https://perma.cc/WM6Y-UYQZ>].
54. *Crisis in Sri Lanka*, INT'L COALITION FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-sri-lanka> [<https://perma.cc/CE7S-KPFY>].
55. Colum Lynch, *For Years, U.N. Was Warned of Threat to Rohingya in Myanmar*, FOR. POL'Y (Oct. 16, 2017), <https://foreignpolicy.com/2017/10/16/for-years-u-n-was-warned-of-threat-to-rohingya-in-myanmar/> [<https://perma.cc/M4F8-7BWF>].
56. See *Security Council - Veto List*, DAG HAMMARSKJÖLD LIBRARY, <https://research.un.org/en/docs/sc/quick> [<https://perma.cc/3AGW-HFS7>].
57. S.C. Res. S/2007/14, at 2 (Jan. 12, 2007) (vetoed by China and the Russian Federation).
58. See generally Michelle Nichols, *China Fails to Stop U.N. Security Council Myanmar Briefing*, REUTERS (Oct. 24, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-un/china-fails->

for Myanmar has simply translated into a consistent understanding that China would not support significant Security Council involvement.

Most recently, it is the situation in Syria that has attracted the most attention with fourteen Russian vetoes (and eight accompanying Chinese vetoes):

- On October 4, 2011, Russia and China vetoed a resolution that would have demanded an end to use of force by the Syrian authorities, calling for an end to violence and human rights violations;⁵⁹
- On February 4, 2012, Russian and China vetoed condemnation of “continued widespread and gross violations of human rights and fundamental freedoms by the Syrian authorities, such as the use of force against civilians, arbitrary executions, killing and persecution of protestors and members of the media, arbitrary detention, enforced disappearances, interference with access to medical treatment, torture, sexual violence, and ill-treatment, including against children”;⁶⁰
- On July 19, 2012, Russia and China vetoed condemnation of bombing and shelling of population centers, and condemnation of detention of thousands in government-run facilities;⁶¹
- On May 22, 2014, Russia and China vetoed referral of the situation in Syria to the ICC;⁶²
- On October 8, 2016, Russia vetoed a resolution expressing outrage at the alarming number of civilian casualties, including those caused by indiscriminate aerial bombardment in Aleppo;⁶³

to-stop-un-security-council-myanmar-briefing-idUSKCN1MY2QU
[<https://perma.cc/TP6X-DZHV>].

59. S.C. Res. S/2011/612, 1–2 (Oct. 4, 2011) (vetoed by the Russian Federation and China).
60. S.C. Res. S/2012/77, ¶ 1 (Feb. 4, 2012) (vetoed by the Russian Federation and China).
61. S.C. Res. S/2012/538, pmb. (July 19, 2012) (vetoed by the Russian Federation and China).
62. S.C. Res. S/2014/348, pmb. (May 22, 2014) (vetoed by the Russian Federation and China).
63. S.C. Res. S/2016/846, pmb. (Oct. 6, 2016) (vetoed by the Russian Federation).

- On December 5, 2016, Russia and China vetoed a 7-day ceasefire in Aleppo that would have allowed humanitarian assistance;⁶⁴
- On February 28, 2017, Russia and China vetoed condemnation of the use of chemical weapons and a demand for compliance with the Organisation for the Prohibition of Chemical Weapons (“OPCW”);⁶⁵
- On April 12, 2017, Russia vetoed a request for documentation such as flight plans and access to air bases from which chemical weapons were believed to have been launched;⁶⁶
- October 24, 2017, Russia vetoed renewal of the UN Joint Investigative Mechanism (“JIM”)—a chemical weapons inspection regime that would have attributed responsibility to the side using the weapons;⁶⁷
- On November 16, 2017, Russia vetoed a resolution that would have condemned the use of toxic chemicals as weapons, expressed grave concern that civilians continue to be killed and injured by such weapons, renewed the mandate of the JIM, and stated that “no party in Syria shall use, develop produce otherwise acquire, stockpile or retain, or transfer chemical weapons”;⁶⁸
- On November 17, 2017 Russia again vetoed renewal of the JIM;⁶⁹
- On April 10, 2018, Russia vetoed condemnation of “use of any toxic chemical including chlorine as a weapon in the Syrian Arab Republic,” and an expression of outrage “that civilians continue to be killed and injured by

64. S.C. Res. S/2016/1026, ¶ 10 (Dec. 5, 2016) (vetoed by the Russian Federation and China).

65. S.C. Res. S/2017/172, pmbl. (Feb. 28, 2017) (vetoed by the Russian Federation and China).

66. S.C. Res. S/2017/315, ¶ 5 (Apr. 12, 2017) (vetoed by the Russian Federation).

67. S.C. Res. S/2017/884, ¶ 1 (Oct. 27, 2017) (vetoed by the Russian Federation). The JIM was originally created by Security Council Resolution S/2015/2235, on August 7, 2015, with its mandate renewed twice in 2016.

68. S.C. Res. S/2017/962, pmbl., ¶¶ 1, 3 (Nov. 16, 2017) (vetoed by the Russian Federation).

69. S.C. Res. S/2017/970, ¶ 1 (Nov. 17, 2017) (vetoed by the Russian Federation).

chemical weapons and toxic chemicals as weapons in the Syrian Arab Republic”;⁷⁰

- On September 19, 2019, Russia and China vetoed a resolution that would have implemented a ceasefire for Syria’s war-torn Idlib province, called for a halt to a campaign of indiscriminate aerial bombardment occurring there, and demanded humanitarian access and safe passage for medical personnel;⁷¹ and
- On December 20, 2019, Russia and China vetoed a resolution that would have called for improved humanitarian assistance, reiterated the obligation to comply with international humanitarian law and international human rights law, and called for “safe, unimpeded and sustained access” for humanitarian convoys.⁷²

There has also recently been at least one veto related to Yemen, of draft Resolution S/2018/156, regarding sanctions, vetoed by Russia due to a reference to a Yemen Panel of Experts’ finding that Iran was in non-compliance with the arms embargo that had been imposed.⁷³

-
70. S.C. Res. S/2018/321, ¶ 1 (Apr. 10, 2018) (vetoed by the Russian Federation). The resolution also would have established the UN Independent Mechanism of Investigation (“UNIMI”) “to identify to the greatest extent feasible, individuals, entities, groups, or governments who were perpetrators, organizers, sponsors or otherwise involved in the use of chemical weapons, including chlorine or any other toxic chemical, in the Syrian Arab Republic.” *Id.*, ¶ 8.
71. S/2019/756 (vetoed by the Russian Federation and China).
72. S/2019/961 (vetoed by the Russian Federation and China).
73. *Chronology of Events, Yemen*, SECURITY COUNCIL REPORT (Aug. 2, 2018), <https://www.securitycouncilreport.org/chronology/yemen.php> [<https://perma.cc/3KLA-ZUXU>]; Rick Gladstone, *Russia Vetoes U.N. Resolution to Pressure Iran Over Yemen Missiles*, N.Y. TIMES (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/world/middleeast/iran-yemen-security-council.html> [<https://perma.cc/7ZLB-UNK6>] (“Russia blocked a resolution at the United Nations Security Council on Monday that would have pressured Iran over the illegal use of Iranian-made missiles by Houthi insurgents in Yemen.”). There are also reports of a veto threat by the U.S., stalling a U.K.-drafted resolution until it dropped language on the need for accountability for war crimes and guaranteeing humanitarian deliveries. Julian Borger, *UN Agrees Yemen Ceasefire Resolution After Fraught Talks and US Veto Threat*, THE GUARDIAN (Dec. 21, 2018), <https://www.theguardian.com/world/2018/dec/21/un-yemen-ceasefire-stockholm-resolution-us> [<https://perma.cc/T3RY-VK6J>]. Another source mentions U.S., U.K., and French veto threats to quash attempts at restraining the Saudi-led coalition or implicating its members in war crimes. *Category: Yemen at the UN*, SANA’A CTR. FOR STRATEGIC STUDIES (Aug. 5, 2018),

Were these kinds of vetoes—blocking chemical weapons inspections or blocking humanitarian assistance during a siege—envisioned during the Charter negotiations? No, there simply was no discussion of vetoing such measures.

While it is not claimed that veto use caused all the fatalities in any of the situations discussed, there certainly is a linkage between vetoes being cast (or veto threats made)—an action by one or more of the permanent members—and fatalities on the ground, even if one cannot necessarily link particular vetoes to particular fatalities. Notwithstanding, it is safe to say that current veto use in the face of atrocity crimes *is costing lives*.⁷⁴

These vetoes and veto threats also arguably conveyed to the governments at issue that they would be protected from scrutiny and accountability.⁷⁵ They also undermined the potential for deterrence that otherwise potentially could have been created as the vetoes provided the governments at issue with a sense of invincibility—that they had a certain measure of “protection” from scrutiny, the imposition of responding measures (such as sanctions), and/or accountability.⁷⁶

VOLUNTARY VETO RESTRAINT INITIATIVES

Consternation at unrestrained veto use has existed for a while, commencing, as mentioned, with early Cold War General Assembly

<http://sanaacenter.org/category/publications/yemen-at-the-un>
[<https://perma.cc/VC96-B7PD>].

74. One example is that after creation of an OPCW Fact-Finding Mission (“OPCW-FFM”) through at least the early work of the JIM, there is a nearly two-year gap in chemical weapons attacks in Syria documented by the Independent Commission of Inquiry on the Syrian Arab Republic. See *Chemical Weapons Attacks Document by the Independent International Commission of Inquiry on the Syrian Arab Republic*, OHCHR (Jan. 15, 2018), https://www.ohchr.org/SiteCollectionImages/Bodies/HRCouncil/IICISyria/COISyria_ChemicalWeapons.jpg [<https://perma.cc/RP96-9NSQ>] (listing no chemical weapons attacks between April 2014 and April 2016) [hereinafter *Chemical Weapons Attacks*]. In fact, a draft Security Council resolution mentioned that “immediately after the JIM’s establishment there was a decrease in the number of allegations of use of chemicals as weapons in the Syrian Arab Republic.” See S.C. Res. S/2017/172 (Feb. 28, 2017) (vetoed by the Russian Federation and China).
75. *This Is How Putin Kneecapped the UN Security Council*, POLITICS.CO.UK (Apr. 20, 2018), <https://www.politics.co.uk/comment-analysis/2018/04/20/this-is-how-putin-kneecapped-the-un-security-council> [<https://perma.cc/QHV4-J4EN>].
76. See generally *id.*

resolutions seeking veto restraint.⁷⁷ More recently, attention has shifted particularly to veto use while there are ongoing atrocity crimes (genocide, crimes against humanity, and/or war crimes).⁷⁸ Over the last nearly twenty years, states and civil society actors have increasingly called for voluntary veto restraint in the face of such crimes.⁷⁹

The Responsibility Not to Veto

Commencing in 2001 with the report of the International Commission on Intervention and State Sovereignty, which first articulated the concept of the “Responsibility to Protect” (“R2P”), one sees a call for veto restraint.⁸⁰ Of course, the agenda of R2P can be all too easily blocked by veto use.⁸¹ Various later R2P reports contain similar calls for veto restraint in the face of atrocity crimes.⁸²

The “S5” Initiative

Chronologically, there was next an initiative out of the “S5” (“Small 5”) group of states (Costa Rica, Jordan, Singapore, Switzerland, and Liechtenstein) calling for veto restraint in the face of atrocity crimes as well as other measures to encourage Security Council transparency.⁸³ It was presented in a draft General Assembly resolution

77. See G.A. Res. 40(I) (Dec. 13, 1946); G.A. Res. 117(II) (Nov. 21, 1947); GA Res. 290(IV) (Dec. 1, 1949).

78. While “ethnic cleansing” is sometimes included in this context, that term has no defined meaning under international criminal law, so is not used by the author. See, e.g., Rome Statute of the International Criminal Court arts. 6–8, July 18, 1998, UN Doc. A/CONF.183/9* (as amended) (defining genocide, crimes against humanity, and war crimes).

79. *UN Security Council Code of Conduct*, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, http://www.globalr2p.org/our_work/un_security_council_code_of_conduct [https://perma.cc/85FR-PLHV] [hereinafter GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT].

80. *The Responsibility to Protect*, INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, xiii (2001).

81. *UN Security Council and the Responsibility to Protect: Voluntary Restraint of the Veto in Situations of Mass Atrocity*, UNITED NATIONS ASS’N-UK, <https://www.una.org.uk/sites/default/files/Briefing%20-%20Veto%20code%20of%20conduct.pdf> [https://perma.cc/XM5W-AMBV].

82. See, e.g., Rep. of the Secretary-General’s High-Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility, ¶ 256, U.N. Doc. A/59/565 (Dec. 2, 2004); Rep. of the Secretary-General: Implementing the Responsibility to Protect, ¶ 61, U.N. Doc. A/63/677 (Jan. 12, 2009).

83. See Letter Dated November 3, 2005, from Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland, (Nov. 3, 2005), available at

in 2006,⁸⁴ but no action was taken. The initiative then resurfaced in a 2012 draft resolution calling for veto restraint and other measures encouraging Security Council transparency.⁸⁵ After pressure reportedly was exerted on the Under-Secretary General for Legal Affairs,⁸⁶ she declared the resolution pertained to an “important question,” and under Article 18(2) of the UN Charter required a two-thirds General Assembly vote, rather than a majority vote.⁸⁷ In the face of that decision, as well as apparent pressure by permanent members for other states not to support the resolution,⁸⁸ the S5 resolution was withdrawn.⁸⁹ Switzerland’s then-Permanent Representative, H.E. Mr. Paul Seger, in his speech withdrawing the resolution, somewhat prophetically stated “[t]his is not the closing of a chapter, but the opening of a new one.”⁹⁰

The French/Mexican Initiative

Encouragingly, a call for veto restraint was also taken up by a permanent member of the Security Council—France.⁹¹ At one point, as part of various proposals for UN Security Council reform, one idea floated was giving away France’s seat on the Security Council to

https://www.globalpolicy.org/images/pdfs/Swiss_S5_Resolution_November_10_2005.pdf [<https://perma.cc/JZ5Y-WC7M>] (suggesting a draft General Assembly resolution).

84. *Id.*

85. Draft Resolution, *Enhancing the Accountability, Transparency and Effectiveness of the Security Council*, UN Doc. A/66/L.42/Rev.2 (May 15, 2012), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a%2066%20142%20rev2.pdf> [<https://perma.cc/848J-CKUF>].

86. Volker Lehmann, *Reforming the Working Methods of the UN Security Council: The Next Act*, FRIEDRICH EBERT STIFTUNG, 3 (Aug. 2013), available at <https://library.fes.de/pdf-files/iez/global/10180.pdf> [<https://perma.cc/P3UJ-7VJ6>].

87. Legal Opinion of Patricia O’Brien Under-Secretary-General for Legal Affairs (May 14, 2012), available at <http://www.innerecitypress.com/OLA2PGAs5May.pdf>.

88. Lehmann, *supra* note 86, at 3.

89. *Id.*

90. Statement by H.E. Mr. Paul Seger, Permanent Representative, Permanent Mission of Switzerland to the UN, Follow-Up to the Outcome of the Millennium Summit, G.A. 66th Sess., at 7 (May 16, 2012), available at https://www.eda.admin.ch/dam/mission-new-york/en/documents/2012-05-16_Millennium_Summit_S5_Statement.pdf [<https://perma.cc/MM5M-5R57>].

91. GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 79.

become a rotating European Union seat.⁹² Possibly, France saw its seat as a permanent member as being less than fully secure, and, therefore, saw more of a need to be seen as a responsible member of the Council in its voting.

France proposed a political declaration, which became known as the “French/Mexican initiative,” calling for veto restraint in the face of atrocity crimes.⁹³ Currently 105 states have endorsed this approach.⁹⁴ Yet, it contains a carve-out that the veto can be used in a permanent member’s “vital national interests.”⁹⁵ That begs the question of whether the permanent member would be the sole judge of its “vital national interests.” Furthermore, why should there be any “vital national interests” that align with the perpetration of atrocity crimes?

The ACT Code of Conduct

A fourth voluntary veto restraint initiative is the ACT Group of States’ “Code of Conduct.”⁹⁶ (ACT stands for “Accountability, Coherence and Transparency.”) Interestingly, it was France that first articulated the need for a code of conduct, but it was the S5 group (minus Singapore), that then advocated for the Code of Conduct, which launched in May 2013 with twenty-two states then supporting it.⁹⁷

The Code of Conduct is not simply limited to veto restraint in the face of atrocity crimes, but more broadly calls for states to support timely and decisive Security Council action in the face of atrocity crimes

-
92. For proposals to change the membership of the Security Council, see Global Policy Forum, *Background on Security Council Reform, Membership Including Expansion and Representation*, <https://www.globalpolicy.org/security-council/security-council-reform/membership-including-expansion-and-representation.html> [https://perma.cc/ZJH9-ZTF9].
93. For background on the “French/Mexican initiative,” see Jean-Baptiste Jeangène Vilmer, *The Responsibility Not to Veto: A Genealogy*, 24 GLOB. GOVERNANCE, 1, 6 (2018), available at https://www.fesny.org/fileadmin/user_upload/The_Responsibility_Not_to_Veto_-_web_version.pdf [https://perma.cc/3PWM-KM2A].
94. *Center for Global Affairs Examines Security Council Veto Reform*, NYU (May 20, 2019), <https://www.sps.nyu.edu/homepage/academics/divisions-and-departments/center-for-global-affairs/highlights/2019/center-for-global-affairs-examines-security-council-veto-reform.html> (updated by Trahan email exchange with the Legal Adviser of the Permanent Mission of Mexico to the UN).
95. Vilmer, *supra* note 93, at 6.
96. Permanent Rep. of Lichtenstein to the U.N., Letter Dated December 14, 2015 from the Permanent Representative of Liechtenstein to the United Nations Addressed to the Secretary-General, U.N. Doc. A/70/621-S/2015/978, annex I (Dec. 14, 2015) [hereinafter Code of Conduct].
97. Lehmann, *supra* note 86, at 2.

and not vote against a “credible draft resolution” before the Security Council to end the commission of genocide, crimes against humanity, or war crimes, or to prevent such crimes.⁹⁸ It is currently signed by 121 states—including the United Kingdom and France.⁹⁹ Thus, there are actually *two* permanent member states endorsing veto restraint in the face of atrocity crimes.

Yet, the carve-out in the Code of Conduct (apparently drafted at U.K. insistence) that the call for veto restraint would only apply to the veto of a “credible draft” Security Council resolution begs the question, what constitutes a “credible draft resolution,” leaving an opening for a permanent member to declare a resolution not a “credible draft” and use the veto anyway.

There have also been a number of other voluntary veto restraint initiatives. One was proposed by a group of elder statespersons known as the “Elders,” which included Kofi Annan and Nelson Mandela.¹⁰⁰ Former Under-Secretary General for Legal Affairs at the UN Hans Corell had his own veto restraint initiative.¹⁰¹ There was even a U.S.-based Genocide Prevention Task Force chaired by former U.S. Secretary of State Madeleine Albright and U.S. Senator William S. Cohen that called for veto restraint.¹⁰² The U.S. Task Force during the

98. Code of Conduct, *supra* note 96, annex I, ¶ 2.

99. *See List of Supporters of the Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes, as Elaborated by ACT*, PERMANENT MISSION OF THE PRINCIPALITY OF LIECHTENSTEIN (Jan. 1, 2019), https://www.regierung.li/media/medienarchiv/2020-1-1_CoC_List_of_supporters.pdf [hereinafter *List of Supporters of the Code of Conduct*].

100. *The Elders Call for Strengthening of the United Nations: Fit for Purpose in the 21st Century*, THE ELDERS (Feb. 7, 2015), https://theelders.org/sites/default/files/2015_02-press-release-the-elders-call-for-the-strengthening-of-the-united-nations_0.pdf [<https://perma.cc/RJB3-3GPW>].

101. Letter Dated Dec. 10, 2008 from Former U.N. Legal Counsel Hans Corell to the Governments of the Members of the United Nations (Dec. 10, 2008), *available at* <http://www.havc.se/res/SelectedMaterial/20081210corelllettertounmembers.pdf> [<https://perma.cc/JR28-DNLM>] (advancing the idea that when it comes to Security Council reform, the rule of law is more important than additional members).

102. Madeleine K. Albright & William S. Cohen, *Preventing Genocide: A Blueprint for U.S. Policymakers*, U.S. GENOCIDE PREVENTION TASK FORCE, at 106–07 (Dec. 8, 2008), *available at* https://www.usip.org/sites/default/files/files/genocide_taskforce_report.pdf [<https://perma.cc/6H49-YBHV>].

Obama Administration did not result in the United States joining either the Code of Conduct or the French/Mexican initiative.¹⁰³

Some of the variations in these veto restraint initiatives include: which crimes are covered; whether a threat of the veto should be covered; whether the threat of the crimes would be covered (or the crimes must be occurring); whether there should be an outside body that serves as a “trigger” to recognize that the crimes are occurring; whether there should be an explanation by a permanent member using the veto, including how the veto is consistent with international law; whether there should be a carve-out permitting the veto in a permanent member’s “vital national interests”; and whether all vetoes of resolutions in the face of genocide, crimes against humanity, and/or war crimes should be covered, or veto restraint should only apply, for example, where there is a “credible draft resolution.”¹⁰⁴

On the positive side, these initiatives reflect nearly twenty years of momentum that something must be done about unrestrained veto use while there are ongoing atrocity crimes (genocide, crimes against humanity, and/or war crimes), and two permanent members share this position.¹⁰⁵ On the negative side, these initiatives are seen as “soft law”¹⁰⁶—a code of conduct and a political declaration—so they do not purport to articulate binding legal obligations, and, perhaps more significantly, three permanent members have joined none of them.¹⁰⁷ Thus, in the end, while these initiatives are extremely helpful in increasing the political “cost” of veto use, they are not reining in veto use, even in the face of mass atrocities.

EXAMINING EXISTING LEGAL LIMITS TO VETO USE IN THE FACE OF ATROCITY CRIMES

In light of continuous use of the veto and its threat in situations of atrocity crimes—despite continued condemnation of such practices and widespread calls for veto restraint—the time is ripe for taking a fresh

103. See generally *List of Supporters of the Code of Conduct*, *supra* note 99; Vilmer, *supra* note 93, at 9.

104. These variations in approach will be examined in my forthcoming book. See TRAHAN, *supra* note 2, Chapter 3.

105. See generally Press Release, General Assembly, Member States Call for Removing Veto Power, Expanding Security Council to Include New Permanent Seats, as General Assembly Debates Reform Plans for 15-Member Organ, U.N. Press Release GA/12091 (Nov. 20, 2019).

106. See, e.g., Theresa Reinold, *The “Responsibility Not to Veto,” Secondary Rules, and the Rule of Law*, 6 GLOBAL RESP. TO PROTECT 269, 276 (2014) (referring to the responsibility not to veto as a soft secondary rule in the form of a non-binding code of conduct).

107. See generally Dinah L. Shelton, *Soft Law*, in HANDBOOK OF INT’L L. 1–22 (Routledge Press, 2008) (defining “soft law”).

look at this situation and to consider whether international law has anything to say about unrestrained veto use in the face of atrocity crimes. Certainly, in 1945, there was not yet as much international law as exists today, but, by now, it is clear that the veto power (conferred by the UN Charter)¹⁰⁸ sits within the context of a system of international law. Whereas the veto sometimes appears to be treated as a *carte blanche* (a permanent member may veto for whatever reason or no reason),¹⁰⁹ the veto, created in the UN Charter, actually sits within a system of international law.

Three main legal arguments indicate there are legal limits, or constraints, on the use of the veto in the face of genocide, crimes against humanity, and/or war crimes based on existing international law.¹¹⁰ (These arguments are detailed far more extensively in my book.)¹¹¹

The Veto and Jus Cogens

First, is whether current veto use is consistent with genocide, crimes against humanity, and war crimes being recognized as *jus cogens*

108. While the word “veto” is not contained in the UN Charter, the veto power is created under Article 27(3). See U.N. Charter art. 27, ¶ 3. The requirement of concurring votes means that a negative vote (i.e., veto) cannot be cast. See *id.*

109. WOUTERS & RUYS, *supra* note 35, at 9 (“States often fail to provide clarification of their exact motives for casting a vote. Even when States do give a public explanation, this will not necessarily correspond to the real reason.”). Liechtenstein recently announced a new initiative that there should be mandatory discussion in a formal meeting of the General Assembly every time the veto is used within the Security Council. See Meetings Coverage, U.N. GAOR, 73d Sess., 106th mtg., *General Assembly Adopts 5 Resolutions, Including Texts on Revitalizing Its Own Work, Designating 2021 ‘International Year of Peace and Trust,’* U.N. Doc. GA/12174 (Sept. 14, 2019), available at <https://www.un.org/press/en/2019/ga12174.doc.htm> [<https://perma.cc/6EZ2-ZFA2>].

110. See generally, e.g., Hannah Yiu, *Jus Cogens, the Veto and the Responsibility to Protect: A New Perspective*, 7 N.Z. Y.B. INT’L L. 207–53 (2009).

111. See TRAHAN, *supra* note 2.

norms.¹¹² *Jus cogens* norms are, hierarchically, the highest level of law¹¹³ from which no derogations are permitted¹¹⁴ which “cannot be violated,”¹¹⁵ which must be respected “in all circumstances,”¹¹⁶ and which “rules are absolute.”¹¹⁷ Because the veto power is conferred by the UN Charter, it is subordinate to *jus cogens* in terms of the hierarchy of norms.¹¹⁸

-
112. ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Commentary on arts. 40, 26, G.A. Res. 56/83 (adopted) (2001) [hereinafter ILC Draft Articles] (recognizing the existence of, *inter alia*, genocide and crimes against humanity as *jus cogens* norms). As to war crimes, the ILC writes: “In the light of the description by the ICJ of the basic rules of international humanitarian law applicable in armed conflict as ‘intransgressible’ in character, it would . . . seem justified to treat these as peremptory.” *Id.* (emphasis added) (citing Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 257 (July 8, 1996)).
113. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 L. & CONTEMP. PROBS. 67 (1996) (“[A] *jus cogens* norm holds the highest hierarchical position among all other norms and principles.”). See also André da Rocha Ferreira et al., *Formation and Evidence of Customary International Law*, 1 UFRGS MODEL U.N. J. 182, 194 (2013) (“Peremptory norms of international law or norms of *jus cogens* have a superior hierarchy in relation to other rules.”).
114. See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331 (defining a peremptory norm as a norm of general international law “accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”).
115. JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 71 (Cambridge Studies in Int’l and Comp. L. Ser. No. 56, 2007).
116. Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT’L & COMP. L. 609, 610 (1977).
117. *Id.* at 612.
118. See R. NIETO-NAVIA, INTERNATIONAL PEREMPTORY NORMS (*JUS COGENS*) AND INTERNATIONAL HUMANITARIAN LAW 5 (2003). See also JAMES CRAWFORD, “CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW” GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 421 (2013) (“It seems intuitively right that the Security Council should be bound by peremptory norms. They are by definition norms that cannot be derogated from except by subsequent norms of the same kind.”); SIMON CHESTERMAN, THE U.N. SECURITY COUNCIL AND THE RULE OF LAW: THE ROLE OF THE SECURITY COUNCIL IN STRENGTHENING A RULES-BASED INTERNATIONAL SYSTEM 10–11, 19 (2008) (“It is generally acknowledged that the Security Council’s powers are subject to the UN Charter and norms of *jus cogens* The Council does not operate free of legal constraint. In strict legal terms this means that the Council’s powers are exercised subject to the Charter and norms of *jus cogens*.”).

Then, is it acceptable to veto in the face of genocide, crimes against humanity, and/or war crimes¹¹⁹ considering these are *jus cogens* norms (receiving this highest level of protection)? In the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) held that the Security Council’s “powers cannot . . . go beyond the limits of the [UN].”¹²⁰ The European Court of First Instance has held that *jus cogens* constitutes “a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations.”¹²¹ If the UN cannot violate *jus cogens*—as it cannot—then the Security Council, an organ of the UN, also cannot violate *jus cogens*.¹²² Permanent members are also

-
119. My forthcoming book will examine whether all war crimes have risen to the level of *jus cogens*, or which ones have risen to that level. See TRAHAN, *supra* note 2, ch. 4.1.
120. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).
121. See, e.g., Case T-315/01, Kadi v. Council & Comm’n, 2005 E.C.R. II-03649; Case T-306/01, Yusuf and Al Barakaat International Foundation v. Council & Comm’n, 2005 E.C.R. II-03533; Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi and Al Barakaat Int’l Found. v. Council and Comm’n, 47 I.L.M. 923, ¶ 287 (Sept. 3, 2008). On appeal, the Court of Justice of the European Communities (now known as the Court of Justice of the European Union) saw it somewhat differently, that its review should focus on how Community members implement Security Council resolutions. Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission, 47 ILM 923, para. 287 (Eur. Ct. Just. Sept. 3, 2008).
122. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Request for the Indication of Provisional Measures, 1992 I.C.J., 9, 160 (Apr. 14) (dissenting opinion by Weeramantry, J.) (“The history of the United Nations Charter . . . corroborates the view that a clear limitation on the plenitude of the Security Council’s powers is that those powers must be exercised in accordance with the well-established principles of international law.”); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 115 (June 21) (dissenting opinion by Fitzmaurice, J.) (“[T]he Security Council is as much subject to [international law] . . . as any of its individual member States are, [just as] the United Nations is itself a subject of international law . . .”).

bound to respect *jus cogens* by the fact that states are bound to respect *jus cogens*¹²³ and the permanent members are states.¹²⁴

Is it therefore acceptable to use the veto in a way that is inconsistent with, or, in the circumstances, facilitates (even if indirectly) the ongoing commission of crimes prohibited by, *jus cogens*? For example, is it acceptable to veto chemical weapons inspections when chemical weapons use is a war crimes (and, depending on context, a crime against humanity or means to commit genocide)?¹²⁵ Assume such chemical weapons inspections were deterring chemical weapons attacks (which they were in Syria), but after the veto of the inspections regime, which was attributing responsibility to the side using the weapons, chemical weapons attacks increased. Therefore, there is a correlation between veto use and increased chemical weapons attacks.¹²⁶ The actions of the permanent members (including veto use): (a) must not be used in circumstances such that their effect is to facilitate (even if indirectly) *jus cogens* violations,¹²⁷ (b) must not undermine the duty of other Security Council members to cooperate to make an appropriate

123. Salahuddin Mahmud & Shafiqur Rahman, *The Concept and Status of Jus Cogens: An Overview*, 3 INT'L J. L. 111 (2017) (“According to *Oxford Dictionary of Law*, *jus cogens* refers to a rule or principle in international law that is so fundamental that it binds *all states* and does not allow any exception.’ Thus the concept of *jus cogens* in the context of international law indicates that it is a body of fundamental legal principle which is *binding upon all members of the international community in all circumstances.*”) (emphasis added to last sentence).

124. Security Council Report, *UN Members – Security Council*, <https://www.securitycouncilreport.org/un-members-security-council/perma.cc/8UUKK-LTTK>].

125. *See, e.g.*, Jennifer Trahan, *A Critical Guide to the Iraqi High Tribunal’s Anfal Judgment: Genocide Against the Kurds*, 30 MICH. J. INT’L L. 305 (2009) (analyzing the “Anfal trial,” including the Iraqi Government’s campaign, including chemical weapons use, against the Kurds, adjudicated to constitute genocide).

126. *Chemical Weapons Attacks*, *supra* note 74 (noting a decrease in chemical weapons attacks after the OPCW-FFM was created and during the early work of the JIM).

127. *See* Yiu, *supra* note 110, at 232 (“Where there is a [core crime] situation involving the breach of a *jus cogens* norm, the veto cannot be used in a manner that *facilitates* this breach because such usage would be a violation of a non-derogable norm of international law.”) (emphasis added).

response to a serious breach of a *jus cogens* norm,¹²⁸ and (c) must be consistent with *jus cogens*.¹²⁹

The Veto and the UN Charter

Second, the veto power is created by the UN Charter.¹³⁰ Yet, the UN Charter provides a limitation on the Security Council's power. Under Article 24(2), the Security Council must act "in accordance with the Purposes and Principles of the United Nations."¹³¹ The "Purposes and Principles" of the United Nations in Articles 1 and 2 of the Charter are quite broad, but they include respecting "principles of justice and international law," "promoting and encouraging respect for human rights," "co-operation in solving international problems of [a] . . . humanitarian character," and "good faith."¹³² One might then ask whether the vetoes that are occurring are consistent with the UN's "Purposes and Principles,"¹³³ because if they are not, then the vetoing permanent member is acting *ultra vires*—that is, beyond the proper exercise of Security Council power.¹³⁴ It appears quite clear that current veto use is inconsistent with the UN's "Purposes and Principles." Vetoes that are not in accordance with the UN's "Purposes and Principles" would be beyond the competence of the permanent member. The Charter cannot have granted permanent member states the power to violate the UN's "Purposes and Principles," as the capacity of being

128. ILC Draft Articles, *supra* note 112, Commentary on arts. 40–41 (recognizing a duty of states to cooperate to bring to an end through lawful means any serious breach of an obligation arising under a peremptory norm of general international law).

129. This argument as to the need for consistency is derived from jurisprudence of the European Court of Human Rights and European Court of Justice when the courts were trying to construe obligations created under Security Council resolutions in light of obligations created under the European Convention for the Protection of Human Rights and Fundamental Freedoms, and adopted a "harmonious interpretation" approach, whereby the presumption was that Security Council resolutions should be interpreted in a way that is consistent with Convention obligations. See, e.g., Secil Bilgic, *Harmonious Interpretation Meets the UN Charter: The Derogation Presumption*, HARV. HUM. RTS. J. (2016), available at <http://harvardhrj.com/harmonious-interpretation-meets-the-un-charter-the-derogation-presumption> [<https://perma.cc/HK35-8J6R>].

130. *The Veto*, SECURITY COUNCIL REPORT (Oct. 19, 2015), <https://www.securitycouncilreport.org/research-reports/the-veto.php> [<https://perma.cc/83TB-Y2SF>].

131. U.N. Charter art. 24, ¶ 2.

132. *Id.* arts. 1, 2.

133. *Id.*

134. *Ultra Vires*, WEX, https://www.law.cornell.edu/wex/ultra_vires [<https://perma.cc/MC5V-23Q5>] (defining *ultra vires*).

a permanent members was created by the Charter, so permanent members necessarily cannot have powers going beyond those conferred by the Charter.¹³⁵

This argument, as to limitations to veto use provided by the Charter (and similar legal arguments) has already been taken up by a number of states in formal statements at the UN.¹³⁶ Such statements are an important indication that states see veto use in the face of atrocity crimes as problematic as a matter of international law, which is substantially different from the view that veto restraint is or should

135. See U.N. Charter art. 2

136. For example, Egypt has stated that “[t]he use of the veto *undermines the implementation of the provisions of the Charter and of international law.*” U.N. SCOR, 73d Sess., 8262d mtg. at 39, U.N. Doc. S/PV.8262 (May 17, 2018) (emphasis added) (transcribing a debate entitled “Upholding International Law within the Context of the Maintenance of International Peace and Security”). Mexico stated that “the veto in situations where mass atrocities are committed *is an abuse of the law* that can trigger international responsibility for the State committing them and an abuse that leaves the Organization under the sad shadow of paralysis and irrelevance.” *Id.* at 47 (emphasis added). Norway stated: “The use of the veto to protect narrow national interests in situations of mass atrocities *is not in line with the spirit of the Charter.*” *Id.* at 66 (emphasis added). Turkey added that the Security Council’s failure to carry out its primary responsibility for the maintenance of peace and security “pursuant to Article 24 of the Charter” is a “*serious blow to international law.*” *Id.* at 80 (emphasis added). The Netherlands stated that *the special privilege of the veto* ought to be used “with maximum restraint” and that the Council would “force itself into irrelevance” and the “rules-based international order would break down” if instead this privilege were “used as a licence to kill, as a means to obstruct justice, as a way to prevent the truth from being told, *as a means to hold hostage those who want to uphold the principles of the Charter.*” *Id.* at 15 (emphasis added).

The U.S., U.K., and France have articulated similar positions—at least regarding veto use related to the situation in Syria—as violating international law (U.N. SCOR, 73d Sess., 8233d mtg. at 5, U.N. Doc. S/PV.8233 (Apr. 14, 2018); U.N. SCOR, 72d Sess., 8073d mtg. at 7, U.N. Doc. S/PV.8073 (Oct. 24, 2017)), failing to accord with the “Purposes and Principles” of the Charter (U.N. SCOR, 73d Sess., 8231st mtg. at 10–11, U.N. Doc. S/PV.8231 (Apr. 13, 2018)), an abuse of the veto power (U.N. SCOR, 73d Sess., 8228th mtg. at 5–6, U.N. Doc. S/PV.8228 (Apr. 10, 2018); U.N. SCOR, 73d Sess., 8164th mtg. at 5–6, U.N. Doc. S/PV.8164 (Jan. 23, 2018)), undermining of global norms (U.N. SCOR, 73d Sess., 8228th mtg. at 5–6, U.N. Doc. S/PV.8228 (Apr. 10, 2018)), a failure to exercise the duties required of a permanent member of the Security Council (U.N. SCOR, 73d Sess., 8231st mtg. at 9, U.N. Doc. S/PV.8231 (Apr. 13, 2018); U.N. SCOR, 72d Sess., 8105th mtg. at 7, U.N. Doc. S/PV.8105 (Nov. 16, 2017); U.N. SCOR, 72d Sess., 7922d mtg. at 3–4, U.N. Doc. S/PV.7922 (Apr. 12, 2017)), and a violation of international obligations to take action against chemical weapons use (U.N. SCOR, 72d Sess., 7923d mtg. at 5, U.N. Doc. S/PV.7923 (Apr. 12, 2017)).

be a “voluntary” matter. These statements moreover demonstrate that states have not acquiesced to a practice of unlimited veto use in the face of atrocity crimes; rather, states are persistently lodging objections to such veto use.

The Veto and Foundational Treaties

Third, one might focus on the treaty obligations of individual permanent member states. For instance, under the Genocide Convention there is an obligation to “prevent” genocide.¹³⁷ The “prevention” obligation was at issue in the *Bosnia v. Serbia* case before the International Court of Justice (“ICJ”).¹³⁸ Under the four 1949 Geneva Conventions, there is also in Common Article 1 an obligation for states parties to “ensure respect for the Geneva Conventions in all circumstances.”¹³⁹

If all permanent members are parties to both the Genocide Convention and the four 1949 Geneva Conventions (which they are),¹⁴⁰ is it legally acceptable to veto freely in the face of genocide, “grave breaches,” “Common Article 3” war crimes, or other violations of the 1949 Geneva Conventions?

Examining the ICJ’s *Bosnia v. Serbia* decision, the Court held that a state must do what is in its power to prevent “genocide,” depending on its ability to influence.¹⁴¹ Under that standard, the permanent members should have a particularly strong responsibility, as might a country intervening in a situation or one with ties to the regime in question.¹⁴² A permanent member who is both intervening and/or has ties to the regime would presumably have the highest level of

137. Genocide Convention, *supra* note 15, art. 1.

138. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. 43, ¶ 438 (Feb. 26). The ruling in the case of *The Gambia et al against Myanmar* also rested on the same obligation. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures Order, para. 79 (Int’l Ct. of Just. Jan. 23, 2020).

139. See 1949 Geneva Conventions, *supra* note 16, Common Article I.

140. See *Status of the Convention on the Prevention and Punishment of the Crime of Genocide*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=I-V-1&chapter=4&clang=_en [perma.cc/Y4L5-DRN7] (listing the parties to the Genocide Convention); *Treaties, States Parties, and Commentaries*, INT’L COMM. FOR THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_treatySelected=380&xp_viewStates=XPages_NORMStatesParties [perma.cc/9S5Y-CCTU] (listing the parties to the 1949 Geneva Conventions).

141. *Bosn. & Herz. v. Serb. and Montenegro*, 2007 I.C.J. Rep. at 221.

142. See generally *id.*

responsibility because its actions (or lack thereof) could have the greatest impact on what is happening on the ground.

Another interesting facet of the ICJ's *Bosnia v. Serbia* decision is the finding that Serbia had an obligation to prevent genocide in Bosnia—another state.¹⁴³ Thus, the Genocide Convention imposes not only an obligation for a state to prevent genocide on a state's own territory; the obligation has extraterritorial applicability.¹⁴⁴ The ICJ has held that the same is true of the obligation to “ensure” respect for the 1949 Geneva Conventions.¹⁴⁵

Thus, an argument can be made that the individual permanent member countries using vetoes in the face of genocide, “grave breaches,” Common Article 3 violations (or probably the Geneva Conventions more broadly)¹⁴⁶ are violating their individual treaty obligations. These obligations do not cease by virtue of a country sitting on the Security Council. (These treaties also impose certain obligations on the elected members of the Security Council, as well as states more broadly, including in their bilateral relations.)

143. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bos. & Herz. v. Yugo.*), Preliminary Objection, 1996 I.C.J. 595, ¶ 31 (July 11) (“[T]he obligation each state . . . has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”).

144. *Id.*

145. The ICJ recognized the extraterritorial applicability of Common Article 1 in both the *Wall* and *Nicaragua* cases. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 158 (July 9); Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14, ¶ 220 (June 27).

146. See Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT'L REV. RED CROSS 707, 735 (2014) (“[Common Article] 1 epitomizes the commitment of States to avoid [International Humanitarian Law (“IHL”)] violations taking place in the future. It does so by creating a framework whereby States not party to a particular armed conflict must use every means at their disposal to ensure that the belligerents comply with the Geneva Conventions and [Additional Protocol] 1, and probably the whole body of IHL.”) (emphasis added). Protocols I and III also have similar obligations to “ensure respect for” their provisions, so similar arguments would apply to the extent the permanent members are parties to those conventions. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem art. 1, Dec. 8, 2005, 75 UNTS 135.

One might make a similar argument for crimes against humanity, but the treaty on crimes against humanity is in drafting,¹⁴⁷ so one would need to construct a similar argument by focusing on *erga omnes* obligations,¹⁴⁸ general obligations to cooperate,¹⁴⁹ and obligations of good faith.¹⁵⁰

One caveat—needed only as to this third (treaty-based) argument—is that one has to also work around Article 103 of the UN Charter, which basically provides that obligations under treaties can be trumped by obligations created under the Charter.¹⁵¹ Here, one might argue, however, that the Genocide Convention and 1949 Geneva Conventions are not simply *any* treaties but foundational treaties, so rather than viewing these treaties and Article 27 (allowing the veto) to be read in a way that is conflicting, one should adopt a “harmonious interpretation” whereby veto use needs to be consistent with these foundational treaty obligations.¹⁵² Or one might formulate it that the obligations under these treaties embody the “Purposes and Principles” of the UN, and, therefore, pursuant to Article 24(2), Security Council

147. See Int’l L. Comm’n, Draft Articles on Prevention and Punishment of Crimes against Humanity, Adopted by the International Law Commission at its Seventy-First Session and Submitted to the General Assembly as Part of the Commission’s Report Covering the Work of that Session, UN Doc. A/74/10, https://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/7_7_2019.pdf&lang=EF.

148. For discussion of what states must do to fulfill obligations *erga omnes*, see Bassiouni, *supra* note 113.

149. ILC Draft Articles, *supra* note 112, Commentary on arts. 40–41; Marko Milanović, *State Responsibility for Genocide*, 17 EUR. J. INT’L L. 553, 571 (2006) (“[S]tates have a duty to prevent and punish genocide in exactly the same way as they have to prevent and punish crimes against humanity or other massive human rights violation.”).

150. Good faith is mandated not only by UN Charter Article 2(2)—as one of the U.N.’s Principles—but also as a general principle of international law. See, e.g., Andreas R. Ziegler & Jorun Baumgartner, *Good Faith as a General Principle of (International) Law*, in ANDREW D. MITCHELL, M. SORNARAJAH & TANIA VOON, GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 9–36 (2015); Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SEC. L. 453, 471 (citing OPPENHEIM’S INTERNATIONAL LAW 346 (Hersch Lauterpacht ed., 1955)) (discussing the general requirement of states to act in good faith).

151. U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

152. See Bilgic, *supra* note 129 (describing the meaning of harmonious interpretation).

members must respect these treaties.¹⁵³ Thus, it is not so clear the Security Council permanent members are free to act in complete disregard of these foundational treaty obligations.¹⁵⁴

CONCLUSION

In summation, these or similar legal arguments should be seriously considered. The arguments could be particularly helpful to the elected members of the Council, bolstering the reasons to oppose veto use while there are ongoing atrocity crimes. One could even imagine the General Assembly putting a request to the ICJ for an Advisory Opinion on a question such as: does existing international law contain limitations on the use of the veto power by permanent members of the UN Security Council in situations where there is ongoing genocide, crimes against humanity, and/or war crimes? The General Assembly might alternatively consider confirming its understanding of such hard law concepts directly in a General Assembly resolution. In the meanwhile, states at the UN could intensify what many have already been doing, which is speaking out critically at the UN each time the veto is used in violation of these existing legal norms. No longer should the UN system tolerate the veto being used in a way that essentially facilitates or allows the continuing perpetration of atrocities.

153. U.N. Charter art. 24, ¶ 2.

154. For example, while the Security Council may authorize use of force under Chapter VII, Article 42, one would not expect the Security Council to authorize force in a way that constitutes genocide, that suspends the operation of IHL in a particular conflict, or that violates foundational IHL principles such as distinction and proportionality.