Questioning Unlimited Veto Use in Face of Atrocity Crimes

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Questioning Unlimited Veto Use in the Face of Atrocity Crimes

Jennifer Trahan

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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, it was the Soviet Union that insisted on the veto power, which at that point was referred to as “the principle of unanimity.” 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). That concept, however, fell to the wayside, upon Soviet insistence, at least for votes under Chapter VII.

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. 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. In the end, the permanent members quite simply would not agree to a Charter without the veto power.

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

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).
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.
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.\(^\text{10}\)

Of course, in 1945, the field of international justice basically did not yet exist.\(^\text{11}\) Accordingly, if one were to examine contemporaneous uses of the veto—for example, veto of a chemical weapons inspections regime in Syria,\(^\text{12}\) and veto of a ceasefire in Aleppo that would have allowed for provision of humanitarian assistance—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 *jus cogens*,\(^\text{14}\) the International Military Tribunal at Nuremberg was just commencing its work and there was not yet the 1948 Genocide Convention\(^\text{15}\) nor the four 1949 Geneva Conventions.\(^\text{16}\) 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.\(^\text{17}\) The General Assembly responded

\(^{10}\) See Kirgis, supra note 5, at 512.


already in the late 1940s with a series of resolutions requesting the permanent member to show moderation in veto use 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.

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. The United States led this approach as it was trying to obtain authorization for the Korean War. It was, of course, also then a differently composed General Assembly, sympathetic to the U.S. position. This process under the Uniting for Peace resolution, however, has only been utilized a handful of times, 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, so it can sometimes act in the face of Security Council paralysis, but not always. There are limits to the General Assembly’s competence. Certainly, anything that would

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.”).
24. See UN Charter arts. 10 and 11, ¶ 2.
require a force authorization would fall beyond its competence;\textsuperscript{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.

\textbf{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.\textsuperscript{27} During this time, sufficient political alignment existed to permit, for example, the creation of the International Criminal Tribunal for the former Yugoslavia\textsuperscript{28} and the International Criminal Tribunal for Rwanda.\textsuperscript{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.\textsuperscript{30}

\textbf{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 \textit{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{26} See UN Charter Chapter VII, art. 42 (forceful measures).
\item \textsuperscript{27} Joelle Hageboutros, \textit{The Evolving Role of the Security Council in the Post-Cold War Period}, 1 SWARTHMORE INT’L REL. J. 10, 10–11 (2016).
\item \textsuperscript{28} See S.C. Res. S/1993/827 (May 25, 1993).
\item \textsuperscript{29} See S.C. Res. S/1994/955 (Nov. 8, 1994).
\item \textsuperscript{32} See id.
\end{itemize}
presumptively “off the table.” 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.

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. This did not, however, result in complete Security Council paralysis, as there were measures that passed, including, eventually, mandatory sanctions.

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. The UN Assistance Mission for Rwanda (“UNAMIR”), led by Canadian General Roméo Dallaire, was in Kigali with a minimal force and the wrong mandate in the middle of the genocide. States utilized awkward formulations regarding the crimes, such as saying “isolated acts of genocide may be occurring.” Such terminology is essentially meaningless, as either the dolus specialis of genocide is met

33. See id.
There was eventually a UN force deployment of UNAMIR II, but troops arrived only when the genocide was largely over, and the French-led “Opération Turquoise,” also had the effect of facilitating the escape of Hutu perpetrators into then Zaire.

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

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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 insomuch as it embodies a special intent or dolus specialis.”).


43. Blätter & Williams, supra note 37, at 321 n.68.


China appears generally to prefer not to expressly use its veto, and it is more the veto threat that is at work. One sees this manifested in the minimal Security Council response during the Darfur genocide, with a UN-African Union (“AU”) hybrid peacekeeping operation (“UNAMID”), 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. While former President Bashir of Sudan stands charged with genocide committed in Darfur, the current arguments also apply even if the crimes are recognized as crimes against humanity and war crimes. 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-s-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).


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
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]

• 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

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

- 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;  

- 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.

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.

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.


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].


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.\textsuperscript{77} More recently, attention has shifted particularly to veto use while there are ongoing atrocity crimes (genocide, crimes against humanity, and/or war crimes).\textsuperscript{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.\textsuperscript{79}

\textit{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.\textsuperscript{80} Of course, the agenda of R2P can be all too easily blocked by veto use.\textsuperscript{81} Various later R2P reports contain similar calls for veto restraint in the face of atrocity crimes.\textsuperscript{82}

\textit{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.\textsuperscript{83} It was presented in a draft General Assembly resolution

\textsuperscript{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).

\textsuperscript{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).


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


in 2006, 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. After pressure reportedly was exerted on the Under-Secretary General for Legal Affairs, 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. In the face of that decision, as well as apparent pressure by permanent members for other states not to support the resolution, the S5 resolution was withdrawn. 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.”

**The French/Mexican Initiative**

Encouragingly, a call for veto restraint was also taken up by a permanent member of the Security Council—France. 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

84. Id.


88. Lehmann, supra note 86, at 3.

89. Id.


91. GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, supra note 79.
become a rotating European Union seat.\textsuperscript{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.\textsuperscript{93} Currently 105 states have endorsed this approach.\textsuperscript{94} Yet, it contains a carve-out that the veto can be used in a permanent member’s “vital national interests.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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


\textsuperscript{95} Vilmer, supra note 93, at 6.


\textsuperscript{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. It is currently signed by 121 states—including the United Kingdom and France. 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. Former Under-Secretary General for Legal Affairs at the UN Hans Corell had his own veto restraint initiative. 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. The U.S. Task Force during the


Obama Administration did not result in the United States joining either the Code of Conduct or the French/Mexican initiative.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{105} On the negative side, these initiatives are seen as “soft law”—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.\textsuperscript{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

\textsuperscript{103} See generally List of Supporters of the Code of Conduct, supra note 99; Vilmer, supra note 93, at 9.

\textsuperscript{104} These variations in approach will be examined in my forthcoming book. See TRAHAŃ, supra note 2, Chapter 3.


\textsuperscript{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).

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)\(^\text{108}\) 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),\(^\text{109}\) 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.\(^\text{110}\) (These arguments are detailed far more extensively in my book.\(^\text{111}\))

*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*

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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.*


111. *See* TRAHAN, *supra* note 2.
norms. Jus cogens norms are, hierarchically, the highest level of law, from which no derogations are permitted which “cannot be violated,” which must be respected “in all circumstances,” and which “rules are absolute.” Because the veto power is conferred by the UN Charter, it is subordinate to jus cogens in terms of the hierarchy of norms.

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)).


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”).


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 crimes\textsuperscript{119} considering these are \textit{jus cogens} norms (receiving this highest level of protection)? In the \textit{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].”\textsuperscript{120} The European Court of First Instance has held that \textit{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.”\textsuperscript{121} If the UN cannot violate \textit{jus cogens}—as it cannot—then the Security Council, an organ of the UN, also cannot violate \textit{jus cogens}.\textsuperscript{122} Permanent members are also

\textsuperscript{119.} My forthcoming book will examine whether all war crimes have risen to the level of \textit{jus cogens}, or which ones have risen to that level. \textit{See} TRAHAN, supra note 2, ch. 4.1.

\textsuperscript{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).


\textsuperscript{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 Weeremantry, 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* and the permanent members are states. 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)? 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. 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, (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).


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, and (c) must be consistent with *jus cogens*.

**The Veto and the UN Charter**

Second, the veto power is created by the UN Charter. 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.” 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.” One might then ask whether the vetoes that are occurring are consistent with the UN’s “Purposes and Principles,” because if they are not, then the vetoing permanent member is acting *ultra vires*—that is, beyond the proper exercise of Security Council power. 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., Sekil 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].


132. Id. arts. 1, 2.

133. Id.

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).

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. The “prevention” obligation was at issue in the Bosnia v. Serbia case before the International Court of Justice (“ICJ”). 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.”

If all permanent members are parties to both the Genocide Convention and the four 1949 Geneva Conventions (which they are), 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. 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. 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.


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


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.)

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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, so one would need to construct a similar argument by focusing on *erga omnes* obligations, general obligations to cooperate, and obligations of good faith.

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. 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. 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


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.”).


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.\textsuperscript{153} Thus, it is not so clear the Security Council permanent members are free to act in complete disregard of these foundational treaty obligations.\textsuperscript{154}

\textbf{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.

\footnotesize{153. U.N. Charter art. 24, ¶ 2.}

\footnotesize{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 violations foundational IHL principles such as distinction and proportionality.