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## Why the Veto Power Is Not Unlimited: A Response to Critiques of, and Questions About, Existing Legal Limits to the Veto Power in the Face of Atrocity Crimes

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# WHY THE VETO POWER IS NOT UNLIMITED: A RESPONSE TO CRITIQUES OF, AND QUESTIONS ABOUT, EXISTING LEGAL LIMITS TO THE VETO POWER IN THE FACE OF ATROCITY CRIMES

*Jennifer Trahan\**

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## I. INTRODUCTION

In the book, *Existing Legal Limits to the Veto Power in the Face of Atrocity Crimes*,<sup>1</sup> the author argues that, when considered within the context of some paramount and competing obligations of the international legal system, veto use by the permanent members of the U.N. Security Council—in the face of ongoing, or the serious risk of, genocide, crimes against humanity, or war crimes—is of questionable legality.<sup>2</sup>

Specifically, the book examines the veto power when considering (1) *jus cogens*, (2) obligations under the U.N. Charter, and (3) obligations under foundational treaties. Indeed, a number of States' representatives, prominent individual thought leaders, and nongovernmental organizations have supported raising these and related arguments in questioning the *legality* of such veto use. This represents a significant shift in thinking, as, to date, most States have expressed their opposition to veto use in these situations by supporting “voluntary veto restraint.”<sup>3</sup> Those initiatives ask the permanent members voluntarily to restrain their veto use—an approach that, thus far, and without further inducement, does not appear to be reining in such use.

In the course of the author's many interactions with States' representatives, reactions were mostly positive, sometimes even enthusiastic. Some interlocutors understandably expressed hesitation, as the legal perspectives on this issue have not had extensive public consideration. Predictably, there were those, especially among the permanent members that have not signed on to any of the voluntary veto restraint initiatives, who were opposed to the author's arguments.

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1. JENNIFER TRAHAN, *EXISTING LEGAL LIMITS TO THE VETO POWER IN THE FACE OF ATROCITY CRIMES* (2020). The term “atrocity crimes” as used by the author refers to genocide, crimes against humanity, and war crimes. Elsewhere, this term sometimes includes “ethnic cleansing,” although that is not a distinct crime under international criminal law. *See, e.g.*, U.N. Secretary-General, *Advancing Atrocity Prevention: Work of the Office on Genocide Prevention and the Responsibility to Protect*, n.1, U.N. Doc. A/75/863-S/2021/424 (May 3, 2021) (“Ethnic cleansing, while not established as a distinct crime, includes acts that may amount to . . . genocide [or] crimes against humanity.”).
2. TRAHAN, *supra* note 1, at 142–259.
3. *Id.* at 102–41.

This article considers some of these reactions and offers responses to them.

Comments from States came in the form of a variety of questions as well as some specific critiques. Those of a legal character, or a mixed legal and political character, will be loosely grouped into the following categories:

- (A) those advocating that the veto power is above all law—or at least when the Security Council acts under Chapter VII—and therefore is not subject to any constraints;
- (B) a variety of practical questions about the possible wording of a resolution in these circumstances (for instance, whether the author’s arguments apply to *all* resolutions drafted in the face of ongoing, or the serious risk of,<sup>4</sup> genocide, crimes against humanity, or war crimes—or just to those that can garner the support of the minimum nine Security Council members needed for the Security Council to act);
- (C) concerns that one of the possible routes suggested by the author—a General Assembly request to the International Court of Justice (“ICJ”) for an Advisory Opinion on the legality of the use of the veto in the face of genocide, crimes against humanity, or war crimes—would not actually prevent abusive vetoes because it would be non-binding;
- (D) political hesitations about supporting the public examination and consideration of the legal perspective because of how that might impact on the bilateral relations of a state with a permanent member;
- (E) concerns over capacity or “initiative fatigue”—given that there are already other “initiatives” regarding the veto;
- (F) observations that the author has not tried to define the “trigger mechanism” to determine when the crimes are occurring or are at serious risk of occurring, and thereby when legality issues arise; and
- (G) concerns that a ruling by the ICJ might not actually advance the issue.

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4. The ICJ has held, at least vis-à-vis the crime of genocide, that the obligation to “prevent” genocide is triggered when “the State learns of, or should normally have learned of, the existence of a *serious risk* that genocide will be committed.” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 431 (Feb. 26) (emphasis added) [hereinafter *Bosnia v. Serbia* case].

Of these points, only the first is truly oppositional to the author's arguments, with the remainder more in the category of questions. Each is addressed in turn below.

## II. SUMMARY OF THE ARGUMENTS

While this article will not rearticulate the arguments presented in the author's book, it provides a brief recitation of them. Essentially, the author looks at the use of the veto power (found within Article 27(3) of the U.N. Charter)<sup>5</sup> in relationship to other components of the system of international law. Specifically, the author examines the veto when considering (1) *jus cogens*, (2) obligations under the U.N. Charter, and (3) obligations under foundational treaties.<sup>6</sup> The arguments may be briefly articulated as follows.

*First*, international law can be thought of in terms of a hierarchical structure, with *jus cogens* norms positioned at the apex of the hierarchy. *Jus cogens* protections thus sit above the veto power, which is conferred by the U.N. Charter (a treaty). *Jus cogens* norms receive the highest level of protection in the international legal system in that no derogation is permitted from them *except* through the creation of a new norm having the same character.<sup>7</sup> The prohibition of genocide, crimes against humanity, and war crimes are all recognized as peremptory norms protected at the level of *jus cogens*.<sup>8</sup> Because the U.N. is bound to respect *jus cogens*, its principal peace and security organ, the Security Council, is similarly constrained.<sup>9</sup> All States are

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5. See U.N. Charter art. 27, ¶ 3.

6. TRAHAN, *supra* note 1, at 142–259.

7. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 67 (“[A] *jus cogens* norm holds the highest hierarchical position among all other norms and principles [of international law].”).

8. Int’l L. Comm’n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (adopted), Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter Articles on State Responsibility], art. 26 (including genocide and crimes against humanity as peremptory norms). *Id.* at Commentary to art. 40 (including basic rules of international humanitarian law as peremptory norms).

9. “[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.” Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 115 (June 21) (Fitzmaurice, J., dissenting) [hereinafter Namibia Advisory Opinion].

additionally constrained to respect *jus cogens*.<sup>10</sup> It follows, therefore, that the permanent members are thereby also constrained, both as States and as members of the Security Council. Therefore, the actions of the permanent members (including veto use) (1) should be consistent with *jus cogens*; (2) must not facilitate violations of *jus cogens* obligations;<sup>11</sup> and (3) must respect the obligation 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].”<sup>12</sup>

*Second*, a source of constraint on the veto power is found within the U.N. Charter itself. The Charter grants the Security Council the “primary responsibility for the maintenance of international peace and security.”<sup>13</sup> At the same time, it also places limits on the Security Council’s power. Pursuant to Article 24(2), the Security Council must act “in accordance with” the “Purposes and Principles” of the U.N.<sup>14</sup> The “Purposes and Principles” in Articles 1 and 2 of the Charter 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.”<sup>15</sup> If the Security Council must act according to the U.N.’s “Purposes and Principles,”<sup>16</sup> this means that, logically, individual permanent Member States must too. Individual permanent members are also bound by the U.N.’s “Purposes and Principles” because all U.N. Member States are bound<sup>17</sup> and the permanent members are clearly U.N. Member States. Arguably, many of the vetoes being cast do not accord with the U.N.’s “Purposes and Principles,”

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10. *Id.*

11. *See, e.g.*, Rachel López, *The Duty to Refrain: A Theory of State Accomplice Liability for Grave Crimes*, 97 NEB. L. REV. 120, 125–26 (2018) (“State complicity occurs when a State facilitates another State’s commission of an internationally wrongful act . . . . Under international law, States may not legitimize—by consent, acquiescence, or recognition—any act that is contrary to *jus cogens* norms. By logical extension, States should also not be permitted to aid other States in their violations of *jus cogens* norms.”) (citing OPPENHEIM’S INTERNATIONAL LAW 7–8 (Robert Jennings & Arthur Watts eds., 1992)).

12. Articles on State Responsibility, *supra* note 8, at art. 41.1.

13. U.N. Charter art. 24, ¶ 1.

14. *Id.* at art. 24, ¶ 2.

15. *Id.* at art. 1, ¶¶ 1, 3, art. 2, ¶ 2.

16. *Id.* at art. 24, ¶ 2

17. *Id.* at art. 2 (“The Organization *and its Members*, in pursuing of the Purposes stated in Article 1, shall act in accordance with the following Principles.”) (emphasis added).

and are closer to an “abuse of right” (*abus de droit*).<sup>18</sup> A veto that does not accord with the U.N.’s “Purposes and Principles” would be *ultra vires* of the proper exercise of Security Council power.<sup>19</sup>

*Third*, the treaty obligations of the individual permanent Member States, such as those under the Genocide Convention<sup>20</sup> and 1949 Geneva Conventions,<sup>21</sup> to which all permanent members are parties,<sup>22</sup> also constrain the use of the veto in the face of atrocity crimes. The permanent members do not cease to be bound by foundational treaty obligations by virtue of sitting on the Security Council.<sup>23</sup> These treaties

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18. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 71 (May 28) (separate opinion by Alvarez, J.) [hereinafter Conditions of Admission Advisory Opinion] (“The Security Council . . . must be guided solely by considerations of justice and good faith,” otherwise, there would be “an abuse of right which the Court must condemn.”).
  19. “[T]he Charter ha[s] to be considered in its entirety and if the Security Council violated its principles and purposes it would be acting *ultra vires*.” Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INT’L & COMPAR. L.Q. 309, 319 (1997) (quoting Doc. 555.III/1/27, 11 U.N.C.I.O. Docs. 378 (1945)).
  20. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].
  21. 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 [collectively hereinafter 1949 Geneva Conventions].
  22. *See Treaties, States Parties, and Commentaries*, INT’L COMM. OF THE RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_treatySelected=380&xp\\_viewStates=XPages\\_NORMStatesParties](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_treatySelected=380&xp_viewStates=XPages_NORMStatesParties) (last visited Mar. 1, 2022) (parties to the 1949 Geneva Conventions); United Nations Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-1&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en) [<https://perma.cc/62M5-GWKK>] (parties to the Genocide Convention).
  23. As to how to interpret the permanent members’ obligations under these treaties in light of Article 103 of the Charter, see TRAHAN, *supra* note 1, at 220–23. It is significant that these treaties are foundational treaties where the crimes protected are at the level of peremptory norms of international law. *See* Articles on State Responsibility, *supra* note 8, at art. 26. The author does not claim that *all* treaty obligations act similarly. *See, e.g.*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Order, Request for the Indication of Provisional Measures, 1992 I.C.J. 3, 65 (Apr. 14) [hereinafter *Lockerbie (Libya v. U.K.)* Provisional Measures];

impose certain legal obligations, for example, “to prevent” genocide<sup>24</sup> and to “ensure respect for” the 1949 Geneva Conventions in their Common Article 1.<sup>25</sup> Any veto that allows the continuing perpetration, or blocks measures to prevent or alleviate the perpetration, of genocide or “grave breaches,”<sup>26</sup> or “Common Article 3”<sup>27</sup> war crimes, would run afoul of the obligation to “prevent” genocide, or to “ensure respect for” the 1949 Geneva Conventions. The same arguments would apply to the war crimes enumerated in the Additional Protocols to the Geneva Conventions, to the extent they contain Common Article 1 and to the extent that permanent members are parties to them.<sup>28</sup> It is possible to make similar arguments with respect to crimes against humanity, although they would rest on general obligations of international law, as there is not yet a finalized treaty on crimes against humanity.<sup>29</sup>

Note that, while the first two arguments consider situations of the permanent members acting beyond their powers (*ultra vires*), the third argument is different in that it considers when there would be abrogations of treaty obligations and thus international law.<sup>30</sup> A full

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Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Order, Request for the Indication of Provisional Measures, 1992 I.C.J. 114 (Apr. 14) [hereinafter *Lockerbie (Libya v. U.S.)* Provisional Measures] (ruling that obligations under the Montreal Convention on airline safety were outweighed by obligations created under a Security Council resolution).

24. Genocide Convention, *supra* note 20, at art. 1.
25. 1949 Geneva Conventions, *supra* note 21, at Common art. 1.
26. *Grave Breaches Specified in the 1949 Geneva Conventions and in Additional Protocol I of 1977*, INT’L COMM. OF THE RED CROSS (Jan. 31, 1998), <https://www.icrc.org/eng/resources/documents/misc/57jp2a.htm> [<https://perma.cc/C8XF-C3WQ>].
27. 1949 Geneva Conventions, *supra* note 21, at Common art. 3.
28. Not all of the Additional Protocols contain Common Article 1, and not all permanent members are parties to all of the Additional Protocols.
29. See Int’l L. Comm’n, Crimes Against Humanity, Texts and Titles of the Draft Preamble, the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee on Second Reading Prevention and Punishment of Crimes Against Humanity, U.N. Doc. A/CN.4/L.935 (May 15, 2019) (draft crimes against humanity treaty).
30. Because the Charter requires the Security Council to act in accordance with the U.N.’s “Purposes and Principles,” a violation of international law, could also go to whether the Security Council acted within its power under the Charter. See *infra* notes 78–79 (indicating that at least fundamental requirements of international law are binding on the Security Council even when acting under Chapter VII).



version of the legal arguments and the extensive authority supporting them may be found in the author's book.<sup>31</sup>

### III. SUPPORT GENERATED TO DATE

There has traditionally been strong opposition to indiscriminate veto use. This has intensified in recent years with the work of the "S5" group of states,<sup>32</sup> the "French-Mexican Initiative,"<sup>33</sup> and the "ACT Code of Conduct"<sup>34</sup>—all of which call for veto restraint in the face of atrocity crimes.<sup>35</sup> There is now also a proposal of Liechtenstein for adoption of a General Assembly resolution requiring mandatory discussion before the General Assembly of any veto that is cast.<sup>36</sup> Yet, with only two permanent members endorsing the voluntary veto restraint approach (the U.K. and France),<sup>37</sup> it has not resulted in veto

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31. See TRAHAN, *supra* note 1, at 142–259.

32. For discussion, see *id.* at 107–09.

33. 103 Member States and 2 U.N. Observers are signatories to the "French/Mexican" initiative. See *Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities*, GLOB. CTR. FOR RESP. TO PROTECT (Aug. 1, 2015), <https://www.globalr2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities/> [<https://perma.cc/5N43-CJCR>]; E-mail from Pablo Arrocha Olabuenaga, Legal Adviser to the Permanent Mission of Mexico to the United Nations (July 3, 2021, 4:40 PM EST) (on file with author).

34. 122 States are signatories to the ACT "Code of Conduct." Permanent Rep. of Liechtenstein to the United Nations, Letter dated December 14, 2015 from the Permanent Rep. of Liechtenstein to the United Nations addressed to the Secretary-General, U.N. Doc. A/70/621-S/2015/978 (Dec. 14, 2015) [hereinafter Code of Conduct]; *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 LIECH. TO THE UNITED NATIONS IN N.Y. (Apr. 1, 2021), <https://www.regierung.li/files/medienarchiv/2021-4-1-CoC-List-of-supporters.pdf> [<https://perma.cc/X9BB-ATVQ>].

35. For discussion of all current and past voluntary veto restraint initiatives, see TRAHAN, *supra* note 1, at 102–41.

36. See Christian Wenaweser & Sina Alavi, *Innovating to Restrain the Use of the Veto in the Security Council*, 52 CASE WEST. RSRV. J. INT'L L. 65, 69–70 (2020).

37. France and the U.K. are signatories to the Code of Conduct. See Code of Conduct, *supra* note 34. France also co-leads the French/Mexican initiative.

restraint.<sup>38</sup> More recently, however, States<sup>39</sup> as well as prominent individual thought leaders<sup>40</sup> within the international system have come

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38. Frustration with recent vetoes has been at its apex with the recent sixteen vetoes (some double vetoes) cast by Russia, or Russia and China, related to Syria—blocking recognition of crimes, blocking referral to the International Criminal Court (“ICC”), blocking a variety of measures related to chemical weapons, and blocking humanitarian assistance. For more details, see TRAHAN, *supra* note 1, at 262–302.
39. For example, some of the States that view international law and U.N. Charter obligations as relevant to evaluating how the veto is used include: Egypt, Canada, Turkey, the United Kingdom, Mexico, and Jordan. TRAHAN, *supra* note 1, at 202–04 (Egypt: “The use of the veto *undermines the implementation of the provisions of the Charter and of international law*”) (emphasis added); U.N. GAOR, 84th Sess., plen. mtg. at 14, U.N. Doc. A/75/PV.64 (May 17, 2021) (Canada: “The use and threat of the veto in Syria and other situations where atrocity crimes are being perpetrated is shameful, and may be *contrary to obligations under the UN Charter and international law*.”) (emphasis added); U.N. SCOR, 73d Sess., 8262d mtg. at 80, U.N. Doc. S/PV.8262 (May 17, 2018) (Turkey: “[T]he use of the veto as a tool to advance national interests,” and 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*”) (emphasis added); U.N. SCOR, 73d Sess., 8231st mtg. at 10, U.N. Doc. S/PV.8231 (Apr. 13, 2018) (U.K.: “What has taken place in Syria to date is in itself a violation of the United Nations Charter. *No purpose or principle of the Charter is upheld* or served by the use of chemical weapons on innocent civilians. On the contrary: to stand by *and ignore the requirements of justice, accountability* and the preservation of the non-proliferation regime is to place all our security—not just that of the Syrian people—at the mercy of a Russian veto.”) (emphasis added); U.N. SCOR, 73d Sess., 8262d mtg. at 47, U.N. Doc. S/PV.8262 (Mexico: “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.”) (emphasis added). In discussing the use or threat of use of the veto in situations where there are serious allegations of genocide, crimes against humanity and grave breaches of international humanitarian law, the representative of Jordan stated: “The veto does have an important role. But that role should now be reconciled with Articles 24(2) and 1(1)—Articles that should no longer simply be overlooked.” U.N. SCOR, 73d Sess., 6672d mtg. at 21–23, U.N. Doc. S/PV.6672 (Nov. 30, 2011). While the U.K. has raised legality concerns in relation to Russian vetoes related to Syria, the U.K. does not appear to share such concerns regarding all vetoes.
40. Canadian diplomats Lloyd Axworthy and Allan Rock write that certain veto use to constrain U.N. action “is an abuse of the veto privilege and needs to be challenged openly and judicially.” Lloyd Axworthy & Allan Rock, *R2P: A New and Unfinished Agenda*, 1 J. GLOB. RESP. PROTECT 54, 61 (2009). Hans Corell has called for the permanent members to agree not to use their veto unless their most serious direct national interests were affected and to explain, in case they did use the veto, the reasons

to support challenging the *legality* of vetoes cast in the face of genocide, crimes against humanity, or war crimes.<sup>41</sup>

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for so doing; he has also expressed concerns about the legality of vetoes being cast. *See* Letter from Hans Corell, former Under-Sec’y Gen. for Legal Affs. & Legal Couns. of United Nations Ambassador (Dec. 10, 2008), to Gov’ts of the Members of the United Nations (Dec. 10, 2008) (on file with author). Former Prosecutor of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda Richard Goldstone has written: “The veto, while a power granted under the UN Charter, is not paramount to the Charter or other norms of international law. It is one provision under that Charter and subject to the rules and norms of international law.” Richard Goldstone, *Foreword* to TRAHAN, *supra* note 1, at xv. Permanent Representative of Liechtenstein to the United Nations, Christian Wenaweser, and Liechtenstein Legal Adviser, Sina Alavi, write: “The proliferation of the use of the veto in recent times has prevented the Security Council from exercising its functions with respect to some of the gravest threats to international peace and security—often in clear contravention of the purposes and principles of the UN Charter.” Wenaweser & Alavi, *supra* note 36, at 65. Zeid Ra’ad Al Hussein, former High Commissioner for Human Rights and former President of the Assembly of States Parties to the Rome Statute of the ICC, when speaking on behalf of the Kingdom of Jordan, challenged the legality of the veto in certain circumstances. *See supra* note 40. Former High Commissioner for Human Rights and Former Prosecutor of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, Louise Arbour similarly questions the legality of a veto cast where it blocks “an initiative designed to reduce the risk of, or put an end to, genocide.” Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. INT’L STUD. 445, 454 (2008). *See also* CONCEPT NOTE: VETOES INITIATIVE (on file with author) (including Navi Pillay, Andras Vamos-Goldman, David Crane, Judge Christine Van den Wyngaert, Irwin Cotler, Xavier Jean Keita, Adama Dieng and Errol Mendes (additionally questioning veto use in the face of atrocity crimes)). Finally, members of a group known as “The Elders,” comprised of eminent statespersons from around the world, condemned veto use in the face of atrocity crimes, taking the view that “any state casting a veto simply to protect its national interests is abusing the privilege of permanent membership.” *Strengthening the United Nations: Statement by The Elders*, THE ELDERS (Feb. 7, 2015), <https://theelders.org/sites/default/files/2015-04-22elders-statement-strengthening-the-un.pdf> [<https://perma.cc/C2TL-ML89>]; *see also* *Who We Are*, THE ELDERS, <https://theelders.org/who-we-are> [<https://perma.cc/ACE8-ZMXU>].

41. That the current article does not encompass the crime of aggression is in no way intended to minimize its significance. *See* International Military Tribunal (Nuremberg), Judgment of 1 October 1946, at 421 (Aug. 22, 1946–Oct. 1, 1946) (holding that crimes against peace are “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”). Some of the author’s arguments additionally apply to aggression.

In light of this fairly extensive level of support for raising *legality* questions about veto use that blocks measures to prevent or curtail the commission of genocide, crimes against humanity or war crimes, the section below examines some of the questions raised and critiques articulated about pursuing such legality arguments. A similarly problematic practice is the *threat* of the veto in the face of genocide, crimes against humanity, or war crimes. Such a threat can block the Security Council just as effectively as actual veto use.<sup>42</sup> Because in a particular situation it may be difficult to determine exactly what constitutes a veto threat, the author has primarily confined her arguments to *actual* use of the veto, while recognizing the same harm is posed by veto threats.<sup>43</sup>

#### IV. CRITIQUES AND QUESTIONS

##### A. *The Perspective that the Veto Is Not Legally “Abusable” or Subject to Legal Constraints—that It Is Above, or Not Subject to, the Law*

The most significant legal argument against the author’s view is perhaps<sup>44</sup> the argument that the permanent members’ veto power is unfettered and can be used at compete discretion. In fact, the actions of the Security Council, as well as the actions of its permanent members, are subject to law. This includes all permanent members’ actions, including voting, because all permanent members’ power derives from the Charter, and is thus subject to the Charter’s requirements.

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42. See, e.g., *infra* note 114 (noting that the *Gambia v. Myanmar* Provisional Measures Order was not drafted into a Security Council resolution).

43. While the author’s arguments do not directly tackle the problem of the threat of the veto, they do so indirectly. A ruling suggesting legality problems with vetoes cast in the face of genocide, crimes against humanity, or war crimes, would dilute the permanent members’ ability to credibly threaten to use their veto in such circumstances. Thus, questioning the legality of *actual* veto use in certain circumstances *does* help address the problem of veto threats in those circumstances. A parallel problem (not the focus of the author’s writing) exists when, due to a permanent member’s known political alignment, a resolution is not even proposed or drafted because other states serving on the Council anticipate it will face a veto, and thus self-censor themselves—also due to the veto power.

44. The author has not met with legal advisers from permanent Member States, so is here anticipating arguments that could be raised. See, e.g., Albina M. Biskultanova et al., *The Right of Veto: International Experience, Problems, and Prospects of Application*, 42 KASETSART J. SOC. SCIS. 391 (2021).

1. Neither U.N. Organs, such as the Security Council, nor Individual Permanent Member States, May Go Beyond the Powers Conferred on Them by the Charter

The U.N. Charter limits the permanent members' power: namely, by requiring behavior in accordance with the UN's "Purposes and Principles." This is the case for at least two independent reasons. First, the Security Council as a whole is limited to acting in accordance with the "Purposes and Principles" of the U.N.; therefore, the permanent members (a subset of the Security Council) have that same limitation.<sup>45</sup> Second, obviously, all U.N. Member States are bound by their membership in the U.N. to the Charter, the document that defines the terms of that membership.<sup>46</sup> This includes acting in accordance with the "Purposes and Principles" of the U.N.

There are numerous ICJ decisions that establish that the Security Council is subject to international law and that its powers have to be exercised in accordance with the U.N.'s "Purposes and Principles." This is also stated directly in the text of U.N. Charter Article 24(2): "the Security Council shall act in accordance with the Purposes and Principles of the United Nations."<sup>47</sup> Additionally, one of the U.N.'s "Purposes" is acting "in conformity with the principles . . . of international law."<sup>48</sup> The limitations imposed on the power of the Security Council as a whole are relevant because the permanent members are *part* of the Security Council, and therefore are necessarily also subject to the requirement of acting in accordance with the U.N.'s "Purposes and Principles."<sup>49</sup>

As to the Security Council being subject to international law, Judge Weeramantry, for example, writing in the ICJ's *Lockerbie* case, wrote: "The history of the United Nations Charter . . . corroborates the view

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45. Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT'L L. 59, 67 (2005).
  46. Ronald Macdonald, *The Charter of the United Nations in Constitutional Perspective*, 20 AUS. Y.B. INT'L L. 205, 208 (1999).
  47. U.N. Charter art. 24, ¶ 2.
  48. *Id.* at art. 1, ¶ 1. See *infra* notes 78–79 (providing a more nuanced reading of how to understand Chapter VII powers and obligations of international law). Other relevant "Purposes and Principles" include "promoting and encouraging respect for human rights," "co-operation in solving international problems of [a] . . . humanitarian character," and the obligation of "good faith." U.N. Charter arts. 1, ¶ 3, 2, ¶ 2.
  49. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter *Tadić* case]; Hannah Yiu, *Jus Cogens, the Veto and the Responsibility to Protect: A New Approach*, 7 N.Z. Y.B. INT'L L. 207, 242 (2009).

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.*"<sup>50</sup> Judge Fitzmaurice, dissenting in the *Namibia* Advisory Opinion, similarly concluded that "the 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."<sup>51</sup>

That the Security Council is bound by the Charter is reinforced in repeated judicial decisions, including: the ICJ Advisory Opinion in *Conditions of Admission of a State to Membership in the United Nations*,<sup>52</sup> the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in the *Tadić* case,<sup>53</sup> and Judge Jennings's dissent in the *Lockerbie* case.<sup>54</sup> The ICTY Appeals Chamber, in *Tadić*, wrote:

The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).<sup>55</sup>

This answer does not change even when the Security Council is acting under Chapter VII. For example, the ICTY in the *Tadić* case

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50. *Lockerbie (Libya v. U.K.)* Provisional Measures, *supra* note 23, at 65, 175 (diss op., Weeramantry, J.) (emphasis added); *Lockerbie (Libya v. U.S.)* Provisional Measures, *supra* note 23, at 175 (diss op., Weeramantry, J.) (emphasis added).

51. *Namibia* Advisory Opinion, *supra* note 9, ¶ 115 (separate opinion by Fitzmaurice, J., dissenting).

52. *Conditions of Admission* Advisory Opinion, *supra* note 18.

53. *Tadić* case, *supra* note 49, ¶ 70.

54. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.)*, Preliminary Objections, Judgment, 1998 I.C.J. 9, 110 (Feb. 27) (separate opinion by Jennings, J., dissenting).

55. *Tadić* case, *supra* note 49, ¶ 28. *See also* Akande, *supra* note 19, at 314–15 ("It is almost inconceivable for there to be no legal limits to the power of the Security Council—even in the area of maintaining international peace and security. The Security Council is not a sovereign authority. It is an organ of limited membership and its powers are conferred on it by the members of the United Nations through the Charter.").

evaluated whether the Security Council's creation of the ICTY was a proper exercise of Security Council power under Article 41, Chapter VII.<sup>56</sup> There, the ICTY Appeals Chamber required adherence to the Charter despite the fact that the Security Council had acted under Chapter VII.<sup>57</sup> Scholar Dapo Akande makes it clear that "there are legal limits to the powers of the Security Council, even when it is acting to maintain or restore the peace," and provides examples of the Council acting in conformity with Charter obligations, even while exercising its Chapter VII powers.<sup>58</sup> T.D. Gill, another scholar, also makes clear that when invoking Article 39 (part of Chapter VII), the sole limitation "is that the Council's actions must be 'in accordance with the Purposes and Principles of the Organization.'"<sup>59</sup>

The limitation of the Security Council's powers under the U.N.'s "Purposes and Principles" is additionally recognized by the ICJ as a whole in the *Namibia* Advisory Opinion,<sup>60</sup> Judge Weeramantry in dissent in the *Lockerbie* Case,<sup>61</sup> and Judge Lauterpacht in his separate opinion in the *Application of the Genocide Convention* Case.<sup>62</sup> Writing on the "Purposes and Principles," Gill notes: "examination of the[] Charter's Purposes and Principles reveals . . . that these . . . provide sufficient clarity, coherence and precision to serve as a legal basis to

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56. *Tadić* case, *supra* note 49.

57. *Id.*; see also *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, ¶ 13 (June 18, 1997) (similar case regarding establishment of the International Criminal Tribunal for Rwanda).

58. Akande, *supra* note 19, at 310 (also noting that the Council appears to have been mindful, *while in the exercise of its Chapter VII powers*, to adhere to human rights protections in its resolutions). *But see* HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 294 (1951) (arguing that the Council need not act in accordance with international law when acting to maintain or restore international peace and security). Kelsen's view is amply refuted by the more persuasive recent scholarship discussed in this article. *See, e.g., infra* notes 77–79.

59. T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers Under Chapter VII of the Charter*, 26 NETH. Y.B. INT'L L. 33, 41 (1995).

60. *Namibia* Advisory Opinion, *supra* note 9.

61. *Lockerbie (Libya v. U.K.)*, Provisional Measures, *supra* note 23, at 61 (Weeramantry, J., dissenting); *Lockerbie (Libya v. U.S.)*, Provisional Measures, *supra* note 23, at 171 (Weeramantry, J., dissenting).

62. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Montenegro))*, Further Request for the Indication of Provisional Measures, Order of 13 September 1993, 1993 I.C.J. 325, 440, ¶ 101 (Sept. 13) (separate opinion by Lauterpacht, J.).

determine whether measures taken by the Council are or are not legal.”<sup>63</sup>

Under the same principle, individual permanent Member States can have no greater power, nor can they exercise a privilege that is outside the legal boundaries conferred on them by the U.N. Charter. As noted, this is true for two independent reasons. First, because the permanent members are a subset of the Council, they cannot have power greater than that of the Council as a whole.<sup>64</sup> Second, while individual U.N. Member States are given certain functions and privileges under the Charter (such as the permanent members of the Security Council), *all* U.N. Member States are required to carry out their functions and privileges within the legal parameters granted to them by the Charter. Specifically, Article 2 of the Charter requires individual U.N. Member States to adhere to the UN’s “Purposes and Principles.”<sup>65</sup> Thus, the permanent members are also bound by the U.N.’s “Purposes and Principles” for the independent, and simple, reason that they are also U.N. Member States.<sup>66</sup>

## 2. Additionally, the Veto Is Subject to Legal Scrutiny

The ICJ makes clear that there may be legal limitations on voting (and thus also the veto—which is a negative vote by a permanent member). For example, in referring to Security Council and General Assembly voting under the Charter, the ICJ in the *Conditions of Admission* Advisory Opinion explained:

The political character of an organ [such as the Security Council] cannot release it from the observance of the treaty provisions

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63. Gill, *supra* note 59, at 135.

64. This argument is supported by the logic in *Tadić*, where the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) Appeals Chamber recognized that the Security Council’s “powers cannot . . . go beyond the limits of the jurisdiction of the Organization at large [the United Nations].” *Tadić* case, *supra* note 49, ¶ 28. Logically, if the Security Council’s powers cannot go beyond the powers of its parent body, the powers of individual permanent members cannot exceed the powers of the Security Council. *See also* Yiu, *supra* note 49.

65. U.N. Charter art. 2 (“The Organization *and its Members*, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.”) (emphasis added).

66. For discussions of *ius cogens* and foundational treaty obligations (such as those under the Genocide Conventions and 1949 Geneva Conventions), and the obligations these create in terms of veto use, see Trahan, *supra* note 1, at 150–79, 209–42. Note that these obligations could be subsumed into the Charter requirement of adherence to international law (or fundamental principles of international law) or they could be considered as freestanding arguments against an unlimited veto power in the face of atrocity crimes.



established by the Charter when they constitute limitation on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution [i.e., the U.N. Charter].<sup>67</sup>

Scholar Anne Peters, writing on that decision, explains that voting is subject to the “good faith” requirement in the U.N.’s “Purposes and Principles”:

[J]udges of the ICJ reminded all UN members that when participating in a . . . decision either in the Security Council or in the General Assembly the Member is “legally entitled to make its consent . . . dependent on any political consideration which seem to it to be relevant. [However,] [i]n the exercise of this power the member is legally bound to have regard to the principle of good faith.” UN members must exercise their voting power “in good faith, in accordance with the Purposes and Principles of the Organization and in such a manner as not to involve any breach of the Charter.”<sup>68</sup>

While she focuses on “good faith”—one of the U.N.’s “Principles” in Article 2(2)—this reinforces the notion that if voting is subject to that requirement, voting would similarly be subject to the other “Purposes and Principles.” Thus, even in voting, it is clear that the U.N.’s “Purposes and Principles,” are relevant in determining the legal parameters within which States must act.

Additional scholars concur with this conclusion—particularly with reference to the veto power. For example, Hannah Yiu analyzes use of the veto “where genocide is occurring or where there is a prima facie case for suspecting its occurrence” as a breach of the Charter’s “Purposes and Principles.”<sup>69</sup> She writes: “A failure to restrict use of the veto, or [Security Council] paralysis, is to be interpreted as the [Security Council] acting outside of its mandate to exercise its functions in accordance with the Charter’s Purposes and Principles.”<sup>70</sup> As mentioned above,<sup>71</sup> Louise Arbour similarly questions the legality of a

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67. Conditions of Admission Advisory Opinion, *supra* note 18, at 64.

68. Anne Peters, *The Security Council’s Responsibility to Protect*, 8 INT’L ORG. L. REV. 15, 43–44 (citing Conditions of Admission Advisory Opinion, *supra* note 18, ¶¶ 21, 25); *see also* Conditions of Admission Advisory Opinion, ¶ 9 (May 28) (“We do not claim that a political organ and those who contribute to the formation of its decisions are emancipated from all duty to respect the law.”).

69. Yiu, *supra* note 49, at 233.

70. *Id.*

71. *See supra* note 40.

veto cast where it blocks “an initiative designed to reduce the risk of, or put an end to, genocide,”<sup>72</sup> as does John Heieck.<sup>73</sup> Andrew Carswell additionally opines that “taking even a conservative view of the doctrine of abuse of rights, it is arguable that an employment of the veto in a blatantly *mala fide* manner can be characterized as legally abusive.”<sup>74</sup> An abuse of right would be the antithesis of satisfying the Charter’s “good faith” requirement.<sup>75</sup>

3. Even if the Veto Is Considered a Precatory or Preliminary Step,  
It Is Subject to Legal Scrutiny

Finally, some continental scholars argue that voting is just a procedural or preliminary (and therefore somehow law-free) act, and thus not subject to the requirement of acting in accordance with the U.N.’s “Purposes and Principles.”<sup>76</sup> Yet, nothing in the Charter’s text supports this position. As noted, *all* the power that permanent members possess as members of the Security Council were granted by the U.N. Charter. Necessarily, *any actions they take*—whether procedural, preliminary, or otherwise—must accord with the Charter’s terms, including adherence to the U.N.’s “Purposes and Principles.”

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72. Arbour, *supra* note 40, at 454.

73. John Heieck reaches a similar conclusion, including that the veto threat is impermissible in such a situation, based on legal obligations contained in the Genocide Convention and as a matter of *jus cogens*. John Heieck, *The Responsibility Not to Veto Revisited: How the Duty to Prevent Genocide as a Jus Cogens Norm Imposes a Legal Duty Not to Veto on the Five Permanent Members of the Security Council*, in BEYOND RESPONSIBILITY TO PROTECT: GENERATING CHANGE IN INTERNATIONAL LAW 103, 121 (2016). For additional discussion of due diligence, see *infra* note 97 and accompanying text. Both Arbour and Heieck analyze vetoes as potential breaches of obligations under the Genocide Convention (and Heieck also as to *jus cogens*). Because the Charter’s “Purposes” include adherence to international law, a Genocide Convention breach or failure to adhere to *jus cogens* is also relevant to whether the Charter’s “Purposes and Principles” have been adhered to. See also *infra* note 80 (explaining why the author covers all three crimes—genocide, crimes against humanity, and war crimes—in her arguments).

74. Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SEC. L. 453, 471 (2013) (arguing that the use of the veto to prevent an amendment to the U.N. Charter for reasons of purely national interest would constitute an abuse of right).

75. For additional discussion of abuse of right (*abus de droit*) and the good faith requirement, see TRAHAN, *supra* note 1, at 194–98.

76. Interview with Anne Peters, Director, Max Planck Institute for Comparative Public Law and International Law (March 10, 2021); see also EVELYNE LAGRANGE, LA REPRESENTATION INSTITUTIONELLE DANS L’ORDRE INTERNATIONAL 326–327 (2002) (writing specifically on the abuse of the veto).

Thus, neither the Security Council, nor its permanent members, may act outside the power conferred upon them by the Charter. Just consider a hypothetical Chapter VII resolution that is drafted in such a way that it can be interpreted to authorize actions that allow or aid the commission of genocide, or a force authorization that violates the principles of distinction or proportionality.<sup>77</sup> Even when acting under Chapter VII, the Security Council is bound to observe fundamental principles of international law,<sup>78</sup> and thus could not legally authorize or endorse, for example, the commission of genocide or violation of fundamental provisions of international humanitarian law.<sup>79</sup> Similarly,

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77. See, e.g., Karl Doehring, *Unlawful Resolutions of the Security Council and Their Legal Consequences*, 11 MAX PLANCK. Y.B. UNITED NATIONS L. 91, 108 (1997) (“The Security Council is obliged to respect the rules of international law, i.e. the limits of its own competencies under the Charter of the United Nations and the rules of general international law as well.”). Alexander Orakhelashvili writes:

In performing its tasks under the Charter, the Security Council is perhaps empowered to take decisions affecting the legal rights and duties of state and non-state actors, though this general power is subject to limitations. (The exclusion of the power to effect a permanent settlement is an instance of these limitations.) But this is not the same as having the Security Council exempted from the operation of law. That could not be reconciled with the Charter framework or practice. The ICJ, in *Namibia*, while interpreting the Council’s powers broadly, emphasized that the Council is subject to legal standards. The ICTY Appeals Chamber vigorously confirmed that the Council is not *legibus solutus* (unbound by law).

Orakhelashvili, *supra* note 45, at 62. In the *Namibia* Advisory Opinion, the ICJ found the “denial [by South Africa] of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.” *Namibia* Advisory Opinion, *supra* note 9, at 57.

78. See *supra* notes and text accompanying notes 47–51 (discussing the requirement of adherence to international law). A more nuanced approach (which also supports the author’s conclusions) is that at least certain fundamental obligations of international law—such as *jus cogens*, the “Purpose and Principles” of the Charter (including the obligation of good faith), respect for fundamental human rights, and respect for basic norms of international humanitarian law—apply to the Security Council even when using its Chapter VII enforcement power. See Gill, *supra* note 59, at 71 (“[T]he Council’s general powers do not provide it with a blank cheque to take measures which would violate fundamental principles and rules of international law.”). Akande, *supra* note 19, at 341 (“[I]t is not . . . open to the Council to take . . . a measure [that] would be contrary to norms of *jus cogens*, well-established principles of international law or fundamental human rights, or would otherwise be beyond the powers of the Council.”).
79. See Gill, *supra* note 59, at 73 (“[T]he Council [cannot] do anything ‘which is commensurate with the maintenance of peace and security’ if this would

in veto use, permanent members should not enable or facilitate the commission of genocide, crimes against humanity, or war crimes by blocking measures designed to prevent, or alleviate, the commission of such crimes.<sup>80</sup>

As explored more extensively in the author's book, individual U.N. Member States quite simply do not have the power to facilitate violations of peremptory norms of international law,<sup>81</sup> so they could not have delegated such a power to the Security Council when they created it under the U.N. Charter. The Security Council and its members have only delegated powers,<sup>82</sup> and U.N. Member States could not have delegated a power they themselves did not possess—to countenance the continued perpetration of atrocity crimes.<sup>83</sup>

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violate specific provision of the Charter or the fundamental rules of international law relating to human rights and humanitarian norms of conduct"); *see also id.* at 79 (including the prohibition of genocide as a core human rights norm binding on the Council).

80. "No State shall recognize as lawful a situation created by a serious breach [of a peremptory norm of international law], nor render aid or assistance in maintaining that situation." Articles on State Responsibility, *supra* note 8, at art. 41.2; Genocide Convention, *supra* note 20, at art. 1 (obligation to "prevent" genocide); 1949 Geneva Conventions, *supra* note 21, at Common art. 1 (obligation to "ensure respect for" the Conventions). A more extensive discussion of these obligations is found in TRAHAN, *supra* note 1, at 142–259. All three crimes—genocide, crimes against humanity, and war crimes—are recognized as peremptory norms of international law protected at the level of *jus cogens*, *see supra* note 7, and all three crimes are extremely serious human right violations. *See* Task Force on the EU Prevention of Mass Atrocities, *The EU and the Prevention of Mass Atrocities: An Assessment of Strengths and Weaknesses*, at 21 (2013) ("Mass atrocities are the gravest and most extreme violation of human rights.").
81. *See* TRAHAN, *supra* note 1, at 150–79 (discussing peremptory norms of international law protected at the level of *jus cogens*).
82. *See* U.N. Charter art. 24, ¶ 1 ("[I]n carrying out its duties" for the maintenance of international peace and security, "the Security Council acts on . . . behalf [of UN Member States]."). Anne Peters explains: "Members of the Security Council act as delegates of *all other* UN members, and as *trustees* of the international community. Due to this *triple fonctionnel*, their voting behaviour is subject to legal limits." Peters, *supra* note 68, at 39 (citing, *inter alia*, Conditions of Admission Advisory Opinion, *supra* note 18, ¶ 20).
83. *See* Gill, *supra* note 59, at 82 ("The Member States could not attribute to the Organization a power which they themselves did not and do not possess."); Orakhelashvili, *supra* note 45, at 68, n.53 ("States cannot delegate to an international organization more powers than they themselves can exercise.").

The remainder of the questions raised in meetings the author held with States' representatives (legal advisers to U.N. missions),<sup>84</sup> were more focused on how the author's arguments would apply or other practical considerations with raising them.

*B. Practical Questions Whether the Author's Arguments Apply to  
All Draft Resolutions in the Face of Atrocity Crimes*

Some questioned whether the author's arguments apply to *all* draft resolutions while genocide, crimes against humanity, or war crimes are ongoing (or are at serious risk of occurring),<sup>85</sup> where the resolution takes measures to prevent the further commission of such crimes or to alleviate their commission. Three concerns arose: (1) what happens when a resolution does not reach nine affirmative votes from the Council supporting it due to a lack of sufficient political support (either of its overall goals or of its specific wording);<sup>86</sup> (2) what happens when a resolution is supported by at least nine members of the Council, but some of the nine would like to change or drop some particular wording; and (3) whether, in some situations, measures authorized by the U.N. would not improve the situation (citing historical examples where U.N.-authorized intervention has not proven beneficial, or been of questionable benefit, like, for instance, the U.N.-authorized intervention in Libya).<sup>87</sup>

As to a resolution receiving insufficient support, the issue of the veto does not arise because there are not nine affirmative votes in favor of the resolution. The author's arguments only apply to a draft

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84. The author held two group "brainstorming" meetings with legal advisers—one on March 1, 2019 (hosted at the law firm of Foley Hoag LLP and co-hosted by The Global Justice Center), and one on April 21, 2021 (held remotely)—and a number of one-on-one meetings. A few meetings the author held with legal advisers were expressly "off the record," and individual meetings were never expressly "on" or "off" the record; accordingly, the author is not attributing particular statements or questions to particular States.

85. See *Bosnia v. Serbia* case, *supra* note 4, ¶ 431.

86. In practice, language is not the first thing to appear. Rather, first the "temperature of the Council" is taken, and if it looks like there might be enough political will to pass a resolution, a Council member (or members) prepare a draft that is either taken around to other Council members for consideration or comment, or goes directly to a drafting committee of all potentially supporting members. Interview with Andras Vamos-Goldman, former Legal Adviser to the Canadian Mission to the U.N. (Aug. 21, 2021) (on file with author).

87. After the start of crimes by government forces in Libya in response to nascent attempts at a popular "Arab Spring" uprising, the Security Council authorized in resolution 1973 use of force in Libya for the purpose of protecting civilians, including the establishment of a "no fly zone." See S.C. Res. 1973, ¶¶ 6–8 (Mar. 17, 2011).

resolution that *has* received nine affirmative votes—the required number for a resolution to pass.<sup>88</sup> A resolution receiving nine affirmative votes demonstrates the requisite political willingness among Security Council members to act. It is in these circumstances that the author makes her arguments: that the use of a veto would permit genocide, crimes against humanity, or war crimes (or the continuation of these crimes), by blocking pending Security Council action designed to prevent the commission (or continuation) of such crimes or to stop their commission.

A related question arose about a resolution where the measures agreed on are trying to prevent or stop atrocity crimes, but there is some language that a few, otherwise supportive Council members do not want to accept, and this language cannot be negotiated away. In such circumstances, Council members who prioritize passing the resolution have a variety of options that could enable them to support the resolution while making clear that they do not agree with particular language in it. One alternative is releasing a statement explaining the objections to the language at issue. This situation arose, for example, related to referrals to the International Criminal Court (“ICC”) where at least one State that supported the referral objected to certain language contained in the referral resolution.<sup>89</sup>

As to whether, sometimes, Security Council-authorized measures do not turn out to be beneficial, several points are in order. First, the Security Council does indeed have broad latitude under the Charter both in determining when there is a threat to international peace and security<sup>90</sup> and what measures (if any) to employ as a result.<sup>91</sup> If the required number of votes are there,<sup>92</sup> then the Security Council has determined that the measures are deemed beneficial to the maintenance

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88. See U.N. Charter art. 27, ¶ 3.

89. Interview over Zoom with anonymous Legal Adviser (Apr. 21, 2021). The two situations referred to the ICC are the situations in Darfur and Libya. S.C. Res. 1970 (Feb. 26, 2011); S.C. Res. 1593 (Mar. 31, 2005). Both referral resolutions contain language purporting to disallow U.N. funding for the referrals and purporting to carve-out certain nationals of non-States Parties from ICC jurisdiction. For further discussion of these resolutions, see generally Jennifer Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, 24 CRIM. L.F. 417 (2013).

90. U.N. Charter art. 39.

91. *Id.* at arts. 40–42.

92. Procedural votes require nine affirmative votes before the Security Council, whereas substantive votes require nine affirmative votes and no veto. *Id.* at art. 27. If there is a question whether a matter is procedural or substantive, that has to be determined first, and it is usually treated as a substantive issue. Interview with Andras Vamos-Goldman, *supra* note 86.

of international peace and security. Whether the measures turn out to have proven beneficial *after the fact* is a different matter. This could have as much to do with their execution, as with the Council's mandate. But it has no relationship to, or bearing on, the votes cast on the resolution, or the Security Council's scope of authority under the Charter to authorize them. A State that voted in favor of the Libya force authorization,<sup>93</sup> for example, might be tempted to question the parameters of the measures later taken, or the manner of execution of the Council's mandate. However, that would not negate the fact that, at the time of the voting, the Council considered that the measures were warranted and that the Council had the power to take them. This is similar to the question that arose in the *Tadić* case: whether the creation of the ICTY had actually advanced international peace and security in the former Yugoslavia.<sup>94</sup> The ICTY Appeals Chamber, however, explained that whether the measures taken pursuant to Security Council Resolution 827 (creating the ICTY) actually advanced international peace and security was not the relevant legal question.<sup>95</sup> The legal question was whether the measures were taken under the U.N. Charter (Article 41, non-forceful Chapter VII measures) to advance international peace and security.<sup>96</sup> Thus, as a legal matter, the responsibility of individual Council members is to ensure that the Security Council provides the proper authority to respond to, or to try to prevent, atrocity crimes. That is the due diligence obligation that is mandated.<sup>97</sup>

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93. S.C. Res. 1973 (Mar. 17, 2011).

94. *Tadić* case, *supra* note 49.

95. *Id.* ¶ 32.

96. *Id.* ¶ 39 (“It would be a total misconception of what are the criteria of legality and validity in law to test the legality of [the measures taken by the Security Council] *ex post facto* by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia), in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council.”).

97. For example, the ICJ articulated the standard of “due diligence” that is required to comply with the obligation to “prevent” genocide in Article 1 of the Convention:

[I]t is clear that *the obligation in question is one of conduct and not one of result*, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to *employ all means reasonably available to them*, so as to prevent genocide so far as possible.

*Bosnia v. Serbia* case, *supra* note 4, ¶ 430 (emphasis added). ICRC experts Knut Dörmann and Jose Serralvo explain that the obligation to

Accordingly, the author's arguments go to any resolution that has received nine affirmative votes where the resolution attempts to take measures toward preventing or stopping the commission of genocide, crimes against humanity, or war crimes. As a practical matter, such a resolution need not be vetoed over language differences,<sup>98</sup> when there is agreement on the essence of the resolution. States serving on the Security Council are obligated to use due diligence, which entails employing best efforts in trying to prevent or stop atrocity crimes (and maintaining international peace and security). The Council may not always prove successful, but its attempts should not be evaluated after the fact—what is required is for Council members to “use all means reasonably available to them”<sup>99</sup> under international law and consistent with the U.N. Charter.

*C. Concerns that Even Obtaining a Non-Binding Advisory Opinion  
Would Not Prevent Abusive Vetoes*

Another concern expressed was that, even if the ICJ renders an Advisory Opinion, the opinion would be non-binding and would not actually prevent a permanent member in the future from casting its next veto, even in the face of genocide, crimes against humanity, or war crimes. (This concern arose in response to a proposal by the author that the General Assembly request an Advisory Opinion from the ICJ on whether existing international law contains limitations on the use of the veto by permanent members of the U.N. Security Council in situations where there is ongoing genocide, crimes against humanity, and/or war crimes.)<sup>100</sup>

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“ensure respect for” the Geneva Conventions contained in Common Article 1 also creates a due diligence obligation. 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, 724–25 (2014). While, as mentioned, there is no treaty regarding crimes against humanity, there is arguably the same obligation to “prevent” crimes against humanity. See, e.g., 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 violations.”).

98. If the language differences are significantly problematic, the resolution most likely would not attract nine affirmative votes.

99. See *supra* text accompanying notes 90–96.

100. See CONCEPT NOTE, *supra* note 40. See also Akande, *supra* note 19, at 328 (“[The General Assembly could request the [ICJ] to give an advisory opinion on the legality of Security Council decisions”); U.N. Charter art. 96(1) (“The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on *any legal question.*”) (emphasis added).



Indeed, an ICJ Advisory Opinion is non-binding.<sup>101</sup> Yet, ICJ Advisory Opinions are highly authoritative,<sup>102</sup> and even a permanent member would have to consider the long-term implications of disregarding such a ruling (especially if a veto had been used to protect a dubious ally). Thus, the ruling could potentially help change State behavior in this very key area.<sup>103</sup> At a minimum, an ICJ ruling<sup>104</sup> could increase the potential “cost” of casting such a veto.

A positive ICJ decision could confer an added benefit, although one the permanent members would not want. It could act as a rallying point around which most U.N. Member States could coalesce, and, in time, create a competing understanding of the veto than the unlimited power the permanent members suggest they possess. The prospect of such a ruling might provide a less attractive scenario for the permanent members than some form of voluntary restraint, driving the remaining permanent members that have not yet done so to endorse voluntary veto restraint.<sup>105</sup> Thus, the author’s arguments could complement and advance the efforts of the nearly two-thirds of U.N. Member States that endorse voluntary veto restraint.<sup>106</sup>

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101. Akande, *supra* note 19, at 333.

102. ICJ Advisory Opinions “are authoritative *erga omnes* and strongly influence the international community’s understanding of international law as well as the normative expectations of States.” Teresa F. Mayr & Jelka Mayr-Singer, *Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law*, 76 HEIDELB. J. INT’L L. 425, 444 (2016); Milanović, *supra* note 97, at 555 (2006) (“The importance of the ICJ’s jurisprudence lies not in the number of cases it decides, but in the principles of international law and the basic legal reasoning which it sets out in its judgments.”).

103. *See Gill, supra* note 59, at 124 (“If and when such an [advisory] opinion was ever delivered, whereby a decision by the Council, or aspects thereof, were determined to have violated, or to potentially violate, a fundamental Charter principle or rule of *jus cogens*, it would obviously provide a powerful incentive to the Council to rethink its decision and take action which would avoid violation of fundamental rules and principles of international law. Even though the opinion was non-binding it would inevitably influence the Council’s deliberations, and the position of States with regard to the decision.”); *id.* at 126 (“Provided the political will was present in the Assembly or Council to request an advisory opinion on such a question [as Security Council violation of the Charter’s “Purposes and Principles”], it could provide important legal guidance to the Council and the Member States at large which would be useful in clarifying the relevant legal dimension of such a disputed Council decision or effect thereof.”).

104. *See also* discussion *infra* Section IV.G.

105. As noted above, it is the U.K. and France that endorse voluntary veto restraint. *See supra* note 37.

106. *See supra* notes 33–34 as to the number of States that support voluntary veto restraint.

An Advisory Opinion on a general question is not the only method by which the legal issues discussed herein could come before the ICJ.<sup>107</sup> One could also envision:

- (1) an Advisory Opinion related to a particular veto;
- (2) a contentious case under the Genocide Convention (if there were a veto cast blocking measures that could prevent genocide in a particular situation); or
- (3) a contentious case under the Torture Convention<sup>108</sup> (if there were a veto cast blocking measures related to Torture Convention obligations).<sup>109</sup>

An Advisory Opinion on a particular veto would be useful because it would provide a concrete application. Contentious cases under the Genocide or Torture Convention have the advantage of being binding, although several permanent members have reservations related to the ICJ adjudicating cases against them under those conventions.<sup>110</sup> Those

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107. These additional potential paths to litigation are explored further in this author's article. *See generally* Jennifer Trahan, *Vetos and the UN Charter: The Obligation to Act in Accordance with the 'Purposes and Principles' of the United Nations*, J. ON USE FORCE & INT'L L., Apr. 5, 2022, at 1, <https://doi.org/10.1080/20531702.2022.2059882> [<https://perma.cc/D59A-66WX>].

108. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Torture Convention*].

109. The obligation to "prevent" torture contained in the Torture Convention applies to torture occurring "in any territory under [a State's] jurisdiction." *Id.* at art. 2.1. Thus, at least in terms of treaty obligations, the obligation to "prevent" torture may be narrower than the obligation to "prevent" genocide, which contains no such territorial limitation. For discussion of the extraterritorial obligations created by the obligation to "prevent" genocide, see *infra* note 135 and accompanying text.

110. Two permanent members, the United States and China, have filed reservations against Article IX of the Genocide Convention; they thereby do not accept that another party to the Convention could bring a dispute regarding application of the Convention to the ICJ against them. Three permanent members, the United States, China, and France, have similar reservations regarding suits before the ICJ related to the application of the Torture Convention. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide art. IX, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en) [<https://perma.cc/KK4T-KSD6>]; Reservations to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 30(1), [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en) [<https://perma.cc/N6UM-DBC4>].

reservations, unless first successfully challenged,<sup>111</sup> limit the possibility of pursuing such cases.

Pursuing legality questions could thus advance the unacceptability of veto use in the face of genocide, crimes against humanity, and war crimes, as a matter of “hard law.”<sup>112</sup> This would represent a significant shift from the current approach of voluntary veto restraint, which is a “soft law” approach.<sup>113</sup>

*D. Concerns that Some States, Including the Permanent Members,  
Could Choose to Politicize the Pursuit of These Legal Arguments*

Another concern that was almost entirely political was that by raising legality questions, or, for example, supporting a resolution that a permanent member is likely to veto,<sup>114</sup> there could be political “costs” to that State, such as one of the elected ten members serving on the Council.

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111. Five ICJ judges in the *Dem. Rep. Congo v. Rwanda* case suggested that the acceptability of such reservations to the Genocide Convention should be revisited. See *Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Rwanda) (New Application: 2002)*, 2006 I.C.J. 6, 72 ¶ 29 (joint separate opinion by Higgins, Kooijmans, Elaraby, Owada, Simma, JJ.) (“It is . . . not self-evidence that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration.”).

112. While an ICJ Advisory Opinion on either a generic question or particular veto would be non-binding, the law at issue would involve “hard law” obligations (*ius cogens*, the U.N. Charter, and/or treaty obligations).

113. A “code of conduct” and a “political declaration”—such as the ACT Code of Conduct and the French/Mexican initiative respectively—are sources of “soft law.” See TRAHAN, *supra* note 1, at 120, 120 n.96. “Soft law is a term used to describe a range of non-legally binding instruments used by States and international organizations in contemporary international relations, as opposed to hard law, which is always binding.” André da Rocha Ferreira, Cristieli Carvalho, Fernanda Graeff Machry & Pedro Barreto Vianna Rigon, *Formation and Evidence of Customary International Law*, 2013 UFRGS MODEL U.N. J. 182, 194 (2013).

114. For example, a State serving on the Security Council could have taken the Provisional Measures Order in the *Gambia v. Myanmar* case. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Order on the Request for Provisional Measures, 2020 I.C.J. 3 (Jan. 23) [hereinafter *The Gambia v. Myanmar* case]. Such a State could have drafted the key parts of the order into a Security Council resolution. That no such resolution was attempted suggests that none of the States serving on the Security Council wanted to upset their bilateral relations with China, the permanent member that most likely would have vetoed such a resolution, or they chose not to expend time and effort on a resolution they knew would face a near certain veto.

It is possible to look at this question from a legal perspective. If there is truly a legality problem with a veto—e.g., a veto of measures to prevent genocide—then an elected member of the Council, if a party to the Genocide Convention, also has a due diligence obligation,<sup>115</sup> and pursuing the matter could be a way of fulfilling that State's obligations under the Genocide Convention. Because most States are parties to the Genocide Convention,<sup>116</sup> it is likely that most or all states involved will owe the same due diligence obligation to “prevent” genocide; thus, no single State should be acting on its own.<sup>117</sup>

Also, when States act collectively—as was the case when sixty-five U.N. Member States co-sponsored a request for a Security Council resolution that would have referred the situation in Syria to the ICC<sup>118</sup>—it is less likely that any single state will incur “political costs.” The same would be true when at least nine Security Council members (including a majority of elected members) co-sponsor or agree to a draft resolution that provides Security Council authority to act to prevent or curtail the commission of atrocity crimes. Furthermore, working toward the goal of a Security Council that functions according to the provisions of the Charter is in line with every U.N. Member State's obligations under the Charter.<sup>119</sup> While the main goal would be preventing mass atrocity crimes, an additional benefit to the international community would be reducing the need for large-scale humanitarian, security, and development assistance necessitated when atrocity crimes are permitted to continue unabated.

*E. The Concern over Capacity, Given There Are Already Other  
“Initiatives” Regarding the Veto*

The author has also heard the argument that “there are just too many initiatives.” This is both a concern about capacity (most States have finite resources in terms of the time and effort required to pursue the legality angle), as well as the fact that there are already two veto-related voluntary restraint initiatives on the table: the French/Mexican initiative and the ACT Code of Conduct.<sup>120</sup> Additionally, as mentioned,

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115. See *supra* note 97 for a discussion of States' due diligence obligations.

116. See *supra* note 22 for the States Parties to the Genocide Convention.

117. To the extent the author focusses on genocide, it is because it provides the clearest case. Yet, the arguments herein apply equally to all three crimes—genocide, crimes against humanity, and war crimes—except where a particular treaty is relied upon (e.g., the Genocide Convention, the Torture Convention, or the 1949 Geneva Conventions).

118. Draft Resolution, U.N. Doc. S/2014/348 (vetoed by the Russian Federation and China).

119. See U.N. Charter arts. 1–2, 24 ¶ 2.

120. See *supra* notes 33–34 (French/Mexican initiative and Code of Conduct).

Liechtenstein has proposed obtaining a General Assembly resolution requiring mandatory discussion in the General Assembly of every veto cast before the Security Council.<sup>121</sup>

While this question has few links to legal considerations, it warrants mentioning that all existing veto related initiatives—as are the author’s arguments—are working in the same direction.<sup>122</sup> Thus, the initiatives are “complementary.” The author’s arguments can thus be considered as something to pursue in complement to the French/Mexican initiative and Code of Conduct, as the author’s arguments could make it more likely that these latter initiatives become more attractive options.

In the short term, all that is being requested of States<sup>123</sup> is to raise the argument—that *legality* matters, and vetoes should be subject to the requirements of international law and the U.N. Charter.<sup>124</sup>

F. *The Question Why the Author Did Not Try to Define the  
“Trigger Mechanism” to Determine when Atrocity Crimes Are  
Occurring*

Yet another question has been why the author does not define a “trigger mechanism” that determines when genocide, crimes against humanity, or war crimes are occurring. In other words, even if there is an ICJ ruling that the veto must not be used if there is ongoing genocide, crimes against humanity, or war crimes, who would determine that those crimes *are occurring*? Without such a determination, there is a concern that a permanent member could simply deny the crimes are occurring and cast its veto.

First, the author notes that this “trigger” question is also an issue for the French/Mexican initiative and Code of Conduct—when would voluntary veto restraint be triggered? The French/Mexican initiative does not contain a trigger mechanism, whereas the Code of Conduct suggests the “facts on the ground” would provide the trigger, although potentially guided by the Secretary-General and other U.N. offices.<sup>125</sup>

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121. See Wenaweser & Alavi, *supra* note 36, at 69–70.

122. The ACT Code of Conduct, French/Mexican initiative, and the author’s arguments focus on vetoes cast in the face of atrocity crimes. The Liechtenstein proposal would apply to all vetoes. See Wenaweser & Alavi, *supra* note 36, at 69–70.

123. The request is not the author’s alone: a critical mass of prominent individuals and nongovernmental organizations support questioning how the veto is being used in the face of genocide, crimes against humanity, or war crimes. See CONCEPT NOTE, *supra* note 40 (individual and NGO supporters).

124. Canada, for example, recently issued such a statement. See U.N. GAOR, 84th Sess., plen. mtg. at 14, U.N. Doc. A/75/PV.64 (May 17, 2021).

125. The Code of Conduct: “*Invite[s]* the Secretary-General, making full use of the expertise and early warning capacities of the United Nations system, in

Under conventions such as the Genocide Convention, the Torture Convention, or the Geneva Conventions, there is no designated body or person to determine when genocide, torture, or grave breaches or other Geneva Convention violations are occurring. While these conventions create certain obligations *when* the crimes are occurring (or are at serious risk of occurring),<sup>126</sup> in essence, the conventions leave to each State initially to determine whether that point has been reached. This unfortunately leaves room for States to deny, or ignore, that the crimes are occurring (particularly if a State is complicit in their commission) and ignore convention obligations. Waiting until a court adjudicates the matter could come years too late, at a time when prevention has long become moot. To assist, U.N. bodies have employed fact-finding missions, commissions of experts, and commissions of inquiry to make these kinds of determinations *prima facie*—that there are reasonable grounds to believe the crimes are occurring.

The author has quite deliberately *not* tried to answer this question in her book because which body within (or outside) the U.N. should decide when the crimes are occurring (or are at serious risk of occurring) is a political question. As such, if coupled with asking a legal question to the ICJ, this could well result in the case being dismissed under the “political question doctrine.”<sup>127</sup> Consequently the process for making such determinations must be left to States. In the meantime, a determination by either an established, or specially constituted, fact-finding mission, commission of inquiry, or commission of experts could prove helpful.

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particular the Office of the United Nations High Commissioner for Human Rights and the United Nations Office on Genocide Prevention and the Responsibility to Protect, to continue to bring to the attention of the Council situations that, in her or his assessment, involve or are likely to lead to genocide, crimes against humanity or war crimes.” Code of Conduct, *supra* note 34, at 3. For additional discussion of having a “trigger mechanism,” see TRAHAN, *supra* note 1, at 131–34.

126. As a technical matter, the trigger should be when there is a “serious risk” of the crimes occurring, because, at least as to the crime of genocide, that is when the “due diligence” obligation arises. See *Bosnia v. Serbia* case, *supra* note 4 (on serious risk); see also *supra* note 97 (discussing due diligence). As to preventing war crimes and crimes against humanity, it also makes sense that “prevention” should occur when the crimes are at “serious risk” (or even prior), as it would make no sense to wait until the crimes fully manifest before attempting to prevent them.

127. For discussion of the “political question” doctrine, see TRAHAN, *supra* note 1, at 251–54.

G. *The Concern that One Cannot Guarantee a Useful Ruling by the ICJ*

Reactions to the author's book included one final, and significant, set of questions: if States requested an Advisory Opinion from the ICJ, would the ICJ decision necessarily help clarify the legal situation? Or is there a chance the ICJ might rule that the veto is above all law and set back progress in this area? Might the ICJ sidestep the question? Or might it render a somewhat helpful, somewhat harmful decision that entrenches uncertainty, rather than providing legal clarity?

While it is impossible to know for certain how the ICJ would rule, the author's arguments rest significantly on existing ICJ decisions.<sup>128</sup> It seems unlikely that the ICJ would repudiate its past rulings, and therefore a fully negative decision (that the permanent members are above the law in their veto use) appears unlikely, too. As to sidestepping the question, admittedly, there is considerable precedent and ample temptation for the ICJ to avoid squarely addressing such a highly-charged question. One way to minimize this possibility is to formulate any question to the ICJ as precisely as possible.<sup>129</sup> As to a somewhat helpful and somewhat harmful ruling, that possibility cannot be dismissed. Yet, even a somewhat helpful ruling would be preferable to the current state of affairs—where the veto is being used in complete disregard of all legal considerations.

There is another way to increase the likelihood of a helpful ICJ ruling. If States would make statements at the U.N. and other appropriate fora to the effect that they believe that the veto is constrained by international law and U.N. Charter obligations, that could help solidify *opinio juris*, making it more likely that the ICJ would render a positive ruling. It may seem to be somewhat of an odd alignment, as the ICJ is not known for being a “human rights court.”<sup>130</sup> However, with the *Bosnia v. Serbia* case<sup>131</sup> and the *Gambia v. Myanmar* case,<sup>132</sup> as well as Canada and the Netherlands poised to pursue a Torture Convention case against Syria before the ICJ,<sup>133</sup> the ICJ is

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128. *Id.* at 142–259; *see also supra* Section IV.A.

129. *See supra* text accompanying note 101 for a suggested formulation.

130. *See, e.g.,* Sandy Ghandhi, *Human Rights and the International Court of Justice the Ahmadou Sadio Diallo Case*, HUM. RTS. L. REV. 527, 528 (2011).

131. *See Bosnia v. Serbia* case, *supra* note 4.

132. *The Gambia v. Myanmar* case, *supra* note 114, ¶ 39.

133. *Joint Statement of Canada and the Kingdom of the Netherlands Regarding Their Cooperation in Holding Syria to Account*, GOV'T NETH. (Mar. 12, 2021), <https://www.government.nl/documents/diplomatic-statements/2021/03/12/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-their-cooperation-in-holding-syria-to-account> [https://perm

becoming a prominent venue for pursuing cases involving State responsibility for atrocity crimes.<sup>134</sup> While the *Bosnia v. Serbia* decision was somewhat disappointing in its outcome, it did render a fairly progressive decision in its holding that essentially *every* state party to the Genocide Convention owes a “due diligence” obligation to “prevent” genocide wherever it may be occurring.<sup>135</sup> Thus, there is some reason for optimism about bringing a case on the veto’s legal limits before the ICJ.

## V. CONCLUSION

The purpose of this article has been to address the various questions and critiques that the author has encountered while developing and presenting legal arguments that show that, in certain situations, there are existing limits to the veto power. It is simply through a legally incomprehensible reading of the U.N. Charter that the permanent members have been able to use their power to block measures designed to prevent or curtail the commission of genocide, crimes against humanity, or war crimes, where at least nine other states serving on the Security Council have agreed on measures to try to prevent or curtail the commission of these crimes. Such practices have contributed greatly to the current near paralysis of the Security Council, especially

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a.cc/65CY-6FB9] (“On 18 September 2020, the Netherlands invoked Syria’s responsibility for human rights violations, specifically holding Syria responsible for torture under the UN Convention against Torture. On 3 March 2021, Canada took the same step.”).

134. See Milanović, *supra* note 97, at 565 (noting that the *Bosnia v. Serbia* case was “the ICJ’s first true human rights case”); see also *id.* at 601 (providing background on State responsibility for serious breaches of peremptory norms of international law); see also *id.* (“State responsibility for genocide is not by its nature criminal, though this concept does not divest genocide of its nature as a crime under international law, and individual criminal responsibility runs concurrently with state responsibility.”).
135. See *Bosnia v. Serbia* case, *supra* note 4 (due diligence). In the Preliminary Objections Decision, the ICJ expressly stated that “the obligation each state . . . has to prevent and to punish the crime of genocide is not territorially limited by the Convention.” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugo.), Preliminary Objections, 1996 I.C.J. 595, ¶ 31 (July 11). The extraterritorial implications of the ruling are also clear in that the ICJ was adjudicating the responsibility of Serbia (then part of the Federal Republic of Yugoslavia) to prevent genocide committed in July 1995 in Bosnia and Herzegovina, an independent State as of 1992. See also Marko Milanović, *State Responsibility for Genocide: A Follow Up*, 18 EUR. J. INT’L L. 669, 687, 691 (2007) (“[T]he ICJ has made it clear that every state in the world has an obligation to prevent . . . genocide, albeit to a greater or to a lesser extent”; “the Court makes the obligation to prevent genocide a truly global duty of every state to do what it reasonably can”).



in the most crucial and pressing situations. If, on the 75th anniversary of the United Nations, states desire a more functional Security Council, the author's legal arguments provide a path forward. They also provide the Secretary-General with an opportunity to utilize his "good offices" to kick-start and support such an effort.<sup>136</sup> As an academic, the author has outlined the arguments and suggested a variety of options for their advancement. If states and the U.N. leadership are serious about wanting to ensure that the Security Council will act in situations of genocide, crimes against humanity, or war crimes, they need to progress beyond asking only for voluntary veto restraint and add consideration of existing legal limits to the veto power to their active agenda.

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136. The author filed a submission to this effect entitled "Contribution to the UN Secretary-General's report, 'Our Common Agenda,' mandated by the United Nations General Assembly resolution adopted in 2020 to mark the 75th anniversary of the United Nations Charter." *See generally* U.N. SECRETARY GENERAL, OUR COMMON AGENDA (2021) (on file with author).