

2023

Legal Issues Surrounding Veto Use and Aggression

Jennifer Trahan

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



Part of the [International Law Commons](#)

Recommended Citation

Jennifer Trahan, *Legal Issues Surrounding Veto Use and Aggression*, 55 Case W. Res. J. Int'l L. 93 (2023)
Available at: <https://scholarlycommons.law.case.edu/jil/vol55/iss1/7>

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

LEGAL ISSUES SURROUNDING VETO USE AND AGGRESSION

*Jennifer Trahan**

TABLE OF CONTENTS

TABLE OF CONTENTS	93
I. INTRODUCTION	94
II. AGGRESSION AND <i>JUS COGENS</i>	100
A. <i>Jus Cogens</i> —the Highest Level of International Law	100
B. The Prohibition of Aggression as <i>Jus Cogens</i>	102
C. The Content of the Peremptory Norm.....	104
D. The Obligation to Respect <i>Jus Cogens</i> Carries Over to the Security Council	107
E. The Obligation to Respect <i>Jus Cogens</i> also Carries over to the Permanent Members	111
F. A Security Council Resolution in Conflict with <i>Jus Cogens</i> Would Be Void.....	115
G. Application to Russia’s Veto.....	117
H. Russia’s Veto Is at Odds with the Obligations Reflected in the ILC’s Articles of Responsibility of States for Internationally Wrongful Acts.....	119
III. AGGRESSION AND THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS.....	122
A. The Security Council’s Powers Are Limited by the UN Charter, Including the Requirement of Acting in Accordance with the UN’s Purposes and Principles	123
B. The Permanent Members’ Powers Are Limited by the UN Charter, Including the Requirement of Acting in Accordance with the UN’s Purposes and Principles	127
C. The UN’s Purposes and Principles.....	128
D. The Obligation to Adhere to the UN’s Purposes and Principles Pertains to Veto Use.....	129
E. Application of the UN’s Purposes and Principles to Russia’s Veto.....	135
F. Operationalizing These Legal Obligations.....	140

* Clinical Professor, NYU Center for Global Affairs and Director of their Concentration in Human Rights and International Law; Convenor, The Global Institute for the Prevention of Aggression. Thanks to Jenny Aanestad for her research assistance, Andras Vamos-Goldman for his insightful comments, and Erin Lovall for her editorial assistance.

IV. CONCLUSION..... 143

I. INTRODUCTION

On February 24, 2022, in the largest mobilization of troops in Europe since World War II, Russia launched a full-scale invasion of the neighboring state of Ukraine.¹ Russia claimed to be demilitarizing and de-Nazifying Ukraine, protecting the people against genocide, and acting in self-defense.² The International Court of Justice has since provisionally ruled “that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine” and issued a provisional measures order for Russia to “immediately suspend the military operations”³ Russia’s intervention—which arguably began in 2014 with the attempted annexation of Crimea and installation of Russian separatist-backed forces in Eastern Ukraine⁴—appears, on its face, to constitute a clear violation of Article 2(4) of the UN Charter.⁵ Indeed, in a resolution co-sponsored by ninety-four UN Member States, the UN General Assembly “[d]epl[or]e[d] in the strongest terms the aggression by

-
1. Natalia Zinets & Aleksandar Vasovic, *Missiles Rain Down Around Ukraine*, REUTERS (Feb. 24, 2022, 7:45 PM), www.reuters.com/world/europe/putin-orders-military-operations-ukraine-demands-kyiv-forces-surrender-2022-02-24 [<https://perma.cc/K6LX-2NDU>].
 2. Press Release, President of Russia Vladimir Putin, Address by the President of the Russian Federation (Feb. 21, 2022, 10:35 PM), <http://en.kremlin.ru/events/president/news/67828> [<https://perma.cc/7B5K-YJSZ>].
 3. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J. 1, ¶¶ 60, 86 (Mar. 16).
 4. H.R. Res. 1038, 117th Cong. (2022) (“Since 2014, President Vladimir Putin has violated the sovereignty of Ukraine and used military force to seize control and unlawfully occupy Crimea and installed Russian separatist-backed forces in eastern Ukraine”).
 5. U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

the Russian Federation against Ukraine [which it declared to be] in violation of Article 2(4) of the Charter.”⁶

Yet, despite the UN Charter violation—or at least apparent Charter violation⁷—the Russian Federation, using its veto power under Article 27(3), was able, on February 25, 2022, to block condemnation of its own aggression before the UN Security Council⁸—the body charged under the UN Charter with “primary responsibility for the maintenance of international peace and security.”⁹ Moreover, because of Russia’s veto power, it is unlikely that the Security Council will play any significant role related to the situation in Ukraine—in implementing a sanctions regime, taking measures to try to stop or end the commission of atrocity crimes,¹⁰ referring the situation to the International Criminal Court (which referral could include the crime of aggression),¹¹ or

-
6. G.A. Res. ES-11/1, ¶ 2 (Mar. 2, 2022) (passed with a resounding 141 in favor, 35 abstaining, 5 against); *see, e.g.*, John Bellinger, *How Russia’s Invasion of Ukraine Violates International Law*, COUNCIL ON FOREIGN RELS. (Feb. 28, 2022, 2:25 PM), www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law [<https://perma.cc/S2GD-HASQ>]; James Green et al., *Russia’s Attack on Ukraine and the Jus ad Bellum*, 9 J. ON USE FORCE & INT’L L. 4, 4 (2022); *see also* S. Res. 546, 117th Cong. (2022) (“President Vladimir Putin, in February 2022, initiated a premeditated, unprovoked, unjustified, and unlawful war against the sovereign nation of Ukraine . . .”).
 7. *See infra* text accompanying notes 33–35.
 8. S.C. Res. S/2022/155 (Feb. 25, 2022) *vetoed* by the Russ. (draft resolution).
 9. U.N. Charter art. 24, ¶ 1.
 10. “Atrocity crimes” herein means genocide, crimes against humanity, and/or war crimes. The crime of aggression also results in atrocities and there are other horrific crimes that could equally be termed “atrocity crimes.” *See* SCOTT STRAUS, *FUNDAMENTALS OF GENOCIDE AND MASS ATROCITY PREVENTION* 35 (2016).
 11. Rome Statute of the International Criminal Court art. 15, July 17, 1998, 2187 U.N.T.S. 90 (Security Council referrals) [hereinafter Rome Statute]. The ICC, by virtue of Ukraine’s exercise of two Article 12(3) declarations has jurisdiction over the Rome Statute’s other crimes (genocide, crimes against humanity, and war crimes) committed in the territory of Ukraine. *See Ukraine*, INT’L CRIM. CT. (Mar. 2, 2022), www.icc-cpi.int/ukraine [<https://perma.cc/2EVE-RSXA>] for the two declarations.

taking other measures to try to resolve the situation.¹² Thus, the Security Council will be largely paralyzed from carrying out its core mandate because of the veto power of a permanent member.¹³ This is similar to the paralysis that resulted when the Security Council was repeatedly unable to act due to vetoes or veto threats with respect to the crimes occurring in Syria,¹⁴ in Darfur, Sudan,¹⁵ and numerous other situations.¹⁶

All of this begs the question of whether international law has anything to say about this. Can a permanent member of the Security Council, violating the core norm against the aggressive use of force (Article 2(4) of the UN Charter),¹⁷ by using a single provision of the Charter (Article 27(3)),¹⁸ block its own condemnation? Specifically, why should the veto, provided for in one provision of the Charter, Article 27(3),¹⁹ be considered

-
12. The Security Council has many “tools” at its disposal, running the gamut under Chapter VII from provisional measures to non-forceful measures, to forceful measures. *See* U.N. Charter arts. 40–42.
 13. Admittedly, even if the Security Council were able to function related to the situation in Ukraine, some options that the Council normally has at its disposal such as Chapter VII forceful intervention would be off the table because Russia is a nuclear power. Yet, there are other measures the Council has at its disposal.
 14. More than 17 Security Council resolutions were vetoed, including those trying to prevent atrocity crimes, such as use of chemical weapons. For a discussion of the war crimes and crimes against humanity occurring in Syria, and each of Russia’s and sometimes China’s accompanying vetoes, see JENNIFER TRAHAN, *EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES* 262–302 (2020).
 15. For discussion of the genocide occurring in Darfur, Sudan, and each of China’s veto threats that watered down the sanctions regime, and weakened the peacekeeping mandate and delayed the UN’s eventual hybrid peacekeeping deployment, see *id.* at 302–42.
 16. For discussion of other vetoes and veto threats in the face of atrocity crimes, see *id.* at 33–47. The author applies her arguments to all veto use in the face of genocide, crimes against humanity or war crimes, regardless of which permanent member is casting the veto.
 17. U.N. Charter art. 2, ¶ 4.
 18. *Id.* art. 27, ¶ 3.
 19. The word “veto” is not found in Article 27(3), which states that a resolution requires the affirmative vote of the permanent members

“above” the core norm obligations in article 2(4)²⁰—not to mention other parts of the Charter and the requirements of international law, including respect for *jus cogens*? Is it logical that a permanent member still be allowed to reap all the benefits of permanent membership, even when violating the UN Charter, violating the “Purposes and Principles” of the UN,²¹ violating international law, and causing the Security Council to be unable to carry out its core mandate? Is this not an “abuse of right”²²—and the accompanying responsibility—that comes with veto power?²³ This article explores these tensions.

In my book, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*,²⁴ I argue that there are certain in-built limitations to veto use in the face of genocide, crimes against humanity, and war crimes—i.e., “atrocity crimes.”²⁵ Namely, the veto should not be used in a way that: (1) is inconsistent with, or facilitates violations of, *jus cogens*; (2) is contrary to the UN’s Purposes and Principles; or (3) is inconsistent with treaty obligations, such as those found in the Genocide Convention²⁶ and 1949 Geneva Conventions.²⁷

in order to pass. It is read to permit permanent members to abstain, also allowing the resolution to pass. *See id.*

20. *Id.* art. 2, ¶ 4.

21. *Id.* arts. 1–2.

22. *See generally* Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 389 (2002).

23. *See* U.N. Charter art. 27.

24. TRAHAN, *supra* note 14.

25. *See id.* at 2. The crime of aggression, however, might also be considered an “atrocity crime,” and most certainly is a “core crime” under the ICC’s Rome Statute. *See* Rome Statute, *supra* note 11, art. 5, ¶ 1.

26. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

27. *See generally* the 1949 Geneva Conventions: Geneva Convention 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 I”); Geneva Convention 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 II”); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (“Geneva Convention III”);

Basically, my thesis is as follows: one would not expect the Security Council to endorse the commission of genocide in a resolution—indeed, the resulting resolution would likely be void;²⁸ thus, if there is ongoing genocide, and a plan to try to stop it is vetoed, why is that considered permissible, when the result is to sanction the continued perpetration of genocide? If the Security Council is unable to endorse genocide through its resolutions,²⁹ why is an individual permanent member permitted to do so through veto use? That, I argue, is an untenable reading of the UN Charter and obligations of international law as they have evolved over time, i.e., as they presently exist.³⁰ I make essentially the same arguments about vetoes cast in the face of crimes against humanity and war crimes, where the vetoing permanent member is essentially giving a green light to, and thereby helping to enable, the continuing perpetration of those crimes.³¹

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (“Geneva Convention IV”).

28. See *infra* notes 96–99 and accompanying text (discussing Judge Lauterpacht’s decision in the *Application of the Genocide Convention* case).
29. *Id.*
30. Now, there is significantly more law related to the crime of genocide, for example, than in 1945. It is against such an up-to-date reading of international law that one should measure the actions of states today. See Christian Henderson, *The UK Government’s Legal Opinion on Forcible Measures in Response to the Use of Chemical Weapons by the Syrian Government*, 64 INT’L L. & COMPAR. L. Q. 179, 185 (2015) (“the meaning of even fundamental provisions [of the UN Charter] [does] not necessarily remain static”); RONALD C. SLYE & BETH VAN SCHAACK, ESSENTIALS: INTERNATIONAL CRIMINAL LAW 92 (2009) (“It is generally accepted at the international level that treaties are to be treated as living documents. In other words, they are to be interpreted in the context of the time in which they are being applied, and not as they would have been interpreted at the time of their drafting.”); Arman Sarvarian, *Humanitarian Intervention after Syria*, 36 LEGAL STUD. 20, 24–25 (2016) (quoting Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT’L & COMPAR. L. Q. 926, 929 (2000) (international law “is not static but develops through a process of State practice of actions and the reaction to those actions”)).
31. As to crimes against humanity, because there is not (yet) a freestanding treaty, the third treaty-based argument does not apply. See TRAHAN, *supra* note 14, at 247.

This article examines the extent to which the first two arguments—about veto use that (1) is inconsistent with, or facilitates violations of, *jus cogens*, or (2) is contrary to the UN’s Purposes and Principles—apply when there is ongoing aggression, i.e., use of force contrary to the UN Charter. The article does not examine the third level of obligation—aggression measured against treaty obligations—as, here, the treaty being breached by aggressive use of force is the UN Charter. Thus, the author’s second argument (based on the UN Charter), and the third argument (based on treaty obligations) merge regarding aggression.

The article takes as a starting assumption that Russia has, at least in its 2022 invasion, if not already in 2014,³² committed an act of aggression or use of force that appears to violate Article 2(4) of the UN Charter—i.e., a *prima facie* case exists. Of course, if there were to be litigation over state responsibility or a criminal case for the crime of aggression,³³ the legality or illegality of Russia’s actions—and those of individual civilian and military

32. See *supra* note 4 and accompanying text (regarding Russia’s prior invasion of Crimea).

33. Both Ukraine and Russia have the crime of aggression (an older version of the definition) in their criminal codes. See Criminal Code of Ukraine, ch. 20, art. 437 (2001); Uголовnyĭ Kodeks Rossiĭskoĭ Federatsii [UK RF] [Criminal Code], art. 353 (Russ.). The ICC lacks jurisdiction over the crime of aggression related to Russian nationals and crimes committed on Russian territory, as Russia is not a State Party to the ICC’s Rome Statute. See Rome Statute, *supra* note 11, art. 15*bis*, ¶ 5 (there is no ICC jurisdiction over the crime of aggression committed by nationals, or crimes committed on the territory, of a non-State Party). The same is true of Belarus (which permitted its territory to be used to launch the invasion), and actually, Ukraine is not a party to the Rome Statute either. See *infra* note 178 (Belarus); see also Ukraine, *supra* note 11. Various efforts are currently ongoing to create an ad hoc Special Tribunal for the Crime of Aggression. See, e.g., Representatives of Latvia, Liechtenstein and Ukraine to the U.N., Letter dated Aug. 12, 2022 from the Representatives of Latvia, Liechtenstein and Ukraine to the United Nations Addressed to the Secretary General, at 2, U.N. Doc. A/ES-11/7-S/2022/616 (Aug. 17, 2022); see also *Blog Series: The Case for Creating an International Tribunal to Prosecute the Crime of Aggression against Ukraine*, JUST SEC., www.justsecurity.org/tag/u-n-general-assembly-and-international-criminal-tribunal-for-aggression-against-ukraine/.

leaders responsible for them³⁴—would need to be adjudicated.³⁵ Thus, the author claims only that Russia’s actions *appear* to violate *jus cogens* and *appear* to violate the UN Charter.

II. AGGRESSION AND *JUS COGENS*

This first section explores the tension between veto use and a violation of a peremptory norm of international law protected at the level of *jus cogens*. Specifically, it examines veto use that appears to further or assist a *jus cogens* violation—i.e., violation of a peremptory norm of international law—by allowing continuation of the status quo where the *jus cogens* violation is occurring. This analysis is applied to Russia’s veto in the face of its own apparent violation of a peremptory norm of international law, the prohibition of aggression, committed³⁶ through its invasion of Ukraine.

A. *Jus Cogens—the Highest Level of International Law*

According to the Vienna Convention on the Law of Treaties,³⁷ “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”³⁸ Sir Gerald

34. The crime of aggression applies to persons “in a position effectively to exercise control over or to direct the political or military action of a State.” Rome Statute, *supra* note 11, art. 8*bis*, ¶ 1.

35. The determination of an act of aggression by an outside body—such as the General Assembly or Security Council—would not bind the ICC, which would have to make its own determination whether an act of aggression occurred. This should be true in other fora as well—whether there was an act of aggression would be part of the case and need to be proven. *Id.* arts. 15*bis*, ¶ 9; 15*ter*, ¶ 4.

36. See caveat *supra* text accompanying notes 33–35.

37. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

38. *Id.* art. 53. A *jus cogens* norm has been described as one that: “(1) [h]as the status of a norm of general international law; (2) [i]s accepted and recognized by the international community of states as a whole; (3) [c]annot be derogated from; and (4) [c]an only be modified by a new norm of the same status.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(k) (AM. LAW INST. 1987). *But see* James A. Green, *Questioning the Peremptory Status*

Fitzmaurice, the Special Rapporteur of the International Law Commission on the Law of Treaties,³⁹ explains *jus cogens* as follows: “There are certain forms of illegal action that can never be justified These are acts which are not merely illegal, but *malum in se*, [namely] rules in the nature of *jus cogens*—that is to say obligations of an absolute character, compliance with which is not dependent on corresponding compliance by others, but is requisite in all circumstances”⁴⁰ Professor Alfred Verdross, a member of the ILC writing in 1966,⁴¹ articulated the concept this way:

[I]n the field of general international law there are rules having the character of *jus cogens*. The criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community. Hence these rules are absolute.⁴²

The hierarchical nature of international law, with *jus cogens* or peremptory norms at the apex, is explained as follows:

Peremptory norms of international law or norms of *jus cogens* have a superior hierarchy in relation to other rules. This classification is reflected in the text of Article 53 of the [VCLT] . . . , according to which a treaty is void if it conflicts with a peremptory norm of international law.⁴³

of the Prohibition of the Use of Force, 32 MICH. J. INT’L L. 215, 220 (2011).

39. See Karl Zemanek, U.N. Audiovisual Library of International Law, Vienna Convention on the Law of Treaties, <https://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf> [<https://perma.cc/EP2Q-5G32>].
40. Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT’L & COMPAR. L. 609, 610 (1977) (quoting Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rules of Law*, 92 RECUEIL DES COURS 120 (1957)).
41. Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT’L L. 55, 55 (1966).
42. Whiteman, *supra* note 40, at 612 (quoting Verdross, *supra* note 41, at 58).
43. André da Rocha Ferreira et al., *Formation and Evidence of Customary International Law*, 2013 UFRGS MODEL U.N. J. 182, 194 (“Peremptory norms of international law or norms of *jus cogens*”).

“Rules contrary to the notion of *jus cogens* could be regarded as void, since those rules oppose the fundamental norms of international public policy.”⁴⁴

B. *The Prohibition of Aggression as Jus Cogens*

Just as, for example, the prohibitions of genocide, crimes against humanity, violations of basic rules of international humanitarian law, slavery, and torture are protected at this highest level of international law,⁴⁵ so too is the prohibition of aggression.⁴⁶ Thus, the ILC specifically identifies “the prohibition

have a superior hierarchy in relation to other rules.”); VCLT, *supra* note 37, art. 53; *see also* N.G. Onuf & Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 J. INT’L L. & POL’Y 187, 189 n. 7 (1994) (“H[ans] Kelsen has argued the logical necessity of a hierarchical arrangement of positive norms in the international legal order”) (citing HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 408–38 (1952)); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 9 (2006) (“The superior rules [i.e., *jus cogens*], determine the frame[work] within which the inferior rules [i.e., custom, treaties and ‘the rights and obligations’ flowing therefrom] can be valid, while the inferior rules must comply with the content of the superior rules” in order to be lawful.); JOHN HEIECK, A DUTY TO PREVENT GENOCIDE: DUE DILIGENCE OBLIGATIONS AMONG THE P5 185 (2018) (“[S]tates have already consented to the notion of hierarchically superior norms when they codified *jus cogens* in Articles 53 and 54 of the VCLT.”); Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under the UN Charter*, 3 SANTA CLARA J. INT’L L. 72, 73 (2005) (“The position of the rules of *jus cogens* is hierarchically superior compared to other ordinary rules of international law.”).

44. Hossain, *supra* note 43, at 74.
45. Int’l Law Comm’n, Rep. on the Work of the Seventy-First Session, U.N. Doc. A/74/10, at 146–47, 208 (2019).
46. *Id.* The ILC’s list of peremptory norms is as follows:
 - (a) The prohibition of aggression;
 - (b) The prohibition of genocide;
 - (c) The prohibition of crimes against humanity;
 - (d) The basic rules of international humanitarian law;
 - (e) The prohibition of racial discrimination and apartheid;
 - (f) The prohibition of slavery;
 - (g) The prohibition of torture;

of aggression” in its non-exhaustive list of peremptory norms of general international law—*jus cogens*.⁴⁷

In its Commentary, the ILC provides the following details:

The first norm identified . . . is the prohibition of aggression. The prohibition of aggression was referred to by the [ILC] in the commentary to the articles on responsibility of States for internationally wrongful acts. In 1966, the [ILC] stated that the “law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*” Like the commentary to the articles on responsibility of States for internationally wrongful acts, the conclusions of the Study Group on fragmentation of international law referred to the prohibition of aggression as a peremptory norm. The report of the Study Group on fragmentation of international law, after referring to the [ILC’s] identification of the prohibition of aggression, included “the prohibition of aggressive use of force” on its list of the “most frequently cited candidates for the status of *jus cogens*.”⁴⁸

One scholar further explains the existence of the *jus cogens* norm:

The prohibition on the use of force was also recognised as *jus cogens* at the 1969 Vienna Conference, when it was the most frequently cited example of a norm of *jus cogens*. Discussions leading to the adoption of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, also demonstrated agreement among States as to the *jus cogens* nature of a norm in the *jus ad bellum*.⁴⁹

The importance of the norm cannot be understated. Louis Henkin described the prohibition against aggressive use of force

(h) The right of self-determination.

47. *Id.*

48. *Id.* at 205 (citations omitted).

49. Katie A. Johnston, *Identifying the Jus Cogens Norm in the Jus ad Bellum*, 70 INT’L & COMPAR. L. Q. 29, 42 (2021) (citations omitted); for the declaration, see G.A. Res. 42/22, at 287 (Nov. 18, 1987).

as “the principal norm of international law of [the twentieth] century.”⁵⁰

C. *The Content of the Peremptory Norm*

As to the content of the peremptory norm, while there have been some variations in how the norm is formulated,⁵¹ it is generally understood as the use of force contrary to the UN Charter—i.e., a violation of Article 2(4), which excludes use of force that falls within Article 51 self-defense or Chapter VII authorized Security Council intervention.⁵²

The ILC takes this view, stating: “*the law of the Charter* concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.”⁵³ In the *Nicaragua* case, the ICJ also recognized that the ILC had “expressed the view that ‘*the law of the Charter* concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*,’”⁵⁴ a position neither of the

50. Louis Henkin, *The Use of Force: Law and U.S. Policy, in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 38 (Louis Henkin et al. eds., 2d ed. 1991).

51. *See, e.g., infra* text accompanying notes 58–60.

52. *See* U.N. Charter art. 51; although Green does not adopt this position, he suggests the norm might be formulated as: “[t]he use of armed force directed against the territorial integrity or political independence of any state or which is in any other manner inconsistent with the purposes of the U.N. is prohibited other than when it is employed in conformity with Article 51 of the U.N. Charter or when lawfully authorized by the Security Council under Article 42 of the U.N. Charter.” Green, *supra* note 38, at 233.

53. *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, [1966] 2 Y.B. INT’L L. COMM’N 247, U.N. Doc. A/CN.4/SER.A/1966/Add. 1 [hereinafter *Commentary on Law of Treaties Draft Articles*] (emphasis added); *see also* Johnston, *supra* note 49, at 57 (“[T]he *jus cogens* norm in the *jus ad bellum* is the customary norm which prohibits non-consensual force that does not fall within either of the two apparent exceptions: authorisation under the UN Charter and self-defence.”).

54. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27) (emphasis added) (citing *Commentary on Law of Treaties Draft Articles*, *supra* note 53, at 247).

parties—Nicaragua and the United States—disputed.⁵⁵ This approach was also taken, for example, in the *Oil Platforms* case where the *jus cogens* norm was articulated as the “obligation imposed on all Members under Article 2(4) of the Charter,”⁵⁶ and in oral submissions by Canada in the *Fisheries Jurisdiction* case where the *jus cogens* norm was articulated as “the Charter’s prohibition of the use of force – Article 2, paragraph 4.”⁵⁷

Admittedly, the norm is sometimes articulated somewhat differently. This was true, for example, of Spain in the *Fisheries Jurisdiction* case—“*la norme impérative qui interdit l’usage et la menace du recours à la force.*”⁵⁸ It was also true in the Federal Republic of Yugoslavia, i.e., Serbia and Montenegro, in the *Legality of the Use of Force* case, which used the formulation: “the obligation not to resort to the use of force against another State.”⁵⁹ These formulations, which may have simply lacked precision, appear to be aimed at the same concept. Alternatively, one might read these statements as encompassing the obligation

55. The ICJ stated:

Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations “has come to be recognized as *jus cogens*.” The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a “universal norm,” a “universal international law,” a “universally recognized principle of international law,” and a “principle of *jus cogens*.”

Id.

56. Memorial of the Islamic Republic of Iran, *Oil Platforms* (Iran v. U.S.), 1993 I.C.J. 90, ¶ 4.05 (June 8, 1993).
57. *Fisheries Jurisdiction* (Spain v. Can.), Verbatim Record, ¶ 14 (June 17, 1998, 10:00 a.m.), www.icj-cij.org/public/files/case-related/96/096-19980617-ORA-01-00-BI.pdf [<https://perma.cc/4UKW-8HF5>].
58. Memorial of the Kingdom of Spain, *Fisheries Jurisdiction* (Spain v. Can.), 1995 I.C.J. Pleadings ¶ 4 (Sept. 28, 1995).
59. Memorial of the Federal Republic of Yugoslavia, *Legality of Use of Force* (Serb. & Montenegro v. UK), 2000 I.C.J. Pleadings ¶ 2.1.1. (Jan. 5, 2000).

not to use force *as it is found* in the UN Charter and parallel customary international law.⁶⁰

On balance, there appears quite broad agreement—including from both the ILC and arguably the ICJ⁶¹—that there is such

-
60. The Charter regime on the use of force also represents customary international law. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 188 (“[T]he principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law.”).
61. There remains a slight question whether the ICJ concluded there was such a norm or was simply reciting the ILC’s view. Green, *supra* note 38, at 223–224 (citing *Nicar. v. U.S.*, 1986 I.C.J. at 151, 153 (separate opinion by Singh, J.); *id.* at 192, 199–200 (separate opinion by Sette-Camara, J.)) (“It is the view of the present writer that the Court concluded here that the prohibition of the use of force was a peremptory norm, although it must be said that others have a different interpretation. . . . Strengthening the view that the Court has interpreted the prohibition of the use of force as a peremptory norm are statements made to this effect by judges in their individual opinions [in] the Nicaragua case.”); *see also* *Iran v. U.S.*, 2003 I.C.J. at 324, 329–30 (Nov. 6) (separate opinion by Simma, J.); *id.* at 246, 260 (separate opinion by Kooijmans, J.); *id.* at 290, 291 (dissenting opinion by Elaraby, J.); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 246, 254 (July 9) (separate opinion by Elaraby, J.) [hereinafter *Wall Advisory Opinion*].

a peremptory norm.⁶² There is also fairly broad agreement⁶³—including from the ILC and arguably the ICJ⁶⁴—that its content is the use of force regime under Article 2(4) of the UN Charter.

D. *The Obligation to Respect Jus Cogens Carries Over to the Security Council*

All states and bodies are bound to respect international law, which includes *jus cogens*, including the Security Council.⁶⁵ Thus, Judge Fitzmaurice dissenting in the *Namibia* Advisory Opinion 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. . . .”⁶⁶ Similarly, in his dissenting opinion in the ICJ’s

62. “[A]n overwhelming majority of scholars view the prohibition as having a peremptory character.” Green, *supra* note 38, at 216. For a lengthy list of scholars recognizing the peremptory norm, see *id.* at 216 n.4 (compiling authority); see also Johnston, *supra* note 49; Ulf Linderfalk, *The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law*, 82 NORDIC J. INT’L L. 369, 369 (2013). One judge serving on the ICJ has stated that “[t]he prohibition of the use of force . . . is *universally recognized* as a *jus cogens* principle, a peremptory norm from which no derogation is permitted.” Wall Advisory Opinion, 2004 ICJ at 254 (emphasis added) (separate opinion by Elaraby, J.).

Green himself, however, is skeptical if there is a peremptory norm, given that our understanding of what is prohibited under the Charter evolves over time (for example, potentially including cyber attacks and/or evolving notions of what is permitted as “self-defense”). He discounts the possibility, however, that the *jus cogens* norm might also evolve over time; after all, our understanding of what genocide is varies somewhat over time, as judges interpret the statutory language slightly differently—yet, one does not argue that this disqualifies genocide from being a peremptory norm. See Green, *supra* note 38; for another skeptic, see A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT’L L. 1, 1 (1995).

63. Green, *supra* note 38, at 226 (“Of the numerous writers who have attested to the peremptory nature of the prohibition of the use of force, many have explicitly taken the view that Article 2(4) is, in itself, a *jus cogens* norm.”).

64. See sources cited *infra* note 61.

65. MICHAEL WOOD & ERAN STHOEGER, *THE U.N. SECURITY COUNCIL AND INTERNATIONAL LAW* 78–79 (2022).

66. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security

Lockerbie case, Judge *ad hoc* Jennings eloquently affirmed that the Security Council is constrained by law: “all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law It is not logically possible to claim to represent the power and authority of the law and, at the same time, claim to be above it.”⁶⁷ Judge Weeramantry, also writing in dissent in *Lockerbie*, similarly concluded that: “The history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council’s powers is that those powers must be exercised in accordance with the well-established principles of international law.”⁶⁸ Judge Bedjaoui, additionally writing in dissent in *Lockerbie*, similarly wrote: “is not the essential point of concern to us here the fact that the Council is bound to respect the principles of international law?”⁶⁹

In the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia also opined on the limits of the Security Council’s power, finding that the Council’s powers are not “unbound by law,” rather “[t]he Charter . . . speaks the language of specific powers, not of

Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 220, 294 (June 21) (dissenting opinion by Fitzmaurice, J.).

67. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Judgment, 1998 I.C.J. 9, 99, 110 (Feb. 27) (dissenting opinion by Jennings, J.).
68. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Order, 1992 I.C.J. 3, 50, 65 (Apr. 14) (dissenting opinion by Weeramantry, J.); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Order, 1992 I.C.J. 114, 160, 175 (Apr. 14) (dissenting opinion by Weeramantry, J.).
69. Libya v. U.K., 1992 I.C.J. at 33, 46 (dissenting opinion by Bedjaoui, J.); Libya v. U.S., 1992 I.C.J. at 143, 156 (dissenting opinion by Bedjaoui, J.).

absolute fiat.”⁷⁰ Scholars have similarly concluded that the Security Council is not above the law but subject to it.⁷¹

70. *Tadić*, Case No. IT-94-1-I, ¶ 28. The Appeals Chamber held:

It is clear from this text [of Article 39 of the Charter] that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. 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 jurisdiction 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)

Id.

71. *See e.g.*, Aristotle Constantinides, Professor, Univ. of Cyprus, Presentation at European Society of International Law Inaugural Conference: An Overview of Legal Restraints on Security Council Chapter VII Action with a Focus on Post-Conflict Iraq 2 (2004), http://esil-sedi.eu/wp-content/uploads/2018/04/Constantinides_0.pdf [<https://perma.cc/RS46-4AFN>] (“[T]he Council is not sovereign; it is not above the law. Despite its predominantly and *par excellence* political character and functions, it is still an organ of an international organization, deriving its very broad powers from a treaty concluded by States. It is very unlikely that an organization based on the principle of sovereign equality of its Member States would confer unlimited powers to any of its organs.”); 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, 320 (1997) (“To the extent that the United Nations is a subject of international law it follows that its organs are thereby subjected to international law.”); Anne Peters, *The Security Council’s Responsibility to Protect*, 8 INT’L ORGS. L. REV. 15, 31, 30 (2011) (“The Security Council, as the most powerful organ of the organization, cannot be less subjected to legal obligations than the organization itself”; “The . . . [Security Council] is not a purely political organ acting in a law-free zone, but is subject to legal limits.”); Karl Doehring, *Unlawful Resolutions of the Security Council and Their Legal Consequences*, 1 MAX PLANCK Y.B. U.N. 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

A fortiori, if the Security Council is subject to international law, it necessarily must be subject to *jus cogens* norms, as they are at the apex of the international legal system.⁷² Thus, ICJ judge James Crawford wrote: “It seems intuitively right that the Security Council should be bound by peremptory norms. They are by definition norms that cannot be derogated from except by subsequent norms of the same kind.”⁷³ Simon Chesterman concurs:

It is generally acknowledged that the Security Council’s powers are subject to the UN Charter and norms of *jus cogens* The Council does not operate free of legal constraint. In strict legal terms this means that the Council’s powers are exercised subject to the Charter and norms of *jus cogens*. More importantly, however, the Council’s authority derives from the rule of law—respect for its decisions depends on respect for the Charter and international law more generally.⁷⁴

the rules of general international law as well.”). Additionally, 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).

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, 62 (2005) (citations omitted).

72. See *supra* note 43 and accompanying text.
73. See JAMES CRAWFORD, CHANGE, ORDER CHANGE: THE COURSE OF INTERNATIONAL LAW 12, 17–18 (2014).
74. SIMON CHESTERMAN, THE UN SECURITY COUNCIL AND THE RULE OF LAW: THE ROLE OF THE SECURITY COUNCIL IN STRENGTHENING A RULES-BASED INTERNATIONAL SYSTEM, FINAL REPORT AND RECOMMENDATIONS FROM THE AUSTRIAN INITIATIVE, 2004–2008 10,

This conclusion—that the Security Council is bound by *jus cogens*—can also be derived from application of the principle *nemo plus iuris transferre potest quam ipse habet*, meaning that an international creature cannot acquire more powers than its creators.⁷⁵ Hannah Yiu explains:

[A] further justification for *jus cogens* being a direct and autonomous legal limit on the [Security Council] comes from the fact that the [Security Council], despite its wide powers, has only those powers that have been conferred on it by the UN's Member States. The [Security Council] is a creation of the UN, created by the UN's Member States, all of whom are bound by *jus cogens* norms. It follows then that the [Security Council], as a creation of the UN, is also bound by *jus cogens* norms because an international creature cannot acquire more powers than its creators—*nemo plus iuris transferre potest quam ipse habet*.⁷⁶

E. *The Obligation to Respect Jus Cogens also Carries over to the Permanent Members*

It almost goes without saying that, if the Security Council as a whole is bound to respect *jus cogens*, which, as demonstrated

19 (2008) (emphasis omitted); see also JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 71 (2007) (“As [peremptory] norms are so essential [that they cannot be violated or derogated from], it can be argued that the Security Council is legally bound to respect them.”).

75. See Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371, 374 (2016).

76. Hannah Yiu, *Jus Cogens, the Veto and the Responsibility to Protect: A New Perspective*, 7 N.Z. Y.B. INT'L L. 207, 246 (2009) (citing August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 858 (2001)); Orakhelashvili, *supra* note 71, at 68 n.53 (“[S]tates cannot delegate to an international organization more powers than they themselves can exercise.”); *id.* at 79 (citing cases) (“The encroachment on *jus cogens* is clearly outside the Council's competence. It is established in national and international jurisprudence (although on a different matter than considered here) that conduct outlawed under *jus cogens* is outside the functions of states. Organizations established by states cannot be endowed with functions and powers which states themselves are not entitled to exercise.”).

above, it is,⁷⁷ then the permanent member states, which form a subset of the Council, similarly must be bound.⁷⁸ This proposition can be derived a number of ways.

First, under the logic of the *Tadić* case, discussed above, the ICTY held that the Security Council's "powers cannot . . . go beyond the limits of the jurisdiction of the Organization at large [the United Nations]."⁷⁹ Just as the Security Council, as an organ of the UN, cannot have powers greater than the United Nations, the same is true of individual permanent members.⁸⁰ They cannot have powers greater than those of the Council.⁸¹ Thus, if the Council is bound to respect *jus cogens*,⁸² so too are individual permanent members.

Second, while the permanent members have an exceptional power granted to them under the UN Charter—the veto power⁸³—they are nonetheless still "states" and, as such, subject to respect *jus cogens*.⁸⁴ Because *jus cogens* is "binding on *all subjects* of international law,"⁸⁵ no exception is made, even for

77. See discussion *supra* Part I.

78. Yiu, *supra* note 76.

79. 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).

80. Yiu, *supra* note 76.

81. See *id.* at 246–47.

82. See Orakhelashvili, *supra* note 71, at 68 ("Acts contrary to *jus cogens* are beyond the powers of an institution (*ultra vires*)."); Yiu, *supra* note 76, at 246 ("The [Security Council's] acts are subject to *jus cogens* in the same way that acts of any other international actor would be[.]").

83. U.N. Charter art. 27, ¶ 3 (explaining the veto power of permanent members as votes in the Security Council on non-procedural matters that "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members").

84. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 153 (Int'l Crim. Trib. for the former Yugoslavia Dec. 10, 1998) (emphasis added) ("The most conspicuous consequence of this higher rank [of *jus cogens*] is that *the principle at issue cannot be derogated from by States* through international treaties[.]"); see also HEIECK, *supra* note 43, at 202 ("[T]he Charter, like all other multilateral treaties, is subservient to *jus cogens*.").

85. HEIECK, *supra* note 43, at 189 (emphasis added) (citing Orakhelashvili, *supra* note 71, at 9, 423) ("Given their non-derogable character, *jus cogens* norms are . . . superior to all

permanent members of the Security Council.⁸⁶ The Dissenting Opinion of Judge Fitzmaurice in the *Namibia* case also supports this proposition. While Judge Fitzmaurice was writing on the topic of territorial sovereignty, he wrote: “This is a principle of international law that is well-established as any there can be,— and the Security Council is as much subject to it (for the United Nations is itself a subject of international) *as any of its individual Member States are.*”⁸⁷

Third, this conclusion can be reached under application of the principle *nemo plus iuris transferre potest quam ipse habet*—discussed above⁸⁸—that an international creature cannot acquire more powers than its creators.⁸⁹ If states cannot violate *jus cogens*, then the states that created the UN, and with it the existence of permanent members of the Security Council, necessarily cannot have granted to those members the power to violate *jus cogens*.⁹⁰

Fourth, this conclusion can be reached yet another way. Under UN Charter Article 24(1), UN Member States conferred on the Security Council “primary responsibility for the

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

86. See Orakhelashvili, *supra* note 71, at 69 (“The direct and immediate effect of *jus cogens* means that the Council’s acts are subject to it in the same way as the acts of any other actor.”); Hossain, *supra* note 43, at 78–79 (“States regard these rules [of *jus cogens*] as being so important to the international society of states and to how that society defines itself, such that they cannot conceive of an exception.”).
87. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 220 (June 21) (dissenting opinion by Fitzmaurice, J.).
88. Yiu, *supra* note 76 and accompanying text.
89. *Id.*
90. *Id.* at 246–47.

maintenance of international peace and security,” and agreed that “in carrying out its duties under this responsibility the Security Council *acts on their behalf*.”⁹¹ If the Security Council “acts on their behalf,” and UN Member States cannot violate *jus cogens*, then in “acting on their behalf” neither should the Security Council nor any of its members—including its permanent members—violate *jus cogens*.⁹²

Fifth, as will be discussed in the second half of this article, the Security Council’s powers are also limited by the UN’s Purposes and Principles,⁹³ which include in Article 1(1) respect for international law,⁹⁴ of which *jus cogens* forms a part. Accordingly, respect for *jus cogens* is also mandated by the UN Charter.⁹⁵

-
91. UN Charter, art. 24, ¶ 1 (emphasis added); *see also* Anne Peters, *The Security Council, Functions and Powers, Article 24*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY ¶¶ 45–46 (Bruno Simma et al. eds., 3d ed. 2012) (“The Security Council, being an organ of the United Nations, formally acts on behalf of that legal person and *not* on behalf of the members individually. The Charter’s term ‘on their behalf’ can best be understood as highlighting the fact that, despite the restricted membership of the Council, that body is supposed to act in the interests of *all* members [t]he . . . powers vested in the Council under the Charter are in the nature of a trust and a delegation *from the entire membership of the UN*.”).
92. Orakhelashvili, *supra* note 71, at 60, 68 (“If a relevant norm is peremptory, then states cannot derogate from it, establishing an organization with the power to act in disregard of *jus cogens*. Therefore, *jus cogens* is an inherent limitation on any organization’s powers As the International Law Commission (ILC) emphasized, states cannot escape the operation of *jus cogens*, particularly its invalidating power, through the establishment of an international organization.”).
93. *See* U.N. Charter art. 24, ¶ 2.
94. *Id.* art. 1, ¶ 1.
95. *See* Part II *infra*. While the notion of *jus cogens* was admittedly not well-developed in 1945, the concept did exist, so all Security Council and permanent member powers were already subject to this kind of inherent limitation when the Charter was signed. *See* Hossain, *supra* note 43, at 73 (“The doctrine of international *jus cogens* was developed under a strong influence of natural law concepts, which maintain that states cannot be absolutely free in establishing their contractual relations. States were obliged to respect certain fundamental principles deeply rooted in the international community.”).

F. *A Security Council Resolution in Conflict with Jus Cogens
Would Be Void*

Individual judges serving on the ICJ as well as numerous scholars make clear that a Security Council resolution in conflict with *jus cogens* would be void. While the actual mechanical act of voting might not be void, the resulting resolution would be.

This result is explained by Judge *ad hoc* Eli Lauterpacht in the *Application of the Genocide Convention* Case.⁹⁶ There, in a separate opinion, Judge Lauterpacht found that Security Council Resolution 713⁹⁷—which imposed an arms embargo on Bosnia-Herzegovina that inadvertently assisted the better-armed Serbia side—“can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.”⁹⁸ In addressing the legal consequences that flow from this analysis, Judge Lauterpacht considered one possibility to be that “when the operation of paragraph 6 of Security Council resolution 713 (1991) began to make Members of the United Nations accessories to genocide it ceased to be valid and binding in its operation against Bosnia-Herzegovina[,] and that Members of the United Nations then became free to disregard it.”⁹⁹ Thus, a Security Council resolution that caused states, even inadvertently, to assist genocide—an act contrary to *jus cogens*—would cease to be valid.

Judge de Castro, in the *Namibia* Advisory Opinion, reached a similar conclusion in his Separate Opinion that: “[t]he Court, as a legal organ, cannot co-operate with a [Security Council or General Assembly] resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law.”¹⁰⁰

96. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Monenegro)*, Order, 1993 I.C.J. 325, 407 (Sept. 13) (separate opinion by Lauterpacht, J.).

97. See generally S.C. Res. 713 (Sept. 25, 1991).

98. *Bosn. & Herz. v. Serb. & Montenegro*, 1993 I.C.J. ¶ 102 (separate opinion by Lauterpacht, J.).

99. *Id.* ¶ 103.

100. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security*

He thus implies that Security Council resolutions cannot be contrary to the Charter or principles of law, and that a defective resolution would be void. Judge Dugard also concludes in his Separate Opinion in the *Armed Activities* case that “States must deny recognition to a situation created by a serious breach of a peremptory norm.”¹⁰¹ This would again imply that a Security Council resolution should not be creating or recognizing a serious breach of a peremptory norm, i.e., the Security Council must respect *jus cogens*.

Kamrul Hossain also writes that violations of *jus cogens* limit the “absolute discretion of the Security Council,” and concludes that “the Security Council itself is also under an obligation to follow such legal principles,” otherwise it would be acting *ultra vires*.¹⁰² Additional scholars concur that the Security Council is unable in its resolutions to violate *jus cogens*.¹⁰³

Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 158, 168 (June 21) (separate opinion by de Castro, J.).

101. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, Judgment, 2006 I.C.J. 6, 86, ¶ 8 (Feb. 3) (separate opinion by Dugard, J.).

102. Hossain, *supra* note 43, at 97.

103. Alexander Orakhelashvili writes:

Since peremptory norms safeguard the community interest as opposed to individual state interests, they possess absolute validity; this is in contrast to the relative validity of ordinary or non-peremptory norms. . . . Their rationale consists in invalidating or *prevailing over incompatible acts and transactions* in order to ensure the paramount superiority of fundamental community values and interests. . . . [T]he Security Council must respect peremptory norms because the core values protected by *jus cogens* are not derogable or waivable in the sense of *jus dispositivum*. A Council resolution violating *jus cogens* would indeed be a derogation from *jus cogens*, as it would be an attempt to use the UN system for the establishment of a new legal regime through a resolution contrary to *jus cogens*.

Orakhelashvili, *supra* note 71, at 62–63 (emphasis added); *see also id.* at 88 (emphasis added) (“[O]ne should also bear in mind the special role of peremptory norms in the contemporary international legal system, and consider that the continuance in force of a Council resolution which is in conflict with *jus cogens* is nothing but the maintenance of a situation that is morally and ethically repugnant in the eyes of the international community.”); Stefano Congiu, *Jus Cogens: The History, Challenges and Hope of “A Giant*

G. *Application to Russia's Veto*

Let us return to the context of Russia's February 25, 2022 veto. As of that date, it appeared that a peremptory norm of international law was being violated¹⁰⁴—i.e., use of force contrary to the UN Charter—or that is the working assumption of this article. Additionally, the Security Council was prepared to address the situation through a resolution that had been co-sponsored by 81 UN Member States.¹⁰⁵ Specifically, in Security Council resolution S/RES/155 (2022)¹⁰⁶—which was vetoed¹⁰⁷—the Security Council would have:

Endors[ed] the Secretary-General's call for the Russian Federation to stop its offensive against Ukraine,

Condemn[ed] the 23 February 2022 declaration by the Russian Federation of a “special military operation” in Ukraine,

on Stills,” 7 PLYMOUTH L. & CRIM. JUST. REV. 47, 48 (2015) (“[*Jus cogens* binds the Security Council, with Judge Lauterpacht considering it ‘as a matter of simple hierarchy of norms,’ with *jus cogens* outranking a Security Council resolution.” (quoting *Bosn. & Herz. v. Serb. & Montenegro*, 1993 I.C.J. ¶ 100)); Akande, *supra* note 71, at 322 (reaching similar conclusion based on Judge Lauterpacht’s opinion: “*Jus cogens* norms are peremptory norms of international law and by definition they cannot be derogated from. They are overriding norms of the international legal order and they supersede all other norms. Any Security Council decision in conflict with a norm of *jus cogens* must necessarily be without effect.”); Doehring, *supra* note 71, at 108 (“Peremptory norms of international law cannot be set aside by resolutions of the Security Council; those resolutions cannot produce binding force upon the members of the United Nations.”).

104. See caveat *supra* notes 33–35 and accompanying text.

105. *S/2022/155: Overview*, SEC. COUNCIL REP. (Feb. 25, 2022), <https://www.securitycouncilreport.org/un-documents/document/s-2022-155.php> [<https://perma.cc/4LJL-EN3Q>].

106. See generally S.C. Res. S/2022/155, *supra* note 8.

107. Dag Hammarskjöld Library, Security Council Veto List, www.un.org/depts/dhl/resguide/scact_veto_table_en.htm [<https://perma.cc/KD9Q-V5LR>].

1. Reaffirm[ed] its commitment to the sovereignty, independence, unity, and territorial integrity of Ukraine within its internationally recognized borders;
2. Deplore[d] in the strongest terms the Russian Federation's aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter;
3. Decide[d] that the Russian Federation shall immediately cease its use of force against Ukraine and shall refrain from any further unlawful threat or use of force against any UN member state;
4. Decide[d] that the Russian Federation shall immediately, completely, and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders;
5. Deplore[d] the Russian Federation's 21 February 2022 decision related to the status of certain areas of [the] Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter of the United Nations; [and]
6. Decide[d] the Russian Federation shall immediately and unconditionally reverse the decision related to the status of certain areas of [the] Donetsk and Luhansk regions of Ukraine;
7. Call[ed] on the parties to abide by the Minsk agreements and to work constructively in relevant international frameworks, including in the Normandy Format and Trilateral Contact Group, towards their full implementation;
8. Call[ed] upon all parties to allow and facilitate the rapid, safe, and unhindered access of humanitarian assistance to those in need in Ukraine, to protect civilians, including humanitarian personnel and persons in vulnerable situations, including children;
9. Condemn[ed] all violations of international humanitarian law and violations and abuses of human rights, and call[ed] upon all parties to strictly respect the relevant provisions of international humanitarian law, including the Geneva

Conventions of 1949 and their Additional Protocols of 1977, as applicable, and to respect human rights;

10. Welcome[d] and urges the continued efforts by the Secretary-General, UN Member States, the Organization for Security and Cooperation in Europe, and other international and regional organizations, to support de-escalation of the current situation, and also the efforts of the United Nations to respond to the humanitarian and refugee crisis that the Russian Federation's aggression has created;

11. Decide[d] to remain actively seized of this matter.¹⁰⁸

By vetoing all these measures, Russia—which should not have been able to exercise its veto at all as the resolution was adopted under Chapter VI and not Chapter VII¹⁰⁹—helped facilitate the status quo, i.e., what appears to be a continuing *jus cogens* violation.

H. *Russia's Veto Is at Odds with the Obligations Reflected in the ILC's Articles of Responsibility of States for Internationally Wrongful Acts*

The ILC, in its Articles of Responsibility of States for Internationally Wrongful Acts,¹¹⁰ articulates the obligations states hold vis-à-vis *jus cogens*, i.e., when there is a serious breach of a peremptory norm of international law occurring.¹¹¹ Article 41 states that:

1. States shall cooperate to bring to an end through lawful means any serious breach [of a peremptory norm of international law] . . . [and]

108. S.C. Res. S/2022/155, *supra* note 8.

109. U.N. Charter art. 27, ¶ 3 (“[I]n decisions under Chapter VI, . . . a party to a dispute shall abstain from voting.”). This exclusion from voting applies to both elected and permanent members of the Council. Wouters and Ruys point out that the exclusion has been applied inconsistently. Jan Wouters & Tom Ruys, *Security Council Reform: A New Veto for a New Century?*, 9 ROYAL INST. FOR INT’L RELS. 5, 12–14 (2005).

110. *See generally* G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts (Jan. 28, 2002).

111. *Id.* arts. 26, 40–41.

2. 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.¹¹²

Article 40(2) of the ARSIWA specifies that “[a] breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.”¹¹³

ARSIWA Article 41 thus encompasses three related obligations: (1) states must cooperate to bring to an end serious breaches of peremptory norms of international law; (2) states must not recognize as lawful a situation created by a serious breach of a peremptory norm of international law; and (3) states must not to render aid or assistance in maintaining the situation.¹¹⁴

Through its veto, an argument can be made that Russia: (1) failed to cooperate to end its own serious breach¹¹⁵ of a peremptory norm of international law; (2) blocked other states serving on the Security Council from exercising their responsibility to cooperate to end a serious breach of a peremptory norm of international law;¹¹⁶ and (3) rendered aid and assistance in maintaining the situation where there is a serious breach of a peremptory norm of international law occurring.

While the ILC’s ARSIWA remain uncodified, international courts and tribunals have treated them as a source of international law on questions of state responsibility.¹¹⁷ For

112. *Id.* art. 41.

113. *Id.* art. 40, ¶ 2.

114. *Id.* art. 41.

115. It is inconceivable that Russia’s breach is not a serious one. *See* G.A. Res. ES-11/1, *supra* note 6 (“The military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and . . . urgent action is needed to save this generation from the scourge of war.”).

116. Russia’s veto stopped an affirmative vote by the Security Council, and therefore inhibited other states from being able to follow through to try to end a serious breach of a peremptory norm of international law.

117. James R. Crawford, *State Responsibility*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 65 (2006), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1093?prd=EPIL>; *see also* U.N. Secretary-

instance, the ARSIWA have been widely cited before and by the ICJ, including Article 41, which has been referred to at least twenty-three times.¹¹⁸ Thus, for example, the ICJ applied the obligations in Article 41 in the *Wall*¹¹⁹ and *Chagos*¹²⁰ Advisory Opinions, suggesting those obligations represent binding law. Judge Dugard in the *Armed Activities* case also plainly stated: “States must deny recognition to a situation created by the serious breach of a peremptory norm (Arts. 40 and 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts . . .).”¹²¹

Accordingly, while Russia’s invasion *also* constitutes, or appears to constitute,¹²² a direct violation of *jus cogens*, the purpose of this article is to examine whether Russia used its veto to further its own *jus cogens* violation contrary to obligations of

General, *Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies*, U.N. Doc. A/71/80/Add.1 (June 20, 2017) [hereinafter *Compilation of ARSIWA Decisions*].

118. *Compilation of ARSIWA Decisions*, *supra* note 117, at 6.
119. In the *Wall* Advisory Opinion, the ICJ applied Article 41 when it stated: “[A]ll States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 135, ¶ 159 (July 9).
120. After determining that “the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination . . .”—which it recognized as an *erga omnes* obligation—and that “. . . the United Kingdom’s continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State . . . ,” the ICJ held that “the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and that all Member State must co-operate with the United Nations to complete the decolonization of Mauritius.” *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, ¶¶ 177, 182 (Feb. 25).
121. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, Judgment, 2006 I.C.J. 6, 86, ¶ 8 (Feb. 3) (separate opinion by Dugard, J.).
122. See caveat *supra* notes 33–35 and accompanying text.

international law. Admittedly, it might be difficult to apply the author's conclusions to any one veto, particularly in a timely enough fashion to be useful,¹²³ as this might necessitate obtaining a ruling from the ICJ that there *is* a *jus cogens* violation occurring and that the veto in question helped aid or assist in maintaining the situation by furthering the status quo.¹²⁴ Yet, there is most definitely a legality problem with vetoes that block measures designed to stop or prevent *jus cogens* violations, as Russia's veto appears to have done.

III. AGGRESSION AND THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS

Another tension that existed when Russia cast its veto on February 25, 2022, was that, on that date, Russia was violating—or apparently violating, as none of these issues have yet been adjudicated¹²⁵—several provisions of the UN Charter.¹²⁶ Russia was simultaneously serving on the UN Security Council—the very body charged, under the Charter, with “primary responsibility for

123. The author has several ideas for states to operationalize these arguments; obtaining an ICJ opinion is one such idea. *See infra* note 124; *see also infra* notes 203–207 (discussing three approaches for this to occur: states taking up the arguments; the General Assembly passing a resolution; the General Assembly requesting an Advisory Opinion).

124. Because of this difficulty, the author, in her book, argues (*vis-à-vis* the crimes of genocide, war crimes, and crimes against humanity) that the General Assembly should request an Advisory Opinion from the ICJ on a question such as: does existing international law contain limitations on the use of the veto power by permanent members of the UN Security Council in situations whether there is ongoing genocide, crimes against humanity, and/or war crimes? TRAHAN, *supra* note 14, at 143. This could help clarify that a veto must not be used to further *jus cogens* violations and thereby could potentially start to change the voting behavior of the permanent members. While an Advisory Opinion is non-binding, Advisory Opinions are considered highly authoritative. *See* FARRALL, *supra* note 74, at 75 (“The Court may . . . pronounce on the Council’s powers under its advisory jurisdiction and its pronouncements [while advisory] would carry considerable weight as authoritative findings of law . . .”).

125. *See* caveat *supra* notes 33–35 and accompanying text.

126. *See* U.N. Charter arts. 1–2, especially art. 2 ¶ 4.

the maintenance of international peace and security”¹²⁷—while, through its veto, blocking the UN Security Council from being able to carry out its core mandate.¹²⁸ This raises the question whether veto use—created by Article 27(3) of the Charter¹²⁹—is above all other obligations under the UN Charter, and can be used freely to further continuing Charter violations, even when the violations are of the very Purposes and Principles of the UN. The second half of this article explores these tensions.

A. *The Security Council’s Powers Are Limited by the UN Charter, Including the Requirement of Acting in Accordance with the UN’s Purposes and Principles*

Just as international law provides some outer limits on the UN Security Council’s—and thereby permanent members’—powers, so too do the terms of the UN Charter. Various judges of the ICJ explain that the Council’s powers are constrained by the provisions of the UN Charter, and, particularly, are limited by the requirement of acting in accordance with the UN’s Purposes and Principles. The latter is also expressly stated in Article 24(2) of the Charter: “[i]n discharging [its] duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.”¹³⁰

Thus, in terms of adhering to the UN Charter, specifically related to Security Council and General Assembly voting, the ICJ in the *Conditions of Admission* Advisory Opinion¹³¹ explained:

The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitation on its powers or criteria for its judgment. To ascertain whether an organ has

127. *Id.* art. 24, ¶ 1. It is for that purposes that the Security Council is given its extraordinary powers under Chapter VII. *See id.* arts. 39–41.

128. *But see supra* note 13.

129. *See supra* note 19.

130. U.N. Charter art. 24, ¶ 2.

131. *See generally* *Conditions of Admission of a State to Membership in the United Nations* (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57 (May 28).

freedom of choice for its decisions, reference must be made to the terms of its constitution.¹³²

The ICTY Appeals Chamber in *Tadić* similarly affirmed that the Security Council is bound by the Charter:

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).¹³³

Additionally, Judge Jennings in his dissent in *Lockerbie*,¹³⁴ also relied upon above, made clear that the Security Council is subject to legal constraints, including those contained in the Charter. He wrote: “It is not logically possible to claim to represent the power and authority of the law and, at the same time, claim to be above the law. That this is true of the Security Council is clear from the terms of Article 24, paragraph 2, of the Charter”¹³⁵

As to the need to adhere to the UN’s Purposes and Principles, this was additionally affirmed in the *Namibia* Advisory

132. *Id.* at 64.

133. 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).

134. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Judgment, 1998 I.C.J. 3, 99 (Feb. 27) (dissenting opinion by Jennings, J.).

135. *Id.* at 110; see also Yiu, *supra* note 76, at 241 (summarizing these cases: “[t]he [Security Council] is not a sovereign body and its powers are conferred to it by the members of the UN through the medium of its constituent treaty, the UN Charter. It follows that as a creation of the UN, the [Security Council]’s powers are not unfettered and that it must operate within the parameters of UN Charter norms.”).

Opinion,¹³⁶ where the ICJ wrote that “the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. *The only limitations are the fundamental principles and purposes found in Chapter 1 of the Charter . . .*”¹³⁷ Judge Weeramantry, writing in dissent in the *Lockerbie* case, similarly wrote:

Article 24 itself offers us an immediate signpost to such a circumscribing boundary [on the powers of the Security Council] when it provides in Article 24(2) that the Security Council, in discharging its duties under Article 24(1) “*shall act in accordance with the Purposes and Principles of the United Nations.*” The duty is imperative and the limits are categorically stated.¹³⁸

Judge Lauterpacht also wrote in his separate opinion in the *Application of the Genocide Convention* case that one should not “overlook the significance of the provision in Article 24(2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accordance with the Purposes and Principles of the United Nations.”¹³⁹ Numerous scholars concur with this analysis.¹⁴⁰

136. *See generally* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

137. *Id.* at 52 (emphasis added).

138. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Order, 1992 I.C.J. 114, 160, 171 (Apr. 14) (dissenting opinion by Weeramantry, J.); Libya v. U.K., Order, 1992 I.C.J. 3, 50, 65 (Apr. 14) (dissenting opinion by Weeramantry, J.).

139. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Order, 1993 I.C.J. 325, 407, ¶ 101 (Sept. 13) (separate opinion by Lauterpacht, J.).

140. *See, e.g.*, Akande, *supra* note 71, at 316; Peters, *supra* note 71, at 31; Irmgard Marboe, *R2P and the Abusive Veto: The Legal Nature of R2P and Its Consequences for the Security Council and Its Members*, 16 AUSTRIAN REV. INT’L & EUR. L. 115, 125 (2011); Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SEC. L. 453, 470 (2013); Constantinides, *supra* note 71, at 2–3; Thomas M. Franck, *Comment, The “Powers of Appreciation”: Who Is the Ultimate*

This concept can additionally be seen in UN Charter Article 24(1), which provides that in carrying out its “primary responsibility for the maintenance of international peace and security,” “the Security Council acts *on the[] behalf*” of UN Member States.¹⁴¹ If UN Member States are bound by the Charter’s Purposes and Principles (as they are),¹⁴² then, the Security Council, in acting “*on the[] behalf*” of UN Member States is necessarily also bound.¹⁴³

Finally, the notion that the Security Council’s powers are limited by the UN’s Purposes and Principles is further reinforced by the fact that UN Charter Article 25 states that UN Member States agree “to accept and carry out” Security Council decisions “*in accordance with*” the Charter.¹⁴⁴ Thus, in the *Namibia* Advisory Opinion, the ICJ wrote that the Security Council resolutions under consideration were “adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25,” and “[t]he decisions [were] *consequently* binding on all States Member of the United Nations, which [were] thus under obligation to accept and carry them out.”¹⁴⁵

Guardian of the UN Legality?, 86 AM. J. INT’L L. 519, 523 (1992); Orakhelashvili, *supra* note 71, at 67; Doehring, *supra* note 71, at 97; Terry 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); ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 191 (2004).

141. U.N. Charter art. 24, ¶ 1 (emphasis added).
142. *Id.* 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).
143. *See also* Peters, *supra* note 71, at 35 (explaining this conclusion).
144. U.N. Charter art. 25 (emphasis added).
145. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 115 (June 21) (emphasis added). Scholars concur with this reading. *See, e.g.*, FARRALL, *supra* note 74, at 68–69; Orakhelashvili, *supra* note 71, at 67; Constantinides, *supra* note 71, at 2–3; Akande, *supra* note 71, at 335; Yiu, *supra* note 76, at 244; Jordan J. Paust, *U.N. Peace and Security Powers and Related Presidential Powers*, 26 GA. J. INT’L & COMPAR. L. 15, 15–16 (1996).

B. *The Permanent Members' Powers Are Limited by the UN Charter, Including the Requirement of Acting in Accordance with the UN's Purposes and Principles*

If the Security Council as a whole is mandated to act in accordance with the UN's Purposes and Principles, then so too are individual members of the Security Council, and therefore necessarily also permanent member states. This conclusion that permanent member states are bound, also explained in the author's book,¹⁴⁶ can be derived in a number of ways, some of which parallel arguments made in the first half of this article.

First, if the Security Council is bound, then a subset of the Security Council—its permanent members—cannot have greater power than the organ as a whole.¹⁴⁷ This argument is supported by the logic in *Tadić* (also relied on above) where the 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]."¹⁴⁸ Logically, if the Security Council's powers cannot go beyond the powers of the UN, then the powers of individual permanent members cannot exceed the powers of the Security Council.

Second, UN Member States are bound by the Purposes and Principles of the UN. Specifically, Article 2 states that "[t]he Organization *and its Members*, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles."¹⁴⁹ Thus, the permanent members are also bound by the UN's Purposes and Principles by virtue of the simple fact that they are also UN Member States.

Third, if UN Member States are bound by the Charter, they cannot have granted, nor did they purport to grant, *any* power to permanent member states to act beyond the Charter's terms.¹⁵⁰

146. TRAHAN, *supra* note 14, at 193.

147. *Id.* at 192.

148. 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).

149. U.N. Charter art. 2 (emphasis added).

150. See Yiu, *supra* note 76, at 246 ("The [Security Council], despite its wide powers, has only those powers that have been conferred on it by the UN's Member States."); DE WET, *supra* note 140, 189 n.46 ("The Charter can neither grant the Security Council more powers than the member states intended it to have, nor can it enable the

C. *The UN's Purposes and Principles*

Under the Charter, the UN's Purposes, defined in Article 1, include:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; . . . [and]
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . .¹⁵¹

The Charter's preamble additionally reminds us that one of the central purposes for the creation of the United Nations¹⁵²—which followed closely on the heels of World War II—was: “*to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow on mankind . . .*.”¹⁵³ With that in mind, the preamble states that countries “unite our strength to maintain international peace and security.”¹⁵⁴

Thus, the UN's Purposes encompass: (1) preventing and removing threats to the peace and suppressing acts of aggression; (2) acting in conformity with principles of justice and international law; (3) achieving international co-operation in

Security Council to do anything which the member states cannot do themselves.” (citing Gill, *supra* note 140, at 68)).

151. U.N. Charter art. 1, ¶¶ 1, 3.

152. For one account of the negotiations of the UN Charter, see OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

153. U.N. Charter pmbl. (emphasis added).

154. *Id.*

solving international problems of a humanitarian character; and (4) promoting and encouraging respect for human rights.¹⁵⁵

Additionally, the UN's Principles, defined in Article 2 of the Charter, include the following obligations:

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations¹⁵⁶

Thus, the UN's Principles encompass: (1) the obligation of good faith; (2) the obligation to settle disputes by peaceful means; and (3) the obligation to refrain from the threat or use of force contrary to Article 2(4).

D. *The Obligation to Adhere to the UN's Purposes and Principles Pertains to Veto Use*

Writing on the obligation of good faith, for example, various scholars agree that it extends to good faith in voting (which would include veto use). Relying on the *Conditions of Admission* Advisory Opinion, Anne Peters concludes that the obligation of good faith carries over to Security Council voting:

[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

155. *See id.* art. 1.

156. *Id.* art. 2, ¶¶ 2–4.

accordance with the Purposes and Principles of the Organization and in such a manner as not to involve any breach of the Charter.”¹⁵⁷

Robert Kolb, in Bruno Simma’s *Commentary* on the Charter, similarly writes:

Good faith . . . sets a limit to the admissible exercise of discretion. The principle forbade a State to make its vote dependent on conditions that were not inherently connected with the sense and purpose of the Charter provision to be applied. The fact that the rules are directed to a specific purpose provides a yardstick for deciding what is required by good faith in the individual case.¹⁵⁸

He continues: “The objective of a proper functioning of the Organization has also been claimed as a limit to the use of the right of veto. Good faith is in such a case the legal vector through which the abuse of the voting right could be sanctioned as being the expression of a policy alien and irreconcilable with the aims of the Organization.”¹⁵⁹ Hannah Yiu, writing on the crime of genocide, similarly concludes: “there is a strong argument that the permanent five should restrict their powers of veto in cases of genocide or suspected genocide so that the [Security Council] is acting in good faith towards the international community, in accordance with the Principles of the Charter.”¹⁶⁰

157. Peters, *supra* note 71, at 43–44 (emphasis added and omitted) (quoting Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, ¶¶ 21, 25 (May 28)); *see also* *Conditions of Admission*, 1948 I.C.J. at 67, 71 (separate opinion of Alvarez, J.) (“[T]he Security Council and the members of the General Assembly . . . must be guided solely by considerations of justice and good faith,” otherwise, there would be “an abuse of right which the Court must condemn[.]”).

158. Robert Kolb, *Purposes and Principles, Article 2(2), in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 98, ¶ 22 (Bruno Simma et al. eds., 2d ed. 2002).

159. *Id.* ¶ 23.

160. Yiu, *supra* note 76, at 247. Marboe also sees the principle of good faith as relevant to Security Council voting. Marboe, *supra* note 140, at 125 (footnotes omitted) (“All UN members, when participating in a political decision in the Security Council or in the General Assembly, are legally entitled to make their consent dependent on any political consideration. However, in the exercise

Andrew Carswell additionally concurs on the issue of good faith: “Reading [A]rticles 2(2), 24 and 1(1) collectively, we may deduce that the [permanent members] are obliged to discharge in good faith their responsibility for maintaining international peace and security. *Employment of the veto in a manner that does not coincide with this responsibility arguably amounts to a breach of the good faith requirement.*”¹⁶¹ Carswell reaches this conclusion based in part on a statement made in 1945 in San Francisco by four of the permanent members¹⁶² where they assured other states that the veto would not be used abusively.¹⁶³ They stated: “It is not to be assumed . . . that the permanent Members, any more than the non-permanent Members, would use their ‘veto’ power willfully to obstruct the operation of the Council.”¹⁶⁴ Noting also the obligation generally to act in good faith, Carswell concludes: “It was on this basis that the UN Charter was ultimately ratified.”¹⁶⁵

Scholars also take the view that veto use could constitute an “abuse of rights” (*abus de droit*)—which would be antithetical to satisfying the obligation of good faith. Andrew Carswell, for example, 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.”¹⁶⁶ He concludes:

employment of the veto can arguably be viewed as “abusive” in certain circumstances, even if [A]rticle 27(3) is

of this power, the member is bound to have regard to the principle of good faith.”).

161. Carswell, *supra* note 140, at 470 (emphasis added and omitted).
162. It was originally envisioned that there would be four permanent members—the US, UK, USSR, and China—with France later added. See *The Yalta Conference, 1945*, OFF. OF THE HISTORIAN, history.state.gov/milestones/1937-1945/yalta-conf [https://perma.cc/8FYF-EC67].
163. Carswell, *supra* note 140, at 471 n.72.
164. U.N. Conference on International Organization, *Statement at San Francisco by the Delegations of the Four Sponsoring Governments on the Voting Procedure in the Security Council*, U.N. Doc. S/Procedure/79 (June 7, 1945), quoted in Carswell, *supra* note 140, at 471.
165. Carswell, *supra* note 140, at 471.
166. *Id.*

not breached as such. If a permanent member exercises its veto in a bad-faith manner, legally constituting an abuse of the right contained in [A]rticle 27(3)—and consequently in violation of the responsibility conferred upon it by the international community on whose behalf it acts—it can be logically inferred that the Security Council is not “exercising [in the dispute or situation in question] the functions assigned to it in the present Charter.”¹⁶⁷

Anne Peters agrees, writing: “it seems possible to qualify the exercise of the veto in a [core crimes] situation as an *abus de droit*.”¹⁶⁸ Other scholars agree.¹⁶⁹ Various states have taken similar

167. *Id.* See also BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE 175 (1998) (concluding that use of the veto to prevent an amendment to the UN Charter for reasons of purely national interest would constitute an abuse of right).

168. Peters, *supra* note 71, at 39. She explains:

Members of the Security Council act as delegates of *all other* UN members, and as *trustees* of the international community. Due to this *triplement fonctionnel*, *their voting behaviour is subject to legal limits*. Their position as trustees prohibits them handling their participation rights in the collective body in an arbitrary fashion. As a minimum, the fiduciary obligation of the members of the Security Council brings with it an obligation to balance all relevant aspects. This means that the rule of law not only prohibits arbitrary decisions of the Security Council as a whole, as stated above, but should also govern the Council members’ votes approving or preventing arbitrary decisions.

Id. (emphasis added) (citing Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 82, ¶ 20 (May 28) (dissenting opinion of Basdevant, Winiarski, McNair & Read, JJ.) (“[T]he members of the Security Council . . . [act] on behalf of all the Members of the United Nations.”)); see also Georges A. J. Scelle, *Le phénomène juridique de dédoublement fonctionnel*, in RECHTSF RAGEN DER INTERNATIONALEN ORGANISATION 324 (Walter Schätzel & Hans Jürgen Schlochauer eds., 1956) (coining the phrase *dédoublement fonctionnel*).

169. See, e.g., Marboe, *supra* note 140, at 130 (“[A]lthough it may be the right of a [permanent member] to exercise the veto, its exercise in a concrete situation may be abusive.”); Yiu, *supra* note 76, at 244 (emphasis added) (“It is arguable that the use of the veto in a case of genocide in which intervention is clearly warranted and would otherwise have been authorized would be just such an *abuse*

positions in formal statements made at the UN that veto use can constitute an abuse of the veto power.¹⁷⁰

While the law discussed above focusses on the obligation of good faith (and its antithesis, the abuse of rights) contained as one of the UN's Principles in Article 2(2) of the Charter, the ICJ in its decisions discussed above makes clear that the Security Council's (and hence permanent members') power is limited by the UN's Purposes and Principles—suggesting *all* of the Purposes and Principles matter.¹⁷¹ Various sources, for example, also make clear that the obligation to respect human rights, one of the UN's Purposes, also limits Security Council power.¹⁷² Thus, neither in

of powers, in contravention of the Charter's Purposes and Principles, and thus unenforceable against member states.”).

170. U.N. SCOR, 73d Sess., 8228th mtg. at 5–6, UN Doc. S/P.V.8228 (Apr. 10, 2018) (UK's statement); U.N. SCOR, 73d Sess., 8164th mtg. at 5–6, UN Doc. S/P.V.8164 (Jan. 23, 2018) (UK's statement); U.N. SCOR, 73d Sess., 8262d mtg. at 47, 61, UN Doc. S/PV.8262 (May 17, 2018) (Mexico and Ukraine's statements).

171. *See* discussion *supra* Parts II.A–C.

172. At least two ICJ cases recognize that human rights violations violate the Purposes and Principles of the UN. Akande, *supra* note 71, at 324 (citing United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, 42 (May 24) (holding that “[w]rongfully to deprive human beings of their freedom and to subject them to physical constraints in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations[.]”); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 57 (June 21) (finding the “denial [by South Africa] of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.”)). Additional legal scholars similarly recognize that the Purposes of the UN mandate respect for human rights, and this requirement accordingly limits Security Council power. *See* Peters, *supra* note 71, at 17 (“The Security Council is bound at least by the ‘Purposes and Principles’ of the Charter (*cf.* Article 24(2) of the UN Charter), which include customary human rights law[.]”); Orakhelashvili, *supra* note 71, at 64 (“The Security Council can never be entitled to infringe upon human rights embodied in universal human rights instruments.”). Jordan Paust writes:

The first such limitation [on Security Council power] can be found in paragraph 2 of Article 24, which assures a constitutional limit on power when directing that the Council, in discharging its duties with respect to the maintenance of international peace and security, “shall act

its resolutions nor veto use by its permanent members should the Security Council be violating *any* of the UN's Purposes or Principles.

Furthermore, it does not appear to matter that the Security Council might be acting under Chapter VII. Article 24 expressly states:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.¹⁷³

Thus, the obligation to adhere to the UN's Purposes and Principles is specifically mentioned as applying *even when* the Security Council is discharging its Chapter VII powers and duties.¹⁷⁴

in accordance with the Purposes and Principles of the United Nations." As noted in Article 1 of the Charter, such Purposes and Principles include human rights Thus, the constituted authority of the Security Council is conditioned by the need to serve, among other goals, human rights

Paust, *supra* note 145, at 15–16; *see also* Akande, *supra* note 71, at 323 ("[I]t would be anachronistic if the Security Council, an organ of the United Nations, was itself empowered to violate human rights when the whole tenor of the Charter is to promote the protection of human rights by and in States."); *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on Jurisdiction, ¶ 29 (June 18, 1997) ("[T]he protection of International Human Rights is the responsibility of all United Nations organs, the Security Council included, without any limitation, in conformity with the UN Charter.").

173. U.N. Charter art. 24, ¶¶ 1–2.

174. Admittedly, the requirement of the Security Council's acting in accordance with international law, including *jus cogens*, is somewhat complex. There are times when the Security Council seems to be permitted to violate what would otherwise be required

E. *Application of the UN's Purposes and Principles to Russia's Veto*

Let us now return to Russia's veto cast on February 25, 2022¹⁷⁵ and how it measures up to the requirement of acting in accordance with the UN's Purposes and Principles.

On the date of its veto, Russia was violating—or a prima facie case exists that it appeared to be violating¹⁷⁶—numerous of the UN's Purposes and Principles. Specifically, Russia was, or

under international law. For example, its Chapter VII, Article 42 powers to implement forceful measures could otherwise be seen to violate the sovereignty of the country in question (and the prohibition against aggression), were they not expressly authorized under the Charter. U.N. Charter art. 42.

The requirement of acting in conformity with the principles of international law and *jus cogens* probably needs to be read in this light—that the Security Council cannot violate general principles of international law (for example, pass a discriminatory resolution), but certainly has the powers granted under the Charter. *See, e.g.*, Nico Krisch, *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Introduction to Chapter VII: The General Framework*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1259 (3rd ed. 2012) (citations omitted) (“Peremptory norms of international law are often regarded as a stricter limit on the [Security Council]. Many commentators have argued that these norms pose limits to Chapter VII powers since no international treaty, including the UN Charter, can derogate from them, and [Articles] 53 and 64 of the [VCLT] may seem to indicate such a result. The ICTY has followed this line, and several domestic and regional courts have adopted it with a particular view to human rights protections.”). Thus, even a Chapter VII force authorization would have limits such that *jus cogens* is respected—for example, the resolution could not violate “intransgressible” rules of International Humanitarian Law such as the need to respect distinction and proportionality, just as it could not authorize the commission of genocide. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) (“intransgressible” rules of International Humanitarian Law are peremptory norms); Paust, *supra* note 145, at 16 (emphasis added) (“[*Jus cogens* prohibitions, such as the prohibitions of aggressive force and genocide, should condition and limit U.N. peace and security powers. In particular, Security Council actions under Chapter VII of the Charter generally must not serve to encourage aggression and genocide. . . . To the extent that they do, Members should not be bound[.]”).

175. S.C. Res. S/2022/155, *supra* note 8..

176. See caveat *supra* text accompanying notes 33-35.

appeared to be, violating the first Purpose of the UN by failing to “maintain international peace and security.”¹⁷⁷ The day prior, forces of the Russian Federation launched a massive air and ground attack on the territory of Ukraine, also using the territory of Belarus as a launching ground for the invasion.¹⁷⁸ The attack was antithetical to maintaining “international peace and security.”

Through its invasion, Russia was additionally failing to act “in conformity with” the obligation to adhere to “international law,” also required by Article 1(1). Specifically, as demonstrated in Part I of this article, Russia was violating, or appeared to be violating, the *ius cogens* norm against aggression (use of force contrary to Article 2(4) of the UN Charter).¹⁷⁹

On the date of its veto, Russia was also violating, or appeared to be violating, the third Purposes of the UN, in that it was failing to “achieve international co-operation in solving international problems of [a] . . . humanitarian character.”¹⁸⁰ It was, in fact, in the process of creating a massive humanitarian crisis. Its bombardments eventually created massive refugee and IDP flows that resulted in the displacement of millions of individuals.¹⁸¹ The invasion also created the risk of mass famine in numerous

177. U.N. Charter art. 1, ¶ 1; *see, e.g.*, Farnaz Fassihi, *Russia Vetoes a U.N. Security Council Resolution Calling on it to Withdraw from Ukraine*, N.Y. TIMES (Feb. 25, 2022), www.nytimes.com/2022/02/25/world/europe/united-nations-russia-withdraw-ukraine.html [<https://perma.cc/XU9C-SL7N>].

178. Holly Ellyatt, *Russian Forces Invade Ukraine*, CNBC, www.cnn.com/2022/02/24/russian-forces-invade-ukraine.html (Feb. 24, 2022, 11:38 AM) [<https://perma.cc/ZLN9-A5Z5>]; Becky Sullivan, *Why Belarus Is So Involved in Russia's Invasion of Ukraine*, NPR (Mar. 11, 2022, 5:01 AM), www.npr.org/2022/03/11/1085548867/belarus-ukraine-russia-invasion-lukashenko-putin [<https://perma.cc/YJA2-NA5M>].

179. *See* discussion *supra* Part I.

180. U.N. Charter, art. 1, ¶ 3; *see, e.g.*, Ellyatt, *supra* note 178.

181. Jacob Roberts, *Four Numbers that Help to Illustrate the Ukrainian Refugee Crisis*, INT’L MED. CORPS UK, <https://internationalmedicorps.org/story/four-numbers-that-help-to-illustrate-the-ukrainian-refugee-crisis/> (“According to United Nations High Commissioner for Refugees (UNHCR), more than 8 million Ukrainians have fled the country, while 7.7 million have been forced from their homes and become internally displaced persons (IDPs) inside the country.”) [<https://perma.cc/3JYP-GJKA>].

additional countries due to Russia's blockade of Ukrainian Black Sea ports used to export wheat.¹⁸² Such behavior is antithetical to cooperation in solving international problems of a humanitarian character.

Through its military assault on Ukraine, including apparent targeting of civilians and civilian objects and many other suspected war crimes,¹⁸³ Russia was additionally failing in its obligation to promote and encourage respect for human rights.¹⁸⁴ Russia would eventually deprive large sections of the Ukrainian population of food, water, shelter, healthcare, education, and other fundamental human rights¹⁸⁵—including, most significantly, deprivation of the right to life.¹⁸⁶ Such conduct is the antithesis of respect for human rights.

On the date of its veto, Russia was additionally violating, or apparently violating, the second Principle of the UN—to act in good faith—in many ways, including breaching its ceasefire obligation under the Minsk Accords as well as the obligation under the Budapest Memorandum to respect Ukraine's territorial

-
182. Chloe Sorvino, *Grain Is Starting to Ship from Ukrainian Ports but It Might Be Too Late for Starving Millions*, FORBES (Aug. 10, 2022, 6:30 AM), <https://www.forbes.com/sites/chloesorvino/2022/08/10/grain-is-starting-to-ship-from-ukrainian-ports-but-it-might-be-too-late-for-starving-millions/?sh=73fb60d07cca> [<https://perma.cc/M4JF-Y67U>].
183. *See, e.g., Ukraine: Apparent War Crimes in Russia-Controlled Areas*, HUM. RTS. WATCH (April 3, 2022, 1:00 AM), <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas> [<https://perma.cc/QDQ2-SUPA>]; *Ukraine Reports 15,000 Suspected War Crimes*, BBC NEWS (May 31, 2022), <https://www.bbc.com/news/world-europe-61652467> [<https://perma.cc/QEF3-NADM>].
184. U.N. Charter, art. 1, ¶ 3.
185. ACAPS, UKRAINE: PATTERN OF MOVEMENT, PEOPLE'S NEEDS, AND RESPONSE 1–6 (2022).
186. Green, *supra* note 38, at 221 (“It is always worth remembering . . . that the use of military force usually involves the systematic killing of human beings, often on a vast scale.”); Ukraine: Civilian Casualty Update 22 August 2022, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Aug. 22, 2022), <https://www.ohchr.org/en/news/2022/08/ukraine-civilian-casualty-update-22-august-2022> (confirming that the civilian death toll in Ukraine as of August 21, 2022, is 5,587, with the actual toll thought to be significantly higher) [<https://perma.cc/J6DA-XE89>].

sovereignty.¹⁸⁷ Russia was also violating the third Principle of the UN—to settle disputes by peaceful means¹⁸⁸—and the fourth Principle of the UN—the core obligation in Article 2(4) of the UN Charter to refrain from the threat or use of force “against the territorial integrity or political independence of” Ukraine.¹⁸⁹

All told, through its veto, Russia was able to perpetuate the status quo—that is, its veto helped enable the continuation of each of these violations. The other members on the Council, or at least the nine necessary for Security Council action,¹⁹⁰ had a plan to address Russia’s aggression through a variety of measures detailed in draft Security Council resolution 155 (2022).¹⁹¹ By exercising the veto, Russia stopped the UN Security Council from being able to implement these measures. In fact, in recognition of the Security Council’s inability to exercise its primary responsibility for the maintenance of international peace and security, the Security Council took the fairly unusual step of

187. Under the Minsk Accords, Russia and Ukraine agreed, among other things, to a ceasefire in certain areas of the Donetsk and Luhansk regions of Ukraine; under the Budapest Memorandum, Russia, the UK, and the US recommitted to respect Ukraine’s territorial sovereignty and not to use force against its territorial integrity, when Russia and the US persuaded Ukraine to relinquish former Soviet nuclear weapons, turning them over to Russia. *See* S.C. Res. 2202, annex I (Feb. 17, 2015) (on the Package of Measures for the Implementation of the Minsk Agreements); Permanent Reps. of the Russian Federation, Ukraine, the U.K. and Northern Ireland and the U.S. to the U.N., Letter dated Dec. 7, 1994 from the Permanent Representative of the Russian Federation, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. A/49/765 (Dec. 19, 1994).

188. *See* U.N. Charter art. 2, ¶ 3.

189. *See supra* note 5 and accompanying text. As mentioned, if there were to be a case for state, or individual criminal, responsibility, whether or not there was an Article 2(4) violation would need to be adjudicated.

190. U.N. Charter art. 27, ¶ 2 (“Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.”); *S/2022/155: Overview, supra* note 105 (reporting that in the instant situation, there were 11 affirmative votes, with Russia vetoing and three members abstaining (China, India, and the United Arab Emirates)).

191. *See* S.C. Res. S/2022/155, *supra* note 8.

passing a Uniting for Peace resolution, thereby triggering an emergency special session of the General Assembly.¹⁹²

Thus, on the date of its veto, Russia, was failing to act in accordance with the UN's Purposes and Principles at two levels: (a) it was violating, or apparently violating, numerous of the UN's Purposes and Principles through its invasion of Ukraine, and (b) it was able to further (perpetuate and aid) these violations of the UN's Purposes and Principles by ensuring, through its veto, that no effective response came from the Security Council.

This use of the veto is all the more problematic because, as a permanent member of the UN Security Council, Russia is one of the countries carrying the heaviest burden to *maintain* international peace and security.¹⁹³ Specifically, it is one of the states authorized under the Charter to determine when there has been a "threat to the peace, breach of the peace or act of aggression,"¹⁹⁴ and given the responsibility of taking provisional, non-forceful, and/or forceful measures to maintain or restore international peace and security.¹⁹⁵ Through its veto, Russia was thus able to block the Security Council from carrying out its mandate to maintain international peace and security as it is charged with under the Charter.¹⁹⁶ Russia's veto additionally blocked the Security Council as well as other individual states serving on it, from being able to discharge their obligations in accordance with the UN's Purposes and Principles.¹⁹⁷

192. S.C. Res. 2623 (Feb. 27, 2022) ("Taking into account that the lack of unanimity of its permanent members at the 8979th meeting has prevented it from exercising its primary responsibility for the maintenance of international peace and security . . .").

193. *See* U.N. Charter art. 24.

194. *Id.* art. 39.

195. *Id.* arts. 39–42.

196. *See id.*

197. That is, states serving on the Council, and the Council as a whole, were: (1) unable to prevent and remove threats to the peace and suppress acts of aggression; (2) unable to act in conformity with principles of justice and international law; (3) unable to achieve international co-operation in solving international problems of a humanitarian character; and (4) unable to promote and encourage respect for human rights—as mandated by the UN's Purposes. They were also unable to settle disputes by peaceful means—as mandated by the UN's Principles. *See id.* arts. 1–2.

F. *Operationalizing These Legal Obligations*

It may be difficult to operationalize the legal obligations discussed in this article, yet an Advisory Opinion could be sought from the ICJ by the UN General Assembly.¹⁹⁸ It might, for example, inquire whether, on the date of the veto, Russia was acting in conformity with the UN's Purposes and Principles as well as *jus cogens*, as discussed above, and whether Russia's veto helped enable its continuing violations of the UN's Purposes and Principles, and *jus cogens*. The consequences of a veto that is not within Security Council/permanent member powers—one that is not in conformity with the UN's Purposes and Principles or obligations regarding *jus cogens*—is that it would be *ultra vires*, i.e., void.¹⁹⁹

198. U.N. Charter art. 96, ¶ 1. The ICJ is also empowered to receive requests for advisory opinions from the Security Council, although it is unlikely that there would be sufficient votes for such a request if it relates to veto use. *Id.*, art. 96, ¶ 2. Of the permanent members, only the UK has consented to the ICJ hearing contentious cases against it based on general jurisdiction—i.e., not based on a specific treaty that provides for such jurisdiction. See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. OF JUST., <https://www.icj-cij.org/en/declarations> [<https://perma.cc/7SME-PA52>]. The UK's acceptance, however, contains a number of exceptions that make it very difficult to state a case against it. *Declarations Recognizing the Jurisdiction of the Court as Compulsory: United Kingdom of Great Britain and Northern Ireland*, INT'L CT. OF JUST. (Feb. 22, 2017), <https://www.icj-cij.org/en/declarations/gb> [<https://perma.cc/DNY3-HYY7>].

199. In San Francisco, the US delegate to the Charter negotiations, referring to the Purposes and Principles under the Charter, stated that these “constituted the highest rules of conduct” “and if the Security Council violated its principles and purposes it would be acting *ultra vires*.” See Akande, *supra* note 71, at 319 (emphasis added) (quoting U.N. Conference on International Organization, *Thirteenth Meeting of Committee III*, 379, U.N. Doc. 555.III/1/27 (Vol. XI) (May 23, 1945)). See also Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Order, 1993 I.C.J. 325, 407, ¶¶ 100–04 (Sept. 13) (separate opinion by Lauterpacht, J.) (suggesting a Security Council resolution contrary to *jus cogens* would be void and UN Member States would be free to disregard it); HEIECK, *supra* note 43, at 188 (emphasis added) (“[W]hile a treaty, such as the UN Charter, may be valid on its face, the application of certain treaty provisions, such as the exercise of the [permanent members'] discretionary rights . . . to impose binding decisions through Security Council resolutions under Articles 41 and/or 42, and to vote for *or veto* such resolutions under Article 27(3), may be invalid

Before concluding, however, this article needs to articulate some caution about the advisability of pursuing these issues. International law operates in a very political arena. To some extent, during the Cold War, vetoes were simply used by the US and USSR to protect their own geopolitical interests,²⁰⁰ regardless of whether the UN's Purposes and Principles or obligations under international law were being violated. One response, however, is that bad behavior does not justify future bad behavior. Yet, admittedly, for the General Assembly to request an Advisory Opinion from the ICJ on the questions suggested above could appear openly adversarial to the Russian Federation if attempted related to the invasion of Ukraine. Even other permanent members might perceive the raising of these issues as an indirect threat to their veto power—which at least some permanent members apparently believe is completely unlimited.²⁰¹ Thus, such a route would need to be carefully considered, if the votes for obtaining an advisory opinion could even be obtained.²⁰²

if it conflicts with a *jus cogens* norm.”); Orakhelashvili, *supra* note 71, at 68 (“Acts contrary to *jus cogens* are beyond the powers of an institution (*ultra vires*).”); Yiu, *supra* note 76, at 233 (“In the event of [Security Council] refusal to relinquish the veto in [the face of genocide or suspected genocide], any such veto will be *ultra vires*.”); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6, 86, ¶ 8 (Feb. 3) (separate opinion by Dugard, J.) (“States must deny recognition to a situation created by a serious breach of a peremptory norm.”); DE WET, *supra* note 140, at 188 (“Where the execution of an obligation under the Charter such as a binding Security Council decision would result in a violation of a *jus cogens* norm, member states would be relieved from giving effect to the obligation in question.”); Hossain, *supra* note 43, at 97 (“The Security Council itself is . . . under an obligation to follow [*jus cogens*],” otherwise it would be acting “*ultra vires*.”).

200. See *UN to Debate Security Council Permanent Member Veto Power*, AL JAZEERA (Apr. 19, 2022), <https://www.aljazeera.com/news/2022/4/19/un-to-debate-security-council-permanent-member-veto-power> (explaining that since the first veto in 1946, Russia has exercised its veto 143 times, the United States 86 times, the United Kingdom 30 times, and China and France each 18 times) [<https://perma.cc/K7EM-KZKU>].

201. See *infra* text accompanying note 206.

202. The General Assembly votes by majority vote except for “important questions” which are by a two-thirds vote. U.N. Charter art. 18. While the permanent members technically have

A better starting point, one that would be far more neutral and apply to each of the permanent members, could be to seek an advisory opinion on whether veto use needs to be consistent with international law and obligations under the UN Charter.²⁰³ That could help rein in some of the permanent members' more abusive vetoes—particularly regarding the permanent members that fail to commit not to use their vetoes in the face of genocide, war crimes, and crime against humanity.²⁰⁴ Twenty years after voluntary veto restraint was suggested²⁰⁵—i.e., that the permanent members not use their veto in the face of such crimes—and with three holdout permanent members who show no indications of agreeing (the US, China, and Russia),²⁰⁶ the time is ripe to pursue some of these legal challenges. The passage of Liechtenstein's resolution, ultimately co-sponsored by 83 UN Member States, to have mandatory debate within the General Assembly as to any veto cast²⁰⁷ provides an excellent opportunity

only five votes within the UN General Assembly, their sway is far greater.

203. *See supra* note 124 (suggesting a formulation of a question from the General Assembly to the ICJ).
204. Two initiatives seek this commitment—the “French/Mexican initiative” and the “ACT Code of Conduct.” *See* Political Statement on the Suspension of the Veto in Case of Mass Atrocities, Presented by France and Mexico, 70th General Assembly of the United Nations [hereinafter French/Mexican initiative], https://onu.delegfrance.org/IMG/pdf/2015_08_07_ve_to_political_declaration_en.pdf [<https://perma.cc/HL5F-9YPJ>]; Christian Wenaweser (Permanent Rep. of Liechtenstein), Letter dated Dec. 14, 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, U.N. Doc. 70/621-S/2015/978, annex I (Dec. 14, 2015) [hereinafter ACT Code of Conduct].
205. Veto restraint is suggested in the initial report of the International Commission on Intervention and State Sovereignty, which first articulate the doctrine of the responsibility to protect (“R2P”). *See* INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 51 (2001).
206. The US, UK, China, and Russia have not signed the French/Mexican initiative. By contrast, France is a co-sponsor of the French/Mexican initiative and both the UK and France have signed the ACT Code of Conduct. French/Mexican Initiative Act, *supra* note 204; ACT Code of Conduct, *supra* note 204, annex II.
207. G.A. Res. 76/262 (Apr. 26, 2022) (“Standing mandate for a General Assembly debate when a veto is cast in the Security Council.”).

to discuss such legality issues and build momentum towards having the General Assembly request an Advisory Opinion. In the meanwhile, states should make statements at the UN and other appropriate fora questioning the legality of veto use that is inconsistent with obligations under the UN Charter and international law; they could also pursue obtaining a General Assembly resolution recognizing that international law and the UN's Purposes and Principles *do* provide outer limits to veto use.

IV. CONCLUSION

When the permanent members obtained the veto power in 1945, they were never granted unlimited power, because, as explored more extensively in the author's book,²⁰⁸ certain limitations necessarily exist when operating under the UN Charter system. These obligations include not violating the UN's Purposes and Principles or obligations of international law. The permanent members—whose status was created by the Charter—were never granted, nor could they be granted, the power to violate the UN's Purposes and Principles, or obligations of international law, such as respect for *jus cogens*. Furthermore, even in voting, the permanent members are necessarily subject to these constraints as they never received *any* power under the UN Charter that was exempt from the need to act in accordance with the UN's Purposes and Principles, and obligations of international law.

The permanent members admittedly have not been voting as if any such obligations exist—with some freely vetoing, or threatening to veto, in the face of genocide,²⁰⁹ and freely vetoing in the face of war crimes and crimes against humanity.²¹⁰ There most certainly are legality problems with such vetoes, as explained in detail in the author's book. Moreover, other states are certainly not acquiescing in such behavior, but rather vociferously denouncing such vetoes.²¹¹ One explanation of why

208. *See generally* TRAHAN, *supra* note 14, ch. 4, at 142–259.

209. *See* TRAHAN, *supra* note 14, at 302.

210. *See id.* at 262.

211. Compilations of the views of states can be found in *id.* at 201–206; *see also* Jennifer Trahan, *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*, 54 CASE W. RESV. J. INT'L L. 109, 117 n.39 (2022).

legal challenges have not yet been brought is that some relevant legal obligations have only been recently articulated by the ICJ; for example, the due diligence obligation that all states parties to the Genocide Convention owe to prevent genocide, was explained in detail only in 2007 in the *Bosnia v. Serbia* case.²¹² It is against such an updated understanding of international law that one must measure contemporaneous veto use.²¹³

Some of these same legality issues that arise related to vetoes in the face of genocide, crimes against humanity, and war crimes—the vetoes that are the subject of the voluntary veto restraint initiatives²¹⁴ and the author’s book—also arise with a veto cast in the face of aggression. This is particularly true where the other members on the Security Council have a plan—a draft resolution to try to respond and ameliorate the situation and it has attracted at least nine votes (the number required for the resolution to pass absent the veto). Just such a plan existed with the Security Council resolution vetoed on February 25, 2022, by Russia.²¹⁵ That veto in the face of aggression helped to enable the status quo, the continuation of aggression, because it blocked a whole host of measures that other Council members were otherwise willing to undertake. While a Uniting for Peace resolution was passed²¹⁶ and the matter of Russia’s invasion was taken up by the General Assembly, even with the Uniting for Peace resolution, the General Assembly does not possess the powers that the Security Council does under the UN Charter.²¹⁷ Thus, the veto blocked the organ with the compulsory Chapter

212. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. and Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 430 (Feb. 26). The obligation to prevent genocide and its implications for veto use are discussed in TRAHAN, *supra* note 14, at 209–242.

213. See *supra* note 30 and accompanying text.

214. See *supra* note 204 and accompanying text.

215. See S.C. Res. S/2022/155, *supra* note 8.

216. S.C. Res. 2623 (Feb. 27, 2022).

217. For a report on the General Assembly’s powers, see generally REBECCA BARBER, THE POWERS OF THE U.N. GENERAL ASSEMBLY TO PREVENT AND RESPOND TO ATROCITY CRIMES: A GUIDANCE DOCUMENT (2021).

VII tools for responding to threats to the peace, tools that the General Assembly lacks.²¹⁸

The other reason to consider the author's arguments about the legality of vetoes is that other avenues related to Security Council reform, at least regarding the veto, are pretty well exhausted. Because UN Charter amendments require the agreement of all permanent member states, one cannot modify or alter the veto power through a Charter amendment.²¹⁹ Furthermore, as mentioned, states have spent over 20 years seeking voluntary commitments to rein in some of the more abusive veto practices, but have received no commitment from three permanent members.²²⁰ While additional UN Member States may still join these initiatives, it is unlikely that any of those three permanent members—China, Russia and the US—will do so; thus, those initiatives are not stopping abusive vetoes. Nor does Liechtenstein's resolution, requiring mandatory debate within the General Assembly for each veto cast,²²¹ stop abusive vetoes; it is extremely useful, but only in casting a spotlight on veto use. It is therefore time to consider a different approach, one based on the rule of law, specifically, what existing international law has to say about veto use, particularly, veto use in the face of genocide, crimes against humanity, or war crimes (as advocated in the author's book), but potentially also veto use in the face of aggression.

The ICJ is the right court to examine these issues. It is specifically empowered to receive requests for advisory opinions from the General Assembly. Moreover, there is some reason for optimism about a favorable decision. ICJ decisions and individual judges have been quite clear that no body under international law is above *jus cogens* and that Security Council powers are constrained by the UN Charter, particularly the requirement of acting in accordance with the UN's Purposes and Principles. If a Security Council resolution may not violate *jus cogens* or the UN's Purpose and Principles—as case law establishes²²²—it is

218. See, e.g., U.N. Charter arts. 10-12.

219. U.N. Charter art. 108.

220. See *supra* notes 205–206 and accompanying text. The U.S. has recently articulated important commitments to rein in its veto use.

221. G.A. Res. 76/262, ¶ 1 (Apr. 26, 2022).

222. See discussion *supra* Parts I.D.–II.A.

simply not logically consistent that these violations may be furthered (perpetuated and aided) through veto use.