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Vetoes and the UN Charter: the obligation to act in accordance with the 'Purposes and Principles' of the United Nations

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ABSTRACT
This article examines the relationship of the veto power of the permanent members of the UN Security Council and the requirement in the UN Charter that the Council act in accordance with the 'Purposes and Principles' of the UN. The article analyses whether the use of the veto (a negative vote cast by a permanent member) is subject to this requirement, and concludes that it necessarily is – that all the powers of the permanent members are derived from the Charter and are therefore subject to it. The article specifically considers use of the veto in light of the requirement of acting 'in conformity with … principles of justice and international law', and the obligation to act in good faith. The final section examines the consequences of casting a veto not in accordance with such obligations, and how these issues could be positioned for adjudication before the International Court of Justice.

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KEYWORDS Veto; permanent members; Security Council; International Court of Justice; UN Charter; Purposes and Principles

1. Introduction

One might well question the use by a permanent member of the UN Security Council of its veto power to block a Security Council resolution attempting to respond to a situation involving atrocity crimes (genocide, crimes against humanity, and/or war crimes). A veto (and often even the threat thereof) brings progress on such a resolution to a complete halt. These resolutions may include a wide variety of actions available to the Security Council, including: mandating that the parties stop the commission of crimes or hostilities under Chapter VII of the Charter; levying sanctions on those responsible and their enablers; providing for the investigation of

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*This article focuses in depth on a portion of the analysis in the author's book, Jennifer Trahan, Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes (Cambridge University Press, 2020), and expands on that analysis. Specifically, sections 2–4 expand on the author's prior analysis, while section 5 contains largely new analysis.

crimes; securing humanitarian assistance; or referring the situation to the International Criminal Court (ICC) for investigation and/or prosecution. Yet, the veto has been progressively used to block Security Council action in such situations – including even the condemnation of crimes being committed. States have responded to this paralysis in our international peace and security architecture by endorsing 'voluntary veto restraint' – i.e. that the permanent members of the UN Security Council, as a voluntary matter, should refrain from utilising their veto when genocide, crimes against humanity, or war crimes are occurring, and/or that states should pledge not to vote against a 'credible draft resolution' before the Security Council to end the commission of, or to prevent, such crimes. That nearly two-thirds of UN member states have endorsed this approach speaks volumes to the existing widespread frustration with the *status quo ante*. Yet, with three permanent members (the Russian Federation, the People's Republic of China, and the United States) failing to endorse voluntary veto restraint, there is no veto restraint, even while atrocity crimes[1] are unfolding.

In examining the legal obligation created under the UN Charter for UN member states and the UN Security Council to act in accordance with the 'Purposes and Principles' of the United Nations, this article focuses particularly on the obligations in Article 1 of the Charter (the 'Purposes' of the UN). These include the obligations to act 'in conformity with … principles of justice and international law', to promote and encourage 'respect for human rights', and to work to 'achieve international co-operation in solving international problems of [a] … humanitarian character'.[2] It additionally focuses on the obligation in Article 2 of the Charter (the 'Principles' of the UN) to 'fulfil in good faith the obligations assumed … in accordance with the present Charter',[3] and not through an abuse of rights (*abus de droit*). It then examines whether these legal obligations carry over to veto use[4] by the permanent members, concluding that all the powers of permanent members derive from the Charter, and that these obligations therefore necessarily do carry over. The article concludes that veto use in the face of ongoing atrocity crimes, or when such crimes are at 'serious risk' of occurring,[5] appears to be inconsistent with the Charter's 'Purposes

[1]'Atrocity crimes' in this article means genocide, crimes against humanity, and/or war crimes.
[2]Charter of the United Nations (1945) 892 UNTS 119, Article 1 (hereinafter, UN Charter).
[3]UN Charter (n 2) Article 2.
[4]While this article focuses primarily on veto use, the threat of using the veto can work in an analogous fashion, bringing a resolution to a halt just as effectively as an actual veto.
[5]The ICJ in the *Bosnia v Serbia* judgment held that states have an obligation to 'prevent genocide' when there is a 'serious risk' of the crime occurring. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia and Montenegro)* (judgment) [2007] ICJ Rep 43, para 431 (the duty to act is triggered when 'the State learns of, or should normally have learned of, the existence of a *serious risk* that genocide will be committed') (emphasis added). While that holding pertains to the crime of genocide, there is no reason there should not be an analogous

and Principles'. The article additionally concludes that if there are such legality problems, then it should not be a *voluntary* matter whether to refrain from veto use in the face of atrocity crimes; rather, vetoes that fail to accord with the UN's 'Purposes and Principles' should be *ultra vires* of the proper exercise of Security Council power. Indeed, various states are raising these kinds of legality concerns related to vetoes, including the concern that veto use should not conflict with UN Charter obligations or other obligations under international law, and the article compiles various of these statements. The article lastly considers some practical steps going forward towards 'operationalising' the legal issues raised: whether a veto that conflicts with Charter obligations should be considered void or voidable; why the time is ripe for bringing a legal challenge to veto use in the face of atrocity crimes; how such a legal challenge might be brought before the International Court of Justice (ICJ), including options for an advisory opinion or contentious case; and a few thoughts on potential remedies.

2. The obligation in the UN Charter to act in accordance with the 'Purposes and Principles' of the United Nations

The first two articles of the UN Charter articulate the 'Purposes' and 'Principles' of the United Nations.

2.1. The 'Purposes' of the United Nations

The Charter's 'Purposes' 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 … .[6]

approach regarding war crimes and crimes against humanity. That is, states should attempt to prevent those crimes when they are at 'serious risk' of occurring; if one waits until the crimes fully manifest, prevention comes too late. See, e.g. Marko Milanović, 'State Responsibility for Genocide' (2006) 17 (3) *European Journal of International Law* 553, 571 ('States have a duty to prevent and punish genocide in exactly the same way as they have to prevent and punish crimes against humanity or other massive human rights violations').

[6]UN Charter (n 2) Article 1(1), 1(3) (emphasis added).

The most persuasive reading of paragraph 1 – and one based on analysis of *travaux préparatoires* and ICJ decisions – is that the obligation to act 'in conformity with the principles of justice and international law' applies to both peaceful settlement of disputes (as is clear from the text) as well as situations where the Security Council is working to maintain international peace and security.[7]

This reading is reinforced by Judge Weeramantry, who, in the ICJ's *Lockerbie* case, wrote: 'The history of the United Nations Charter … corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers *must be exercised in accordance with the well-established principles of international law*'.[8] Judge Fitzmaurice (dissenting) in the *Namibia* advisory opinion similarly concluded that 'the Security Council is as much subject to [international law] … as any of its individual member States are, [just as] the United Nations is itself a subject of international law … '.[9]

Scholars concurring with this analysis include Anne Peters, who writes: 'the traditional view of Security Council actions in a basically law-free realm is no longer tenable. The rule of law also governs decisions of the Security Council'.[10] She further explains: 'the Security Council under current international law enjoys discretion, but this discretion is not unfettered. Discretion, as a legal and even constitutional concept, is *per*

[7]See 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' (1997) 46 *International & Comparative Law Quarterly* 309, 320 ('Though … debate [at San Francisco during the Charter negotiations] was not conclusive it demonstrates that when the question of limitation of the enforcement powers of the Security Council was raised it was assumed that they were … limited by the principles of international law') (analysing ICJ decisions). Prince Zeid Ra'ad Zeid Al-Hussein (then representing Jordan) in a statement to the Security Council explained the drafting history: 'That last phrase "and in conformity with the principles of justice and international law" was inserted by Senator Arthur Vandenberg of the United States, on 2 May 1945, and accepted immediately by the "Big Four", and, subsequently, by the rest of the representatives in San Francisco, without argument and by consensus': UNSC Verbatim Record, UN Doc S/PV.6672 (30 November 2011) 22. An alternative and also persuasive approach (which also supports the author's conclusions) is that at least certain obligations of international law—such as *jus cogens* the 'Purpose and Principles' of the Charter (including the obligation of good faith), respect for fundamental human rights, and respect for basic norms of international humanitarian law at minimum—apply to the Security Council even when using its Chapter VII enforcement power. See Erica de Wet, *The Chapter VII Powers of the United Nations Security Council* (London Bloomsbury Publishing, 2004) 187, 191, 195, 198, 204. See also 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' (1995) 26 *Netherlands Yearbook of International Law* 33.

[8]*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (provisional measures) [1992] ICJ Rep 3, 65 (Judge Weeramantry) (hereinafter, *Lockerbie (Libya v UK)* (provisional measures)) (emphasis added); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (provisional measures) [1992] ICJ Rep 114, 175 (Judge Weeramantry) (hereinafter, *Lockerbie (Libya v US)* (provisional measures)) (emphasis added).

[9]*Legal Consequences for States of the Continued Presence of South Africa in Namibia* (advisory opinion) [1971] ICJ Rep 16, para 115 (Judge Fitzmaurice).

[10]Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) *European Journal of International Law* 513, 538.

definitionem subject to some outer limits'.[11] Theresa Reinold sees demand that the Security Council act according to the rule of law: 'the global normative climate has certainly changed over the past two decades, and a normative expectation has begun to emerge that not only the UN Security Council, but international organisations more generally, abide by the rule of law standards that they seek to promote in member-states'.[12] Hannah Yiu writes that 'the UN has a legal personality as unequivocally confirmed by the [ICJ in the *Reparations for Injuries Suffered in the Service of the United Nations* advisory opinion], and [concludes that] … the [Security Council] is "subject to" international law because it is a creation of the UN, which is itself a "subject of" international law'.[13]

Thus, the UN's 'Purposes' require acting in 'conformity with … principles of justice and international law', 'promoting and encouraging respect for human rights',[14] and 'co-operating in solving international problems of [a] … humanitarian character'.

2.2. The 'Principle' of the United Nations requiring acting in 'good faith'

Article 2 of the Charter additionally sets forth certain 'Principles', including the principle of 'good faith'. 'Good faith manifests itself as … a principle referring to honesty, loyalty and reasonableness[;] it guarantees the prohibition of the abuse of power … '[15] 'Depending on the exact setting, good faith may require an honest belief or purpose, faithful performance of duties, observance of fair dealing standards, or an absence of fraudulent intent'.[16]

[11] Anne Peters, 'The Security Council's Responsibility to Protect' (2011) 8 *International Organizations Law Review* 15, 31, 43–44.

[12] Theresa Reinold, 'The Responsibility Not to Veto, Secondary Rules, and the Rule of Law' (2014) 6 *Global Responsibility to Protect* 269, 283. The contrary view is that the Security Council is not subject to law, particularly in the exercise of its Chapter VII powers, but this view is also somewhat a political one, propounded by permanent member states seeking to 'protect' their unfettered power, and should be understood in that context.

[13] Hannah Yiu, '*Jus Cogens*, the Veto and the Responsibility to Protect: A New Approach' (2009) 7 *New Zealand Yearbook of International Law* 207, 247, citing *Reparations for Injuries Suffered in the Service of the United Nations* (advisory opinion) [1949] ICJ Rep 174, 179.

[14] The importance of human rights is additionally affirmed in the Charter's preamble, and Articles 55 and 56. See UN Charter (n 2) preamble (determined 'to reaffirm faith in fundamental human rights'), Article 55(c) (obligation of the UN to promote 'universal respect for, and observance of, human rights'); Article 56 ('[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for achievement of the purposes set forth in Article 55'). Genocide, crimes against humanity, and war crimes are 'the gravest and most extreme violation of human rights': Task Force on the EU Prevention of Mass Atrocities, 'The EU and the Prevention of Mass Atrocities: An Assessment of Strengths and Weaknesses' (Report, 2013) 21.

[15] Talya Uçaryılmaz, *The Principle of Good Faith in Public International Law* (Oxford Institute of European and Comparative Law, 2019) 1.

[16] Cornell Law School, 'Legal Information Institute', www.law.cornell.edu/wex/good_faith (accessed 26 March 2022). 'Whether in general international law or in the law of treaties, good faith acts as a limitation. The limitations that the observation of good faith places on States regulate the performance of

Specifically, Article 2(2) requires that '[a]ll Members … *shall fulfil in good faith* the obligations assumed by them in accordance with the present Charter'.[17] Good faith is additionally required under general principles of international law, which recognise a duty to perform a treaty in good faith,[18] a duty to interpret a treaty in good faith,[19] and a duty to negotiate in good faith.[20]

The UN Charter, while a treaty *par excellence* and the constitutive instrument of the UN system, is nonetheless still a treaty and is thus subject to these requirements.[21] Accordingly, there is a duty to perform the obligations under the UN Charter in good faith,[22] a duty to interpret the UN Charter in good faith,[23] and it follows that there is also an obligation to negotiate Security Council resolutions in good faith.[24] As Hannah Yiu writes:

> [I]t would be detrimental to the collective security system established by the Charter if the [Security Council]'s powers were not bound by good faith. As the [Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY)] put it in the *Tadić* case:
>
> > It is a matter of logic that if the Security Council acted arbitrarily or for an ulterior purpose [i.e. without good faith] it would be acting outside the purview of the powers delegated to it in the Charter.[25]

rights and obligations in international discourse': Steven Reinhold, 'Good Faith in International Law' (2013) 2 *UCL Journal of Law and Jurisprudence* 40, 63.

[17] UN Charter (n 2) Article 2(2) (emphasis added).

[18] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, Article 26 (hereinafter, VCLT) ('Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.); Andreas R Ziegler and Jorun Baumgartner, 'Good Faith as a General Principle of (International) Law', in Andrew D Mitchell, Muthucumaraswamy Sornarajah, and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford University Press, 2015) 9, 11 ('having ratified the treaty, [there is a duty] to perform it in good faith and not to frustrate its object and purpose'); *Gabčíkovo-Nagymaros Project (Hungary-Slovakia)* (judgment) [1997] ICJ Rep 7, 78–9 ('The principles of good faith obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized').

[19] VCLT (n 18) Article 31.

[20] Ziegler and Baumgartner (n 18) 19 ('The rule of [*pacta sunt servanda*], as the Permanent Court of International Justice (PCIJ) and the ICJ have often confirmed entails a duty to negotiate in good faith') (citing cases).

[21] Blaine Sloan, 'The United Nations Charter as a Constitution' (1989) 1 *Pace Yearbook of International Law* 61 ('The Charter of the United Nations is a multilateral convention to which all members of the Organization are parties. In other words, the Charter is a treaty and consequently one will look to the [VCLT] for guidance in its interpretation').

[22] See UNGA Res 2625 (XXV), UN Doc A/RES/2625 (24 October 1970) ('Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations'); *Nuclear Tests (Australia v France)* (judgment) [1974] ICJ Rep 254, 268, para 46 ('One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith').

[23] VCLT (n 18) Article 31; Sloan (n 21).

[24] See n 20.

[25] Yiu (n 13) 244. The citation is from *Prosecutor v Tadić* (Decision on the Defence Motion on Jurisdiction) ICTY IT-94-1, T Ch [10 August 1995], para 15.

3. The obligation to act in accordance with the 'Purposes and Principles' of the United Nations applies to the Security Council as a whole and to individual permanent members

3.1. The Security Council as a whole is bound by the UN's 'Purposes and Principles'

Pursuant to Article 24(2), the Security Council is mandated to act in accordance with the 'Purposes and Principles' of the United Nations. Specifically, Article 24(2) states that '[i]n discharging [its] duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations'.[26]

This requirement is reflected in judicial decisions, including: the ICJ in the advisory opinion in *Conditions of Admission of a State to Membership in the United Nations*,[27] the ICTY Appeals Chamber in the *Tadić* case,[28] and Judge Jennings (in dissent) in the *Lockerbie* case.[29] Thus, referring to Security Council and General Assembly voting under the Charter, the ICJ in the *Conditions of Admission* advisory opinion explained:

> The political character of an organ 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 freedom of choice for its decisions, reference must be made to the terms of its constitution.[30]

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).[31]

[26] UN Charter (n 2) Article 24(2).
[27] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (advisory opinion) [1948] ICJ Rep 57.
[28] *Tadić* (n 25).
[29] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (judgment) [1998] ICJ Rep 9, 110 (Judge Jennings).
[30] *Conditions of Admission* (advisory opinion) (n 27) 64.
[31] *Tadić* (n 25) para 28.

Judge Jennings in his dissent in *Lockerbie* additionally made clear that the Security Council is subject to legal constraints, including those contained in the Charter:

> The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows from 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 the law. That this is true of the Security Council is clear from the terms of Article 24, paragraph 2, of the Charter … .[32]

One scholar summarises these cases as follows:

> [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.[33]

Additionally, that the Council's powers are limited by Article 24(2) to those in accordance with the UN's 'Purposes and Principles' is recognised, for example, by the ICJ as a whole in the *Namibia* advisory opinion,[34] by Judge Weeramantry in dissent in the *Lockerbie* case,[35] and by Judge Lauterpacht in his separate opinion in the *Application of the Genocide Convention* case.[36] Thus, in the *Namibia* advisory opinion, 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* … .[37]

Judge Weeramantry in *Lockerbie* 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.[38]

[32] See n 29.
[33] Yiu (n 13) 241, citing Akande (n 7) 315.
[34] *Namibia* (advisory opinion) (n 9).
[35] *Lockerbie (Libya v UK)* (provisional measures) (n 8) 61 (Judge Weeramantry).
[36] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Yugoslavia (Serbia and Montenegro)* (provisional measures) [September 1993] ICJ Rep 325, 440, para 101 (Judge ad hoc Lauterpacht).
[37] *Namibia* (advisory opinion) (n 9) 51–2 (emphasis added).
[38] *Lockerbie (Libya v UK)* (provisional measures) (n 8) 61 (Judge Weeramantry) (emphasis added by Judge Weeramantry).

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'.[39] Numerous scholars concur.[40]

Prince Zeid Ra'ad Zeid Al-Hussein (while serving as Jordan's Permanent Representative to the United Nations), summarised this obligation in a statement to the Security Council:

> The Security Council derives its rights and obligations from the United Nations Charter. Its functions and powers are spelled out broadly in Article 24 of the Charter, including, inter alia, its primary responsibility for the maintenance of international peace and security and its obligation to act in accordance with the purposes and principles of the United Nations Charter in the discharge of its functions … .
>
> Article 24, paragraph 2, states:
>
> 'In discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations'.
>
> It reads 'shall act'. It does not read may act, or should act. It reads 'shall act'. In other words, there is no discretion here. What we find instead is an obligation.[41]

This concept can additionally be seen in 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

[39]See n 36.

[40]See, e.g. Akande (n 7) 316; Peters (n 10) 538 ('Recent state practice and case law on UN sanctions which risk infringing human rights have made clear that the Security Council is bound at least by customary human rights law and by the "Principles" of the Charter (cf. Article 24(2) of the UN Charter)'); Irmgard Marboe, 'R2P and the Abusive Veto – The Legal Nature of R2P and its Consequences for the Security Council and its Members' (2011) 16 *Austrian Review of International and European Law* 115, 125 ('One important limitation [to Security Council power] is already contained in Article 24 itself, which provides that "the Security Council shall act in accordance with the Purposes and Principles of the United Nations". This already marks the outer limits of the discretion of the Security Council') (footnote omitted); Andrew J Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18 *Journal of Conflict and Security Law* 453, 470; Aristotle Constantinides, 'An Overview of Legal Restraints on Security Council Chapter VII Action with a Focus on Post-Conflict Iraq' (*presented at European Society of International Law, Inaugural Conference, Florence, 2004*) 2–3; Thomas M Franck, 'The "Powers of Appreciation": Who is the Ultimate Guardian of the UN Legality?' (1992) 86 *American Journal of International Law* 519, 520, 523; Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16(1) *European Journal of International Law* 59, 61; Karl Doehring, 'Unlawful Resolutions of the Security Council and Their Legal Consequences' (1997) 11 *Max Planck Yearbook of UN Law* 91, 108; 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' (1995) 26 *Netherlands Yearbook of International Law* 33, 41; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004) 191.

[41]UN Doc S/PV.6672 (n 7) 21–2.

states.[42] If UN member states are bound by the Charter's 'Purposes and Principles' (as they are),[43] then, the Security Council, in acting 'on the[] behalf' of UN member states is necessarily also bound. Anne Peters explains:

> 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. "[O]n 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.[44]

Finally, 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.[45] 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'.[46] Scholars concur with this reading.[47]

3.2. Individual permanent member states are also bound by 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 individual permanent member states are necessarily also bound. This conclusion, as also explained in the author's book,[48] can be derived in a number of ways.

First, if the Security Council as a whole is bound, then a subset of the Security Council (its permanent members) necessarily is, as a subset of an organ cannot have greater power than the organ as a whole. This argument is supported by the logic in *Tadić*, where the ICTY Appeals Chamber

[42] UN Charter (n 2) Article 24(1) (emphasis added).
[43] *Ibid*, Article 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).
[44] Anne Peters, 'The Security Council, Functions and Powers, Article 24' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2012) vol I, 776, para 45; see also *ibid*, para 46 ('"The 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*". From that perspective, the members should be allowed to claim "a right of supervision on how this responsibility is exercised on their behalf"') (citations omitted).
[45] See UN Charter (n 2) Article 25 (emphasis added).
[46] *Namibia* (advisory opinion) (n 9) para 115 (emphasis added).
[47] See, e.g. Jeremy M Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007) 68–9; Orakhelashvili (n 40) 67; Constantinides (n 40) 2–3; Akande (n 7) 335; Jordan J Paust, 'U.N. Peace and Security Powers and Related Presidential Powers' (1996) 26 *Georgia Journal of International and Comparative Law* 15, 16; Yiu (n 13) 244.
[48] Trahan (n *) chap 4.2.2.2.

recognised that the Security Council's 'powers cannot … go beyond the limits of the jurisdiction of the Organization at large [the United Nations]'.[49] Logically, if the Security Council's powers cannot go beyond the powers of its parent body, the powers of individual permanent members cannot exceed the powers of the Security Council.

Put differently, UN member states are bound by the 'Purposes and Principles' of the Charter. 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'.[50] As a consequence, UN member states cannot have granted power beyond that to the Security Council because it would exceed their own power. As Hannah Yiu explains, this result is required by the Latin maxim *nemo plus iuris transferre potest quam ipse habet* – i.e. an international creature cannot acquire more powers than its creators.[51] As Erica de Wet also explains, the status of being a permanent member was conferred by UN member states that cannot have conferred a power greater than they possessed[52] – they cannot have granted (nor did they purport to grant) power for Security Council permanent members to violate, or act beyond, the Charter's 'Purposes and Principles'.

Finally, individual permanent member states are additionally required to act in accordance with the Charter's 'Purposes and Principles' for the simple reason that the permanent members are UN member states, and UN member states must act in accordance with the Charter's 'Purposes and Principles'.[53]

Thus, individual permanent member states are bound by the UN's 'Purposes and Principles' for two reasons: (1) they are a part of the Security Council, which is bound, and (2) because they are UN member states, which are also bound. Bruno Stagno Ugarte, formerly Minister of Foreign Affairs of Costa Rica, appropriately concludes:

> [P]ermanent members [must] abide by the obligation to act in conformity with the purposes and principles of the Charter. More specifically, [they must]

[49] *Tadić* (n 25) para 28.
[50] UN Charter (n 2) Article 2 (emphasis added).
[51] Yiu (n 13) 236, 246 (using the argument to explain why the Security Council is bound by *jus cogens*), citing August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* 851, 858, and citing Eike Duckwitz, 'The Doctrine of *Jus Cogens* as a Limit on the Power of the United Nations' Security Council' (Master's Thesis, University of Auckland, 2009) 28–30; Orakhelashvili (n 40) 68 (n 53) ('States cannot delegate to an international organization more powers than they themselves can exercise'). See also de Wet (n 7) 189 ('states cannot confer more powers to organs of international organisations than they can exercise themselves').
[52] De Wet (n 7) 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 Security Council to do anything which the member states cannot do themselves'); Gill (n 7) 68; Yiu (n 13) 246 ('The [Security Council], despite its wide powers, has only those powers that have been conferred on it by the UN's Member States').
[53] See text accompanying n 50.

> adhere to Article 24 of the Charter, in which member states confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that the council acts on their behalf, in the understanding that the Council shall act in accordance with the purposes and principles of the UN.[54]

4. Veto use must accord with the 'Purposes and Principles' of the United Nations

The next question is whether *veto use* would also need to accord with the 'Purposes and Principles' of the UN. The answer, as also explained in the author's book,[55] must necessarily be in the affirmative.

4.1. Veto limits in the face of atrocity crimes

Veto use, while it results in inaction of the Security Council as a whole, is an 'action' by one of the permanent members, in that the veto (a negative vote) needs affirmatively to be cast by a permanent member. As permanent members (the status of which is created by the UN Charter) have no power beyond what the Charter grants them (as demonstrated previously), necessarily, *all their actions* need to be in accordance with the UN's 'Purposes and Principles'. There is nothing within the Charter that excludes voting or veto use from the requirement of adherence to the UN's 'Purposes and Principles'.

Continental scholars sometimes argue that voting is just a preliminary (and therefore somehow law-free) act which will then flow into the actual veto, and thus not subject to the requirement of acting in accordance with the UN's 'Purposes and Principles'.[56] Yet, nothing in the Charter's text supports this position. As noted, *all* of the power that permanent members have as members of the Security Council were granted by the UN Charter. Necessarily, *any* actions they take – whether precatory, preliminary, or otherwise – must accord with the Charter's terms, including adherence to the UN's 'Purposes and Principles'. It defies logic that acting within the UN's 'Purposes and Principles' would include vetoes that block action to prevent or stop atrocity crimes.

Theresa Reinold explains:

> Jordan's Ambassador to the UN [Zeid Ra'ad Al Hussein], for instance, argued that that there is a legal case to be made that the UN Charter itself places limits

[54]Bruno Stagno Ugarte, 'Regulating the Use of Veto at the UN Security Council in Case of Mass Atrocities' (21 January 2015) *Sciences Po*.
[55]See Trahan (n *) chap 4.2.
[56]Trahan conversation with Anne Peters (10 March 2021). See also Evelyne Lagrange, *La representation institutionelle dans l'ordre international* (Kluwer Law International, 2002) 326–7 (specifically on the abuse of the veto).

> on the rights of the Council's permanent members to veto action aimed at preventing mass killings. He maintained that while according to the Charter the Council bears primary responsibility for the maintenance of international peace and security, the Charter also requires that Council decisions be made in 'conformity with the principle of justice and international law'. Genocide and mass slaughter, he continued, are certainly not in conformity with those principles.[57]

Zeid explained in a statement to the Security Council:

> If … the use or threat of use of a veto by a permanent member prevents the Council, by virtue of the majority required in Article 27, paragraph 3, from acting to deter, prevent or dismantle alleged serious violations of the sort that not only threaten international peace and security, but also create an obligation *erga omnes* on all Member States to address it, the question arises as to whether that exercise by one permanent member subverts the Council's ability to fulfil its responsibilities under Article 24 and to uphold the principles of justice and international law, in accordance with Article 1, paragraph 1.[58]

He concludes: 'The veto does have an important role. But that role should now be reconciled with Articles 24(2) and 1(1) – Articles that should no longer simply be overlooked'.[59]

The Canadian Ambassador to the United Nations, in a recent General Assembly debate on the responsibility to protect (R2P), also expressed the view that veto use should be measured by its consistency with obligations under the UN Charter and international law.[60]

Significantly, both the UK and US have suggested the relevance of both the UN Charter's 'Purposes and Principles' and international law when critiquing Russia's vetoes that blocked measures to curtail chemical weapons use in Syria:

> **United Kingdom**: What has taken place in Syria to date is in itself a violation of the United Nations Charter. *No purpose or principle of the Charter is upheld* or served by the use of chemical weapons on innocent civilians. On the contrary: to stand by and ignore the requirements of justice, accountability and the preservation of the non-proliferation regime is to place all our security —not just that of the Syrian people—at the mercy of a Russian veto.[61]

> **United States**: *Russia's veto was the green light for* the Al-Assad regime to use these most barbaric weapons against the Syrian people, in complete *violation of*

[57] Reinold (n 12) 271, quoting Zeid Ra'ad Al Hussein in Colum Lynch, 'Rise of the Lilliputians', *Foreign Policy* (10 May 2012) https://foreignpolicy.com/2012/05/10/rise-of-the-lilliputians/.
[58] UN Doc S/PV.6672 (n 7) 22.
[59] *Ibid*, 22.
[60] UNGA Verbatim Record, UN Doc A/75/PV.64 (17 May 2021) 14 (statement by Mr Bob Rae, Ambassador and Permanent Representative of Canada to the United Nations): ('The use and the threat of use of the veto in the Security Council regarding Syria and other situations where atrocity crimes are being perpetrated is shameful and, I believe, may be contrary to obligations under the Charter of the United Nations and international law').
[61] UNSC Verbatim Record, UN Doc S/PV.8231 (13 April 2018) 10–1 (emphasis added).

> *international law* … . We cannot stand by and let Russia trash every international norm that we stand for, and allow the use of chemical weapons to go unanswered.[62]

Additional states that suggest that veto use must be measured against obligations in the UN Charter or international law (which is also required under the Charter),[63] include:

- **Egypt**, which stated that '[t]he use of the veto undermines the implementation of the provisions of the Charter and of international law'.[64]
- **Mexico**, which maintained that 'the veto in situations where mass atrocities are committed *is an abuse of the law* that can trigger international responsibility for the State committing them and an abuse that leaves the Organization under the sad shadow of paralysis and irrelevance'.[65]
- **Norway**, which asserted that: 'The use of the veto to protect narrow national interests in situations of mass atrocities *is not in line with the spirit of the Charter*'.[66]
- **Turkey**, which added that the Security Council's failure to carry out its primary responsibility for the maintenance of peace and security 'pursuant to Article 24 of the Charter' is a '*serious blow to international law*'.[67]
- **The Netherlands**, which stated that the '*special privilege*' of the veto ought to be used 'with maximum restraint' and that the Council would 'force itself into irrelevance' and the 'rules-based international order would break down' if instead this privilege were 'used as a licence to kill, as a means to obstruct justice, as a way to prevent the truth from being told, *as a means to hold hostage those who want to uphold the principles of the Charter*'.[68]

Scholars have expressed similar views. Hannah Yiu analyses use of the veto 'where genocide is occurring or where there is a *prima facie* case for suspecting its occurrence' as a breach of the Charter's 'Purposes and Principles'.[69] She writes: 'A failure to restrict use of the veto, or [Security Council] paralysis, is to be interpreted as the [Security Council] acting outside of its mandate to exercise its functions in accordance with the Charter's Purposes and Principles … '[70] Louise Arbour similarly questions the

[62] UNSC Verbatim Record, UN Doc S/PV.8233 (14 April 2018) 5 (emphasis added).
[63] UN Charter (n 2) Article 1(1) (requiring 'conformity with the principles of justice and international law').
[64] UNSC Verbatim Record, UN Doc S/PV.8262 (17 May 2018) 39 (emphasis added).
[65] *Ibid*, 47 (emphasis added).
[66] *Ibid*, 66 (emphasis added).
[67] *Ibid*, 80 (emphasis added).
[68] *Ibid*, 15 (emphasis added). The Netherlands was then serving on the Security Council.
[69] Yiu (n 13) 233.
[70] *Ibid.* John Heieck reaches a similar conclusion, including that the veto threat is impermissible in such a situation, but based on legal obligations contained in the Genocide Convention. '[T]he due diligence standard [in the Genocide Convention] constrains the P5 from vetoing, either expressly or impliedly,

legality of a veto cast where it blocks 'an initiative designed to reduce the risk of, or put an end to, genocide'.[71] Anne Peters writes: '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 behavior is subject to legal limits'.[72] It is almost inconceivable, if there are limits to what may be done under the Charter (as there are), that there would be *no* limits to how the veto may be used.

The author's book additionally examines vetoes that are at odds with *jus cogens* and those at odds with treaty obligations such as those contained in the Genocide Convention[73] and Geneva Conventions.[74] The focus of this article, however, is on UN Charter requirements. Yet, because the Charter's 'Purposes' include respect for international law, the author's arguments about *jus cogens* and treaty obligations[75] are additionally relevant to whether UN Charter requirements are met. Such arguments will not, however, be replicated here.

4.2. Vetoes limited by the obligation of good faith

Scholars additionally take the view that the requirement of 'good faith' applies to voting and, thus, to veto use. Anne Peters, for example, relying on the *Conditions of Admission* advisory opinion, concludes that the obligation of good faith carries over to Security Council voting:

draft resolutions aimed at preventing genocide under Article 27(3) … . If a P5 expressly or impliedly vetoes a draft resolution containing the relevant Article 41 and 42 measures, then that state fails to do everything within its power to prevent genocide as required by the due diligence standard, thereby breaching its duty to prevent genocide and incurring international responsibility': John Heieck, 'The Responsibility Not to Veto Revisited: How the Duty to Prevent Genocide as a *Jus Cogens* Norm Imposes a Legal Duty Not to Veto on the Five Permanent Members of the Security Council' in Richard Barnes and Vassilis Tzevelekos (eds), *Beyond Responsibility to Protect: Generating Change in International Law* (Intersentia, 2016) 121. See Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277 (hereinafter, Genocide Convention).

[71] Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice Author (s)' (2008) 34(3) *Review of International Studies* 445, 454. Arbour, however, analyses such a veto as a breach of obligations under the Genocide Convention. Because the Charter's 'Purposes' include adherence to international law, a Genocide Convention breach could also be a breach of the UN Charter's 'Purposes'.

[72] Peters (n 11) 39, citing, *inter alia*, *Conditions of Admission* (advisory opinion) (n 27) para 20, also citing Georges Scelle, who famously coined the term '*dédoublement fonctionnel*': Georges Scelle, '*Le phénonène juridique du dédoublement fonctionnel*', in Walter Schätzel and Hans-Jürgen Schlochauer (eds), *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Vittorio Klosterman, 1956) 342.

[73] Genocide Convention (n 70).

[74] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949) 75 UNTS 85; Geneva Convention III Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287 (collectively hereinafter, '1949 Geneva Conventions').

[75] See Trahan (n *) chap 4.

> [J]udges of the ICJ reminded all UN members that when participating in a … decision either in the Security Council or in the General Assembly the Member is 'legally entitled to make its consent … dependent on any political consideration which seem to it to be relevant. [However,] [i]n the exercise of this power the member is legally bound to have regard to the principle of good faith.' UN members *must exercise their voting power 'in good faith,* in accordance with the Purposes and Principles of the Organization and in such a manner as not to involve any breach of the Charter'.[76]

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.[77]

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.[78]

Hannah Yiu 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.[79]

This author would expand Yiu's arguments to include vetoes in the face of crimes against humanity and war crimes, which could similarly be at odds with the obligation of good faith.

[76]Peters (n 11) 43–4 (emphasis added), citing *Conditions of Admission* (advisory opinion) (n 27) paras 21, 25. See also *Conditions of Admission* (advisory opinion) (n 27) 71 ('The 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 … ') (Judge Alvarez).

[77]Robert Kolb, *Purposes and Principles, Article 2(2)*, in Simma et al (n 44) vol 1, 173, para 23.

[78]*Ibid*, para 24. Kolb, however, maintains that the Security Council is beyond the scope of ICJ review: *ibid* ('the ICJ has no general competence of constitutional review'). However, that conclusion—which is examined in more detail in the author's book, which considers ICJ reviewability of the actions of the Security Council—does not logically follow. See UN Charter (n 2) Article 96 ('The General Assembly … may request the International Court of Justice to give an advisory opinion on *any* legal question') (emphasis added); see also José E Alvarez, 'Judging the Security Council' (1996) 90(1) *American Journal of International Law* 29.

[79]Yiu (n 13) 247. Marboe also sees the principle of good faith as relevant to Security Council voting. See Marboe (n 40) 125 ('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 of this power, the member is bound to have regard to the principle of good faith') (footnotes omitted).

Andrew Carswell also concurs on the issue of good faith:

> Reading articles 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.*[80]

Carswell reaches this conclusion based in part on a statement made in 1945 in San Francisco by four of the permanent members[81] where they assured other states that the veto would not be used abusively. They stated: 'It is not to be assumed … that the permanent Members, any more than the non-permanent Members, would use their "veto" power wilfully to obstruct the operation of the Council'.[82] Noting also the obligation generally to act in good faith, Carswell concludes: 'It was on this basis that the UN Charter was ultimately ratified'.[83]

4.3. Vetoes limited by the doctrine of abus de droit

Scholars have additionally analysed veto use in the face of atrocity crimes as an 'abuse of rights' (*abus de droit*) – which would be antithetical to good faith.[84] Irmgard Marboe explains the doctrine of abuse of rights:

> The concept of abuse of rights is closely linked to the principle of good faith, and implies a distinction between a right and the circumstances in which and how it is exercised. An abuse of rights is present, when a state does not behave illegally as such, but exercises rights that are incumbent on it under international law in an arbitrary manner or in a way which impedes the enjoyment of other international legal subjects of their own rights. So, although it may be the right of a [permanent member] to exercise the veto, its exercise in a concrete situation may be abusive.[85]

Hannah Yiu explains how a veto in the face of genocide could be an abuse of rights (*abus de droit* or *excès pouvoir*):

[80] Carswell (n 40) 470 (emphasis added).
[81] It was originally envisioned that there would be four permanent members—the US, UK, USSR, and China—with France later added: United States Office of the Historian, 'The Yalta Conference, 1945', history.state.gov/milestones/1937-1945/yalta-conf (accessed 26 March 2022).
[82] UNCIO, 'Statement by the Delegations of the Four Sponsoring Governments on the Voting Procedure in the Security Council' (1945) vol XI, 754, cited in Carswell (n 40) 471 n 72.
[83] Carswell (n 40) 471.
[84] See (n 76).
[85] Marboe (n 40) 130 (footnote omitted). Not all scholars concur. See, e.g. Peter Hilpold (ed), *The Responsibility to Protect (R2P): A New Paradigm of International Law?* (Brill, 2015) 192 (the veto 'has been compared to an "*acte de gouvernement*" which is purely political and cannot be considered under categories such as legal or illegal'). Therefore, some would claim that the veto is, by design, not legally abusable.

> A related concept to acting in good faith is the abuse of powers principle, which also binds the [Security Council]. Judge Morelli expressed this in the *Certain Expenses* [*of the United Nations* advisory opinion] … as follows:
>
> It is only in especially serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity. Examples might be a resolution which had not obtained the required majority, or a resolution vitiated by manifest *excès pouvoir* (abuse of rights) … .
>
> In the R2P context, 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 authorised would be just such an abuse of powers, in contravention of the Charter's Purposes and Principles, and thus unenforceable against member states.[86]

Again, while Yiu was writing about the crime of genocide, a veto that blocks a resolution that would prevent or curtail the commission of crimes against humanity or war crimes could be similarly abusive.

Lloyd Axworthy and Allan Rock – two individuals who helped launch R2P – agree that certain veto use to constrain UN action: 'is an abuse of the veto privilege and needs to be challenged openly and judicially'.[87] Anne Peters also sees vetoes as potentially constituting *abus de droit*, and reminds us that the veto must be read against international law *as it has evolved:*

> Initially, the decisions or non-decisions of the Council, including the exercise of the veto, were considered to be in a law-free zone. But this zone has meanwhile been imbued with the rule of law. The rule of law not only prohibits arbitrary measures of the Security Council as a whole, as stated above, but should also govern the Council members' votes approving of or preventing those measures. Under the rule of law, the exercise of the veto may under special circumstances constitute an *abus de droit* by a permanent member.[88]

Andrew Carswell additionally opines that 'taking even a conservative view of the doctrine of abuse of rights, it is arguable that an employment of the veto in a blatantly *mala fid*e manner can be characterized as legally abusive'.[89]

[86] Yiu (n 13) 244, citing *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (advisory opinion) [1962] ICJ Rep 151, 223. See also Reinold (n 12) 290, quoting Singapore's Ambassador complaining of 'abuse of the veto', citing 'Statement by Ambassador Albert Chua'.

[87] Lloyd Axworthy and Allan Rock, 'R2P: A New and Unfinished Agenda' (2009) 1(1) *Global Responsibility to Protect* 54, 61. Lloyd Axworthy is former Minister of Foreign Affairs of Canada and a member of Canada's Parliament; Allan Rock served as Minister of Justice and Attorney-General of Canada, and Canadian Ambassador to the United Nations.

[88] Peters (n 10) 539–40.

[89] Carswell (n 40) 471, citing Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International, 1998) 175 (use of the veto to prevent an amendment to the UN Charter for reasons of purely national interest would constitute an abuse of rights).

Indeed, a number of states, including the United Kingdom,[90] Mexico,[91] and Ukraine,[92] have additionally taken the view that a veto can constitute an abuse of rights.

Thus, the previously cited authority all points to the conclusion that in voting and veto use, permanent members must act in accordance with the 'Purposes and Principles' of the UN, including 'principles of justice and international law', 'respect for human rights',[93] co-operating 'in solving international problems of [a] … humanitarian character', and 'good faith'. An abuse of rights (*abus de droit*), which would violate the obligation of good faith,[94] would thus also violate the UN's 'Principles'.

It is worth noting that other states elected to serve temporarily on the Security Council also have these same obligations, including in their voting. This implies that they too should vote in favour of a credible[95] draft resolution to end the commission of genocide, crimes against humanity, and/or war crimes, or to prevent such crimes.[96] What makes the status of a permanent member different, however, is that their individual negative

[90]The UK stated: 'The Security Council has been unable to act solely because Russia has *abused the power of veto* to protect Syria from international scrutiny for the use of chemical weapons against the Syrian people': UNSC Verbatim Record, UN Doc S/P.V.8228 (10 April 2018), 5–6 (emphasis added). See also UNSC Verbatim Record, UN Doc S/P.V.8164 (23 January 2018) 5–6 ('When the Al-Assad regime deliberately ignored its obligation to stop using chemical weapons and continued to do so with careless regard for human life, Russia chose to *abuse its power of veto* to protect that regime') (emphasis added).

[91]Mexico stated that '*the veto in situations where mass atrocities are committed is an abuse of the law* that can trigger international responsibility for the State committing them and an abuse that leaves the Organization under the sad shadow of paralysis and irrelevance': UN Doc S/PV.8262 (n 64) 65 (emphasis added).

[92]Ukraine stated that 'Russia's revanchist policy of using military force against other States' has taken place 'against a backdrop of Russia's systematic *abuse of the right of veto* and blatant disregard of its obligation to maintain peace and security': *ibid*, 61 (emphasis added). See also UNSC Verbatim Record, UN Doc S/PV.8073 (24 October 2017) 8–9 ('Today's voting has demonstrated a much more dangerous tendency—one in which fundamental international norms are cynically ignored and independent structures are held hostage. Today's voting has demonstrated once again the increasing *abuse of the right to veto*. Today, the Council has failed to do its job again') (emphasis added).

[93]The author, as with the international community, has so far focused on the crimes of genocide, crimes against humanity, and war crimes in this context. See UNGA Res 60/1, UN Doc A/RES/60/1 (24 October 2005) paras 138–9 (2005) (also including 'ethnic cleansing') [hereinafter, World Summit Outcome Document]; '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, open to signature to the members of the United Nations) www.globalr2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities/ (accessed 26 March 2022) (hereinafter, French/Mexican Initiative); Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, UN Doc A/70/621–S/2015/978 (14 December 2015) annex 1, 'Code of Conduct regarding Security Council Action against Genocide, Crimes against Humanity or War Crimes' (hereinafter, Code of Conduct).

[94]See n 84.

[95]While the notion of a 'credible' draft resolution is found in the Code of Conduct (see n 93), admittedly what is 'credible' could be in the eye of the beholder and one could imagine self-serving arguments trying to justify vetoes or negative votes on the grounds that a draft resolution is not 'credible'. Any Security Council resolution that attracts nine positive votes—the number required for a resolution to otherwise pass (absent a veto)—should be considered 'credible'.

[96]These same obligations also carry over to UN member states before other fora such as the General Assembly.

vote (or even the threat thereof) can by itself *stop* Council action. Thus, if there are nine affirmative votes in favour of a resolution (the number required for a resolution to otherwise pass),[97] and the veto is utilised, the veto-casting permanent member is *solely responsible* for the resolution not passing. Permanent members thus bear a unique responsibility not held by other Council members.[98]

The question arises of how one would distinguish an abusive veto from one that is not – that is, precisely which vetoes would violate the UN's 'Purposes and Principles'. The author's arguments apply where at least nine members of the Security Council support a resolution that takes action in situations where there is ongoing genocide, crimes against humanity, or war crimes, or the serious risk of these crimes occurring.

One might also ask: how would one know that the Security Council's proposed course of action would actually help to prevent or stop the commission of the crimes? Yet, the powers of the Security Council under the UN Charter to maintain or restore international peace and security are not fettered, and do not face judicial scrutiny as to whether the measures taken in hindsight actually did accomplish or further that goal, or whether the means selected were the best course of action. The choice of means, and indeed the question of whether to utilise provisional measures, peaceful measures, or forceful measures, is left to the Council.[99]

Finally, another question might arise as to how it would be determined that the crimes are occurring or are at serious risk of occurring, which is usually framed in terms of asking what would serve as the 'trigger' for recognising the point at which obligations arise. In the view of the author, clearly defined 'triggers' are rare in the context of international law. Even under conventions such as the Genocide Convention or the Geneva Conventions, there is no designated body or person to determine when genocide, grave breaches

[97]UN Charter (n 2) Article 27.

[98]If a negative vote by a permanent member is problematic (particularly on grounds of legality), then a negative vote by an elected member would be similarly problematic; yet, that negative vote carries only a fraction of the responsibility for a resolution not passing. Anne Peters explains: 'the permanent members are in a legally different position to the non-permanent ones, because each of them can actually hinder a decision by itself through the veto. A non-permanent member does not have the power to block a Council decision on its own. Its negative vote can only *co*-determine the outcome … ': Peters (n 11) 39. See also Marboe (n 40) 129 ('The P5 have a special legal position in comparison to the non-permanent [members], because each of them can block a decision by itself through a veto'); Arbour (n 71) 453 ('Because of the power they wield and due to their global reach, the members of the Security Council, particularly the Permanent Five Members (P5) hold an even heavier responsibility than other States … ').

[99]This logic parallels logic contained in the *Tadić* case, where Tadić argued (in attempting to show that the Security Council's creation of the ICTY was *ultra vires*) that creating the ICTY 'neither promoted, nor was capable of promoting, international peace [and security]': *Tadić* (n 25) para 27. However, the ICTY Appeals Chamber held that 'it would be a total misconception … to test the legality of such measures *ex post facto* by their success or failure to achieve their ends': *ibid*, para 39. Thus, the relevant question was whether the creation of the ICTY was *a measure* taken to advance international peace and security (not whether it actually did so), as 'Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary power in this regard … ': *ibid*.

or other Geneva Convention violations are occurring. While these conventions create certain obligations when the crimes are occurring (or are at serious risk of occurring), in essence, the conventions leave to each state initially to determine whether that point has been reached. This unfortunately leaves room for states to deny, or ignore, that the crimes are occurring, particularly if a state or its ally is complicit in the commission of crimes, and thus to skirt convention obligations. This is equally the case for obligations under the UN Charter.

There are, however, collective methods and mechanisms that have been established to assist in determining when crimes such as genocide, crimes against humanity, or war crimes are occurring. For example, UN bodies have employed fact-finding missions, commissions of experts, and commissions of inquiry to make these kinds of determinations *prima facie* – whether there are reasonable grounds to believe the crimes are occurring.[100] There are also possibilities of judicial review, but waiting until a court adjudicates the matter would almost certainly come years too late, at a point when 'prevention' has long become moot.

The author's arguments are based on international law; there are, of course, issues that are still governed by political, rather than legal considerations. The author has quite deliberately not tried to answer this 'trigger' question in her book (or in this article) because this decision is essentially political, not legal. As such, if coupled with asking a legal question to the ICJ (a possibility considered subsequently), this could well result in the case being dismissed under the 'political question doctrine'.[101] If states want to create a focal person or office responsible for making such determinations (such as the Special Adviser on the Prevention of Genocide) they could do so. In the meantime, states can utilise an existing international mechanism, such as an established, or specially constituted, fact-finding mission, commission of inquiry, or commission of experts to assist them in their decision-making so that collective action can become possible.

There is, however, a much narrower question, which is worth pondering. When nine members of the Security Council are willing to vote in favour of a Security Council resolution, it is because they have each, individually, made the decision to do so. When the situation they face involves circumstances that could constitute genocide, crimes against humanity, or war crimes, it is logical that each of the nine Security Council members has individually had to first decide this to be the case, and decide further that the situation constitutes a threat to international peace and security. In those circumstances, a permanent member's responsibility to exercise its veto privilege

[100]See, e.g. UN Human Rights Council, 'Report of the Independent International Fact-Finding Mission on Myanmar' (8 August 2019) UN Doc A/HRC/42/50.
[101]For discussion of the 'political question' doctrine, see Trahan (n *) chap 4.4.2.

under Article 27(3) must also consider that there is a very strong indication of atrocity crimes occurring – at least nine other Security Council members felt strongly enough individually, that they were willing to act collectively and on behalf of the international community. In such situations, the permanent members must also adhere to other parts of the UN Charter, including the Charter's 'Purposes and Principles', which would instruct the permanent members not to prevent the Security Council from taking action to prevent or stop such atrocities.

5. The consequences of a veto that fails to accord with the UN's 'Purposes and Principles'

An important additional question is what consequences should follow from casting a veto that fails to accord with the UN's 'Purposes and Principles'. This final section considers whether such a veto would be void or voidable, and how a judicial pronouncement on the topics raised in this article (or more broadly)[102] might be secured – i.e. how a case might reach the docket of the ICJ. It also touches on the issue of remedies (i.e. damages) for casting a veto that fails to accord with UN Charter obligations.

Yet, first, a word on why states should pursue such a judicial determination. It is simple. The dominant approach taken by states to the problem is 'voluntary veto restraint' – that is, that the permanent members should voluntarily refrain from using their veto in the face of genocide, war crimes, or crimes against humanity.[103] This approach is endorsed by the 122 states that have joined the ACT 'Code of Conduct'[104] and the 105 states that have joined the 'French/Mexican initiative'.[105] Yet, when only two permanent member states (the UK and France) endorse this approach,[106]

[102]As mentioned, the author's book additionally contains detailed consideration of vetoes that conflict with *jus cogens*, as well as vetoes that conflict with Genocide Convention or Geneva Convention obligations. See Trahan (n *) chaps 4.1, 4.3. These additional legality challenges could also be pursued through the routes discussed subsequently in section 5.2.

[103]For discussion of voluntary veto restraint initiatives, see Trahan (n *) chap 3.

[104]Code of Conduct (n 93); Global Centre for the Responsibility to Protect, 'List of Supporters of the Code of Conduct regarding Security Council Action against Genocide, Crimes against Humanity or War Crimes, as Elaborated by ACT' (1 January 2019) www.globalr2p.org/resources/list-of-signatories-to-the-act-code-of-conduct (accessed 26 March 2022) (listing 119 states as of that date); updated by e-mail exchange between the author and the legal adviser to the Permanent Mission of Liechtenstein to the UN (number of signatories).

[105]French/Mexican Initiative (n 93); e-mail exchange between the author and the legal adviser to the Permanent Mission of Mexico to the UN (number of signatories).

[106]France co-leads the 'French/Mexican initiative', and France and the UK are parties to the Code of Conduct: see n 104 (parties to the Code of Conduct). The UN Secretary-General also supports veto restraint: UNGA, 'Report of the Secretary-General: Implementing the Responsibility to Protect' (2009) UN Doc A/63/677, para 61 ('I would urge the [P5] to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 138 of the Summit Outcome document, and to reach a mutual understanding to that effect'). See World Summit Outcome Document (n 93).

and three permanent members (the United States, the People's Republic of China, and the Russia Federation) do not, there quite simply is *no veto restraint*. This is the present state of affairs. Thus, after twenty years of pursuing 'voluntary veto restraint',[107] states need to embrace a different approach – of critically examining the veto in the context of obligations under the UN Charter and international law more broadly.[108]

5.1. Whether the veto would be void or voidable

An initial question is whether a veto that fails to accord with the UN's 'Purposes and Principles' would be void or voidable.

5.1.1. The case for void

If a veto is in violation of obligations under the UN Charter, then, as discussed previously, it would be *ultra vires* (i.e. beyond the power of a permanent member); this suggests that such a veto would be void. As discussed previously, the ICTY Appeals Chamber in the *Tadić* case, when evaluating the Security Council's power to create the ICTY, suggested that if the Council lacked such power, its actions would be *ultra vires*.[109]

This approach is also suggested by Judge ad hoc Elihu Lauterpacht in the *Application of the Genocide Convention* case.[110] There, Judge Lauterpacht found that Security Council Resolution 713 (which imposed an arms embargo on Bosnia–Herzegovina during the wars in the former Yugoslavia during the 1990s, thereby inadvertently assisting the Serbian 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*.[111]

He considered that one possible consequence of this analysis was that when

> 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.[112]

[107] At least as early as 2001, veto restraint in the context of atrocity crimes was advocated in the report of the International Commission on Intervention and State Sovereignty (ICISS): see ICISS, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (2001) 51.
[108] See n 102.
[109] See discussion in n 25.
[110] *Application of the Genocide Convention* case (n 36).
[111] *Ibid*, 441, para 102 (Judge Lauterpacht).
[112] *Ibid*, para 103. The ICJ did not ultimately take a position on this issue, as it found part of Bosnia-Herzegovina's request to be outside the scope of its jurisdiction: *Application of the Genocide Convention* case (n 36) para 41.

This suggests that a resolution in such circumstances could be considered void.

Dapo Akande suggests a similar approach with respect to violations of the UN's 'Purposes and Principles'. He points out that 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'. He went on to state that 'the Charter had to be considered in its entirety and *if the Security Council violated its principles and purposes it would be acting ultra vires*'.[113]

This result is also clear given that genocide, crimes against humanity, and war crimes constitute violations of peremptory norms of international law prohibited at the level of *jus cogens*.[114] John Heieck writes:

> While 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 if it conflicts with a *jus cogens* norm.[115]

Hannah Yiu similarly writes: '[i]n 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*'.[116] Because war crimes and crimes against humanity are also prohibited at the *jus cogens* level,[117] Yiu's conclusion should hold true vis-à-vis all three crimes.[118]

Judge ad hoc John Dugard suggests a similar conclusion in his Separate Opinion in the *Armed Activities* (*DRC v Rwanda*) case (2006), when he concludes that 'States must deny recognition to a situation created by a serious breach of a peremptory norm'. He writes:

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[113]Akande (n 7) 319, quoting UN Doc 555.III/1/27, 11 UNCIO Docs (1945) 378 (emphasis added). See also de Wet (n 7) 188 ('where the execution of an obligation under the Charter such as a binding Security Council decision would result in a violation of a *ius cogens* norm, member states would be relieved from giving effect to the obligation in question').

[114]For a compilation of authority that genocide, war crimes, and crimes against humanity are peremptory norms of international law, see Trahan (n *) chap 4.1.2. 'Peremptory norms are normative principles that are considered to be so important for the welfare and even survival of the global community that they cannot be violated or derogated from': Farrall (n 47) 71.

[115]John Heieck, *A Duty to Prevent Genocide: Due Diligence Obligations among the P5* (Edward Elgar Publishing, 2018) 188 (emphasis added); see also Yiu (n 13) 232; Orakhelashvili (n 40) 68 ('Acts contrary to *jus cogens* are beyond the powers of an institution (*ultra vires*)').

[116]Yiu (n 13) 233.

[117]See n 114.

[118]The author by no means intends to minimise the importance of the crime of aggression by excluding it from the present analysis. In the Nuremberg Tribunal Judgment, crimes against peace were deemed 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole': *Trial of German Major War Criminals* (judgment) [1946] Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, 421.

> It is today accepted that a treaty will be void if at the time of its conclusion, it conflicts with 'a peremptory norm of general international law' (Art. 53 of the Vienna Convention on the Law of Treaties of 1969); and that *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 …).[119]

5.1.2. The case against void

At the same time, such a conclusion – that a veto could, in certain circumstances, be void – presents pragmatic challenges in terms of implementation. One would not want to reach an impasse on the floor of the Security Council where nine or more members (potentially including some permanent members) contend that a veto was void, and one or two permanent members insist that it was effective. (While the Council might perhaps be thrown into momentary paralysis, it arguably would be no worse than the paralysis that now exists due to the threat and use of vetoes.) Furthermore, it seems virtually certain that the permanent member(s) casting the veto would disagree that the veto was *ultra vires*; indeed, it is possible that *none* of the permanent members would agree to such a position – that a veto could be *ultra vires* – out of a desire to protect the veto power. Irmgard Marboe also seems to envision such potential chaos when she writes:

> An abusive veto could be treated as irrelevant or as a mere voluntary abstention, which therefore cannot prevent a Council decision. The question that arises is, however, who would have the authority to determine that a veto was "abusive" and therefore "irrelevant". If any member state of the UN could consider by itself whether a veto of one of the P5 was "irrelevant", this could undermine the entire role and function of the Security Council as envisaged in the UN Charter.[120]

Thus, while a veto cast beyond Charter powers or other legality problems should indeed be void, the surest way to *reach* that conclusion would be to secure a judicial pronouncement to that effect.[121]

[119] *Armed Activities in the Territory of the Congo (DRC v Rwanda)* (judgment) [2006] ICJ Rep 6, 88, para 8 (Judge Dugard) (emphasis added). Article 41(1) of the Articles on State Responsibility provides that '[s]tates shall cooperate to bring to an end through lawful means any serious breach [of a peremptory norm of international law]'. Article 41(2) provides that '[n]o 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'. See ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries' (adopted) (2001) UN Doc A/56/10. The ICJ has applied Article 41 in the *Wall* advisory opinion, thereby suggesting acceptance of its legal standards: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (advisory opinion) [2004] ICJ Rep 136, para 159 ('all 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 the obligation not to render aid or assistance in maintaining the situation … '). For a full discussion of vetoes that conflict with *jus cogens*, see Trahan (n *) chap 4.1.

[120] Marboe (n 40) 131.

[121] The author is not suggesting *each* potentially abusive veto would need to be separately adjudicated; rather, one ICJ ruling would hopefully provide guidance that could be extrapolated to other situations.

5.2. Triggering a judicial adjudication

The next question is how one could secure such a judicial pronouncement. The issues concerned are legal ones and involve interpretation of the UN Charter, strongly suggesting that the ICJ would be the appropriate body to render such an adjudication.[122] The author considers four possibilities subsequently: (1) an advisory opinion on the question in the abstract; (2) a contentious case under the Genocide Convention; (3) a contentious case under the Torture Convention;[123] and (4) an advisory opinion on a particular veto. That the ICJ may review the actions of the Security Council is a topic explored in the author's recent book, which concludes, based on several cases where such review has occurred, that the ICJ may indeed engage in such review.[124] This is additionally made clear by the UN Charter, which states that '[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on *any legal question*'.[125]

5.2.1. An ICJ advisory opinion on the question in the abstract

The author's book concludes with three suggestions for UN member states to take in order to raise the issue of legality problems with vetoes cast or threatened in the face of genocide, crimes against humanity, and/or war crimes: (i) to make statements at the UN or other appropriate fora whenever such a veto of questionable legality is cast or threatened; (ii) to consider passing a General Assembly resolution recognising existing legal limits to Security Council vetoes in the face of genocide, crimes against humanity, or war crimes; and/or (iii) to consider having the General Assembly 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 where there is ongoing genocide, crimes against humanity, and/or war crimes, or their serious risk?

The General Assembly requesting the ICJ to pronounce on such a question is thus one route to challenge such veto use, and this approach has to date received considerable support.[126] Such a request may be made through a simple majority

[122] *Conditions of Admission* (advisory opinion) (n 27) 61–2 ('[I]t has also been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, "the principal judicial organ of the United Nations", to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers').

[123] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85 (hereinafter, Torture Convention).

[124] See Trahan (n *) chap 4.4.1; see also Akande (n 7); Alvarez (n 78).

[125] UN Charter (n 2) Article 96 (emphasis added).

[126] See, e.g. Lloyd Axworthy and Allan Rock, 'Canada should support legal limits on UN Security Council vetoes', *Policy Options* (18 December 2020) https://policyoptions.irpp.org/magazines/Canada19r-2020/

vote of the General Assembly.[127] While the Security Council may also request an advisory opinion from the ICJ, there undoubtedly would not be the requisite political support for a challenge related to the veto power.[128]

5.2.2. A contentious case under the Genocide Convention

Another possibility is to pursue a contentious case. Admittedly, this route relies on challenges brought under a specific treaty, and not directly related to the UN's 'Purposes and Principles', but the result could have a direct impact on how the requirement of acting in accordance with 'international law', one of the UN's 'Purposes' in the Charter,[129] is read. That is, a veto cast, blocking measures to prevent the commission of genocide, would likely violate the obligation to 'prevent' genocide contained in Article 1 of the Genocide Convention.[130] Such a violation of international law would be relevant to the question of the consistency of the veto with UN Charter obligations, since one of the UN's 'Purposes' is acting in conformity with international law.

Canada-should-support-legal-limits-on-un-security-council-vetoes (accessed 26 March 2022); Concept Note, on file with the author (Hans Corell, Richard Goldstone, Navi Pillay, Andras Vamos-Goldman, David M. Crane, Judge Christine Van den Wyngaert, Zeid Ra'ad Al Hussein, Irwin Cotler, Xavier Jean Keita, Allan Rock, Lloyd Axworthy, Adama Dieng, Errol Mendes, and 17 non-governmental organisations support obtaining such an advisory opinion).

[127] Advisory opinions were requested by a majority vote in the General Assembly for the *Nuclear Weapons* advisory opinion, the *Wall* case, and the *Kosovo* advisory opinion. See *Legality of the Threat or Use of Nuclear Weapons* (advisory opinion) [1996] ICJ Rep 226, 257; *Wall* (advisory opinion) (n 119); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (advisory opinion) [2010] ICJ Rep 403. Article 18(2) of the Charter requires a two-thirds majority vote of the General Assembly only for 'important questions': see UN Charter (n 2) Article 18 (2). Simma's Commentary thus concludes that practice 'seems to support the view that a request for an advisory opinion does not constitute an "important question" in the sense of Art. 18(2) UN Charter': Karin Oellers-Frahm, 'The International Court of Justice, Article 96', in Simma et al (n 44) vol II, 1981, para 15.

[128] First, there would need to be agreement that the matter should be debated—but assuming a particularly egregious veto does trigger this; then, the issue would likely arise whether the request for the advisory opinion was 'procedural' or 'substantive'. If the permanent members insist that it is 'substantive', then they would have veto power over the request, and likely at least one of them would veto the request: Trahan interview with Andras Vamos-Goldman.

[129] There is an overlap of obligations in that the author's arguments related to *jus cogens* and treaty obligations (n 102) could be subsumed within the UN Charter's requirement of adherence to international law. In terms of litigation strategy, it would be better to pose the author's arguments as they are articulated in her book—as three independent legal arguments. Hannah Yiu also writes of overlapping obligations: 'Given that the principle of good faith applies to the [Security Council], and in light of the fact that many of the Purposes and Principles of the Charter overlap with *jus cogens* norms, and in particular, with the prohibition against genocide, it can be stated that the Charter provides justification for the proposition that the [Security Council] is indeed bound by *jus cogens* norms … . This is still the case even though no specific prohibition against contravening peremptory norms is contained in the Charter: Yiu (n 13) 245.

[130] For further discussion of the obligations under the Genocide Convention, see Trahan (n *) chap 4.3.1. All permanent members are parties to the Genocide Convention: United Nations Treaty Collection, 'Convention on the Prevention and Punishment of the Crime of Genocide' (2022) https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en (parties to the Genocide Convention) (accessed 26 March 2022). An issue also arises as to the potential applicability of Article 103 of the Charter, which suggests that Charter obligations take precedence over treaty obligations; this issue is also examined in Trahan (n *) chap 4.3.3.

Unfortunately, two permanent members, the US and China, have filed reservations to Article IX of the Genocide Convention;[131] they thereby do not accept that another party to the Convention could bring a dispute regarding application of the Convention to the ICJ against them. (Interestingly, the UK, by contrast, has consistently stated that they are unable to accept reservations to Article IX.)[132] While the ICJ in 2006 upheld the validity of such an Article IX reservation in the *Armed Activities (DRC v Rwanda)* case,[133] Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, writing in a Joint Separate Opinion, eloquently stated:

> It is a matter for serious concern that at the beginning of the twenty-first century it is still for states to choose whether they consent to the Court adjudicating claims that they have committed genocide. It must be regarded as a very grave matter that a state should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide.[134]

These five judges concluded: 'It is … not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration'.[135]

Thus, to pursue a challenge under the Genocide Convention related to a veto by either the US or China would first require a challenge to their Article IX reservation.[136] Arguably, the validity of such reservations *should* be

[131]United Nations Treaty Collection, 'Convention on the Prevention and Punishment of the Crime of Genocide' (2022) https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en (Article IX Reservations) (accessed 26 March 2022).
[132]*Ibid*.
[133]*Armed Activities (DRC v Rwanda)* (judgment) (n 119).
[134]*Ibid*, para 25 (joint separate opinion).
[135]*Ibid*, para 29 (joint separate opinion).
[136]An issue remains as to the consequences of a ruling on the invalidity of a reservation: would it mean the reservation is struck down or that the reserving state is no longer a party to the convention? In the 2001 case *Belilos v Switzerland*, involving a Swiss reservation, the European Court of Human Rights held that one could sever the invalid reservation and Switzerland would remain a party: *Belilos v Switzerland*, application no. 10328/83 (judgment) [1988] ECtHR (Court (Plenary)), 4. Similar results were reached by the European Court of Human Rights in *Grande Stevens v Italy* (2014), by the Inter-American Court of Human Rights in *Hilaire v Trinidad & Tobago* (2001), by the ICCPR Human Rights Committee in *Rawke Kennedy v Trinidad & Tobago* (1999), and in CCPR General Comment No 24 (1994): *Grande Stevens v Italy*, application no. 18640/10 (merits) [2014] ECtHR (SS); *Hilaire v Trinidad and Tobago* (judgment (preliminary objections)) no. 80 [2001] IACtHR (ser C); *Rawle Kennedy v Trinidad & Tobago*, comm. no. 845/1999, CCPR/C/67/D/845/1999 [1999] CCPR Human Rights Committee; UN Human Rights Committee, 'General Comment No. 24' (11 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para 18 ('The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation'). The full ICJ has not decided this issue, while individual judges have taken different approaches depending on how essential they found it that the reservation not be severed: see *Certain Norwegian Loans (France v Norway)* (judgment) [1957] ICJ Rep 9 (Judge Lauterpacht) (not severing the reservation); *Interhandel* case *(Switzerland v United States of America)* (judgment) [1959] ICJ Rep 6 (Judge Lauterpacht) (not severing the reservation); *Aerial Incident of 10 August 1999 (Pakistan v India)* (judgment) [2000] ICJ Rep 12 (Judge Al-Khasawneh) (denying that the reservation was essential and severing it). The ILC's

reconsidered. Given what appear to be ongoing genocides against the Rohingya[137] and Uighurs,[138] additional judges might be persuaded to agree with those five judges who believed that the viability of such reservations should be revisited. A challenge under the Genocide Convention need not be brought by a state directly impacted (such as Bangladesh, regarding the Rohingya), as the ICJ has ruled in *The Gambia et al v Myanmar* case that 'all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented'.[139]

Thus, a challenge under the Genocide Convention would be another route to challenge a veto cast, or a veto threat made in the face of ongoing, or a serious risk of, genocide. This has the complication, however – if vetoes or veto threats by the US or China were at issue – of first requiring a challenge to the legality of their Article IX reservations.[140]

5.2.3. A contentious case under the Torture Convention

A similar route might be considered under the Torture Convention.[141] This could be triggered if there were a veto cast in the face of ongoing torture, particularly if the proposed Security Council resolution that was vetoed would have addressed the torture and taken steps to mitigate its occurrence. Article 30(1) of the Torture Convention permits disputes concerning the interpretation or application of the Convention to be brought to the ICJ, although in this case there is a requirement that the parties attempt to settle the matter through negotiation, and, at the request of one of the parties, arbitration, before turning to the ICJ.[142] Again, some states have taken out reservations against ICJ proceedings regarding application of the Torture Convention, including, of the permanent members, China, France,

Guide to Reservations asserts that the state is presumed a party 'without the benefit of the reservation', although it 'may express at any time its intention not to be bound by the treaty without the benefit of the reservation': ILC, 'Text of the Guidelines Constituting the Guide to Practice on Reservations to Treaties', adopted by the UN General Assembly (19 December 2013) UN Doc A/RES/68/111, para 4.5.3.

[137]See n 100.

[138]US Department of State, 'Determination of the Secretary of State on Atrocities in Xinjiang' (Press Release, 19 January 2021) https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/index.html (accessed 26 March 2022) (Pompeo calls China's treatment of the Uighurs 'genocide').

[139]See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v Myanmar)* (provisional measures) [2020] ICJ Rep 3, para 41 ('In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention … . It follows that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end').

[140]Because of ambiguity as to what constitutes a veto 'threat', a stronger legal case would be to challenge the use of an actual veto.

[141]Torture Convention (n 123).

[142]*Ibid*, Article 30(1).

and the United States.[143] Thus, vis-à-vis those permanent members, an ICJ case could not be pursued without first challenging the legality of such a reservation.[144] This route also has the complication that whereas the Genocide Convention contains an obligation to 'prevent' genocide that the ICJ has held includes genocide occurring in another state,[145] the Torture Convention states that the obligation to 'prevent' torture applies to torture in any territory under a country's jurisdiction.[146] Given this express textual limitation, not contained in the Genocide Convention, it is unclear whether the obligation to 'prevent' torture contained in the Torture Convention can be read as broadly as the obligation to 'prevent' genocide under the Genocide Convention.[147]

5.2.4. An advisory opinion on a particular veto

Another possibility – assuming there were a veto cast that seemed particularly egregious – would be to test its legality through an advisory opinion pertaining to *that* particular veto. This would still be an advisory opinion,

[143]UN OHCHR, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Article 30(1) Reservations' (2022) https://indicators.ohchr.org (accessed 26 March 2022).

[144]The author's thinking is inspired by the steps the Netherlands and Canada have taken to commence suit against Syria for breach of the Torture Convention. See Mr Watchlist, 'Joint Statement of Canada and the Kingdom of the Netherlands regarding their Cooperation in Holding Syria to Account' (12 March 2021) https://mrwatchlist.com/2021/03/12/canada-netherlands-accuse-syria-of-torture (accessed 26 March 2022) ('On 18 September 2020, the Netherlands invoked Syria's responsibility for human rights violations, specifically holding Syria responsible for torture under the UN Convention against Torture. On 3 March 2021, Canada took the same step'). See also n 134 (consequences of successfully challenging a reservation).

[145]In the *Bosnia v Serbia* case, the ICJ adjudicated the responsibility of Serbia (then part of the Federal Republic of Yugoslavia) to prevent genocide in July 1995 in Bosnia-Herzegovina, an independent state as of 1992. In the Preliminary Objections Decision, the ICJ also expressly stated that 'the obligation each state … has to prevent and to punish the crime of genocide is not territorially limited by the Convention': *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (preliminary objections) [1996] ICJ Rep 595, para 31.

[146]Torture Convention (n 123) Article 2(1) ('Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction*') (emphasis added).

[147]One possibility is that the ILC recognises, in its Articles on the Responsibility of States for Internationally Wrongful Acts, the obligation of states to 'cooperate to bring to an end through lawful means any serious breach [of a peremptory norm of international law]': Articles on the Responsibility of States (n 119) Article 41(1). This could perhaps inform how one reads the obligation to 'prevent' torture under the Torture Convention. But see UNGA, 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc A/70/303, para 32 ('The obligation enshrined in article 2 of the Convention, which requires States to take effective legislative, administrative, judicial and other measures to prevent torture in "any territory under [their] jurisdiction", applies to all areas and places "where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto, effective control"'); UN Committee Against Torture, 'CAT General Comment No 2: Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2, para 16 ('The Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to "any territory" in article 2 … refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control … ').

given that an advisory opinion, as mentioned previously, may be requested on 'any legal question'.[148] While pursuing such an advisory opinion might appear to be a contentious case masquerading as an advisory opinion, in the *Chagos Islands* advisory opinion, what appeared to be a dispute between Mauritius and the UK, was heard by the ICJ as an advisory opinion.[149] Thus, it appears that a legal question may be put to the ICJ even if motivated by a concrete situation.[150] An advisory opinion on a particular veto might also be pursued after an advisory opinion on these questions in the abstract (the first option discussed previously). Again, such an advisory opinion (either on a particular veto or on the question generally) would not need to be limited to the arguments discussed in this article – vetoes that conflict with the UN's 'Purposes and Principles' – but could additionally consider broader legal theories, such as those additionally examined in the author's book.[151] Because an ICJ ruling would likely require significant time, even if expedited, it would be retrospective, and function more as a general advisory opinion; that is, any challenge to a particular veto would likely be rendered long after the circumstances that occasioned the need for the resolution that was vetoed had passed.

5.3. The issue of damages

A final interesting issue that merits future consideration[152] is whether damages should follow from a veto that is cast in violation of international legal obligations. Such damages are suggested by the writings of several scholars. Louise Arbour, for example, writes: 'If the … responsibility [of the P5] were to be measures in accordance with the International Court of Justice's analysis [in the *Bosnia v Serbia* case], it would seem logical to assume that a failure to act could carry legal consequences and even more so when the exercise or threat of a veto would block action that is deemed necessary by other members to avert genocide, or crimes against humanity'.[153] Anne Peters opines about R2P failures:

> the obligation to make reparations for damages resulting from inadequate protection would also be owed to individuals. In fact, the ICJ has *en passant* acknowledged in the *Wall Opinion* that reparations due for violations of inter-

[148]UN Charter (n 2) Article 96.
[149]*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (advisory opinion) [2019] ICJ Rep 95.
[150]See also *Kosovo* (advisory opinion) (n 127) 417, para 33 ('The motives of individual states which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion whether or not to respond').
[151]See n 102.
[152]A more fulsome discussion is beyond the scope of this article.
[153]Arbour (n 71) 453.

national law may have to be made "to all natural or legal persons concerned".[154]

Irmgard Marboe, by contrast, looks to whether the United Nations could be held responsible, writing: 'the United Nations may in principle also be held responsible in cases in which the Security Council fails to act in any manner to a situation of genocide, war crimes, and crimes against humanity'.[155] However, she concludes that 'the consequences for such inaction – as many aspects of the responsibility of international organisations – are not yet settled'.[156] The propriety of damages is additionally supported by the Latin maxim '*ubi jus ibi remedium*' – where there is a wrong, there must be a remedy,[157] and by case law recognising the 'right to a remedy' for serious human rights violations.[158]

Thus, there are several possible routes by which the issues explored in this article – as well as the broader legal arguments raised in the author's book – could be teed up for adjudication before the ICJ. Because a contentious case under the Torture Convention or Genocide Convention could first require challenging the legality of reservations taken out against ICJ adjudication regarding application of those conventions, pursuing an advisory opinion appears the more direct route. The author also believes that it might be easier for the ICJ to opine on the question in the abstract, rather than on a particular veto. However, if a particular veto were challenged, the judges would have the added pressure of not letting a 'bad actor' permanent member 'off the hook', and this might even be viewed favourably by other permanent members opposed to the particular veto in question. Yet, a ruling on a particular veto could risk looking political (aimed at one or

[154]Peters (n 11) 26, citing *Legal Consequences of the Construction of a Wall* (advisory opinion) (n 119), para 152.
[155]Marboe (n 40) 126 (footnote omitted).
[156]*Ibid.*
[157]See, e.g. *Leo Feist v Young,* 138 F2d 972, 974 (7th Cir, 1943) ('It is an elementary maxim of equity jurisprudence that there is no wrong without a remedy').
[158]For discussion of the right to an effective remedy for human rights violations, see, e.g. *Co-Prosecutors v Nuon Chea et al* (Decision on Ieng Sary's Rule 89 Preliminary Objections (*ne bis in idem* and Amnesty and Pardon)), case file no. 002/19-09-2007, ECCC TC [3 November 2011], paras 38, 42–6; *Prosecutor v Gaddafi* (judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr Saif Al Islam Gadafi pursuant to Articles 17 (1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019) ICC-01/11-01/11, AC [9 March 2020], paras 48, 50, 58, 63, 66 (Judge Luz del Carmen Ibáñez Carranza); *Velasquez Rodriguez v Honduras* (judgment) no. 4 [1988] IACtHR (ser C), paras 166, 172, 174–6; *Aksoy v Turkey*, application no. 21987/93 (judgment) [1996] ECtHR, para 98. See generally International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide* (rev ed 2018). Admittedly, the vetoing permanent member is not the direct perpetrator of the human rights violations or atrocity crimes, but, through its veto, may be enabling the continued commission of such violations or crimes; its responsibility is thus akin to accessory or indirect responsibility. See Articles on the Responsibility of States (n 119) Article 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').

more of the permanent member), while an advisory opinion on a general question would not.

6. Conclusion

This article raises an extremely important and timely debate about the legality of veto use by permanent members of the Security Council when there are ongoing atrocity crimes or where such crimes are at serious risk. Having recently passed the 75th anniversary of the United Nations, it is tremendously concerning that the veto is repeatedly rendering the Council paralysed by dysfunction, just when it is most needed – when massive numbers of lives are at risk due to ongoing, or the serious risk of, genocide, war crimes, or crimes against humanity. The UN Charter was never designed to shield the perpetrators of atrocity crimes, nor designed to allow permanent members to be complicit in shielding their allies while they commit such crimes. Yet, that is how the veto and veto threat are currently operating. If the international community desires a more effective UN, with a functional Security Council at its helm, and international law respected,[159] states need to challenge this state of affairs. The author has suggested several ways to do so.

A statement by the United States – made after vetoes resulted in closure of border crossings that had been permitting humanitarian aid into Syria – reveals deep-seated frustration with the current state of affairs, and suggests the time is ripe for a judicial challenge:

> [T]he United States supported [the resolution] because we will not play a game of dangerous brinkmanship at the behest of Russia and at the expense of Syrian lives … . Through their vetoes today, Russia and China have chosen to ignore the facts on the ground and to disregard the call for collective Council action to respond to the worsening humanitarian crisis in Syria … . There is no justification for Russia's and China's vetoes today, and this action cannot be spun into false choices between humanitarian aid, sovereignty and sanctions. Put simply, rather than voting to save the lives of the Syrian people, Russia and China voted today to save Al-Assad. We should all be saddened, outraged and more determined than ever to hold Russia and China accountable as an accomplice to Al-Assad's reign of death and destruction.[160]

[159] See Reinold (n 12) 293 ('The legitimacy crisis of the Security Council is at the same time a legitimacy crisis of international law'). Jan Wouters and Tom Ruys write: 'One of the main reasons why many Sates abhor the veto power is the fact that permanent members sometimes use the privilege to shield friendly States with whom they maintain close economic and diplomatic relations from condemnation or the imposition of economic sanctions. This sends out the manifestly wrong signal that States that stand close to one of the P-5 can get away with recurrent human rights violations and/or unlawful military incursions into neighbouring States': Jan Wouters and Tom Ruys, 'Security Council Reform: A New Veto for a New Century?' (Egmont Paper 9, Royal Institute for International Relations, 2005) 14.

[160] Letter dated 8 July 2020 from the President of the Security Council addressed to the Secretary-General and the Permanent Representatives of the Members of the Security Council', UN Doc S/2020/661 (9

The kinds of arguments raised herein – questioning whether the vetoes being cast are consistent with UN Charter obligations (as well as other requirements of international law) – could be particularly helpful if invoked by elected members of the Security Council as well as permanent members trying to stave off vetoes. The arguments could, and should, be raised whenever a veto is used or threatened while genocide, crimes against humanity, and/or war crimes are occurring or are at serious risk of occurring. Even beyond the Council's chamber, states might pursue such arguments in other venues, such as the General Assembly, especially when a veto has paralysed the Council and the General Assembly could pursue possible alternative measures.[161] Mandatory discussion within the General Assembly of any veto cast – as Liechtenstein has proposed[162] – could also prove significantly helpful in shedding light on the circumstances in which vetoes are being employed.

Above all, France has reminded us that 'the veto is not a privilege but an international responsibility'.[163] Such pronouncements by permanent members are a good indication that *they actually understand* that this responsibility must, at minimum, be exercised in accordance with the UN Charter. The veto power was never granted unconditionally within the UN Charter, but, already in 1945, when the Charter was drafted, was made subject to certain constraints – including, most fundamentally, the need to adhere to the terms of the Charter itself, including its 'Purposes and Principles'. It seems abundantly clear that some of the vetoes being cast, particularly those while atrocity crimes are occurring or are at serious risk of occurring,[164] are not in accordance with the UN Charter, particularly when one considers the obligations of international law as they have evolved since 1945. The Secretary-General has written in his millennium report that 'surely no legal principle – not even sovereignty – can ever

July 2020) annex 21 (Statement by the Permanent Representative of the United States of America to the United Nations, Kelly Craft).

[161]This occurred when the General Assembly created an investigative mechanism to compile evidence of crimes in Syria, after Russia and China vetoed referral of the situation in Syria to the ICC. See UNGA Res 71/248, UN Doc A/RES/71/248 (21 December 2016) (creating the mechanism); UN Doc S/2014/348 (draft resolution of referral, vetoed).

[162]See Christian Wenaweser and Sina Alavi, 'Innovating to Restrain the Use of the Veto in the Security Council' (2020) 52 *Case Western Reserve Journal of International Law* 65.

[163]French/Mexican Initiative (n 93); see also Secretary-General Report (n 106) para 61 ('Within the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter'); Yiu (n 13) 248 ('the permanent five have been given the special privilege of veto powers, and … this privilege in turn places special responsibility on them … '); Peters (n 11) 39 ('The P5's privilege within the Security Council, the veto power, is only justifiable in a constitutionalized order with a view to those members' special military and economic capabilities. The veto power is thus intrinsically correlated with a special responsibility').

[164]The author's book analyses vetoes cast and veto threats made in relation to the situations in South Africa (during apartheid), Rwanda, Syria, Darfur, Sri Lanka, Israel, Myanmar, and Yemen. See Trahan (n *) chap 1.3.2. The book contains in-depth examination of vetoes related to the situation in Syria, and veto threats related to the situation in Darfur. See *ibid*, chap 5.

shield crimes against humanity … '.[165] So, why, then, is it an acceptable reading of the UN Charter that vetoes can shield the commission of crimes against humanity, as well as genocide and war crimes?

To end with a quote by Bruno Stagno Ugarte:

> For the proper functioning of the UN collective security system, it is crucial the Council acts—and is seen to be acting—in ways that further international peace and security, including the protection of populations from the most serious crimes. Not doing so strikes at the very legitimacy of the system and reduces it to one of selective security in which the permanent members decide which populations under clear and present or imminent physical threat are protected and which are not. The parochial national interests of the permanent members should never leave such populations at the mercy of the perpetrators.[166]

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[165]Report of the Secretary-General, 'We the Peoples: The Role of the United Nations in the 21st Century' (2000) UN Doc A/54/2000, para 219.
[166]Ugarte (n 54).