

Concept Note

**Legal Parameters to the Veto Power
in the Face of Atrocity Crimes**

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I. Purpose

The purpose of this Concept Note is to show how the veto power, found in Article 27(3) of the United Nations Charter, fits within the context of existing rules of international law. The Concept Note is not about the political or historic significance of this provision. Rather, it is meant as a legal guide, specifically highlighting situations in which a negative vote by a permanent member to a substantive Security Council resolution could be in conflict with some or all of: *jus cogens*; the UN Charter itself; as well as other Conventions to which permanent members are parties.

II. Rationale

The United Nations Security Council (UNSC) is periodically deadlocked by the veto (i.e., negative vote) of one or more of its permanent members. While this is a byproduct of the voting procedures contained within Article 27(3), too frequently, such a veto blocks an otherwise willing Security Council from taking measures to prevent or stop the commission of core international crimes (atrocity crimes)—genocide, crimes against humanity, and/or war crimes.¹ It is especially in these circumstances that use of the veto conflicts with other, existing rules of international law.

UN Member States and the international community have long looked for ways of balancing the important role that Security Council voting plays in maintaining international peace and security, with the legal obligations to prevent, stop, and deter core international crimes.²

¹ For purposes of this Concept Note, “atrocity crimes” means genocide, crimes against humanity, and/or war crimes. Some of the arguments herein could additionally apply to the crime of aggression, and there are other horrific crimes that could equally be termed “atrocity crimes.”

² Amending the UN Charter to alter the veto power appears not possible, as it would require agreement of all permanent members. UN Charter, Art. 108.

Much of this effort has focused on seeking the commitment of the permanent members to voluntarily refrain from veto use in the face of genocide, crimes against humanity, or war crimes. Recent versions³ have already received the support of France and the UK. Currently, it is considered unlikely that China, Russia or the United States would consider consenting to voluntary veto restraint.

A more focused look at the place of the veto in the context of international law could offer a fresh perspective, and be complementary to pursuing voluntary veto restraint—through the “French/Mexican” initiative, the ACT Code of Conduct, and General Assembly Resolution 76/262.⁴ In fact, it is a necessary component of the international community’s efforts to find the desired balance between the international peace and security necessity of the veto and its use within the framework of existing norms of international law

III. Legal Arguments

Below are three *independent* legal arguments for the proposition that the veto power (i.e., the exercise of Article 27(3)) must be viewed within the broader context of international law. Each of these arguments demonstrates a different aspect of the legality problems encountered when a veto is cast in the face of genocide, crimes against humanity, or war crimes.

Jus Cogens

International law can be thought of in terms of a hierarchical structure, with *jus cogens* norms positioned at the apex of the hierarchy. *Jus cogens* protections thus sit above the veto power, which is conferred by UN Charter Article 27(3). *Jus cogens* norms receive the highest level of protection in the international legal system in that no derogations may be permitted from them except through the creation of a new norm of comparable character. The prohibition

³ These include the ACT Code of Conduct and the French-Mexican initiative. See 70th General Assembly of the United Nations, Political Statement on the Suspension of the Veto in Case of Mass Atrocities, Presented by France and Mexico, open to signature to the members of the United Nations, at <http://www.globalr2p.org/media/files/2015-07-31-veto-political-declaration-final-eng.pdf>; GA Res. 70/621–S/2015/978, Annex I to the letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes (Dec. 14, 2015), at <http://www.globalr2p.org/media/files/n1543357.pdf>.

⁴ The resolution mandates debate about any veto cast within the UN Security Council be held within 10 working days before the General Assembly.

of genocide, crimes against humanity, and war crimes are all recognized as *jus cogens* norms. Because the UN is bound to respect *jus cogens*, its principle organ, the Security Council, is similarly constrained. All states are additionally constrained to respect *jus cogens*. It follows that the permanent members are thereby also constrained, both as states and as members of the Security Council. Therefore, the actions of the permanent members (including veto use):

- (a) must be consistent with *jus cogens*;
- (b) must not be used in circumstances such that their effect is to facilitate *jus cogens* violations; and
- (c) must respect the obligation of states to “cooperate to bring to an end through lawful means any serious breach” “of an obligation arising under a peremptory norm of general international law” and preclude states from recognizing as lawful a situation created by a serious breaches of a peremptory norm of international law and from rendering aid or assistance in maintaining that situation (ARSIWA, Arts. 41.1–2).⁵

The UN Charter

A second source of constraint on the veto power is found in the UN Charter. The Charter limits Security Council power in that Article 24(2) states that the Security Council must act “in accordance with” the “Purposes and Principles” of the UN. As deploying the veto to defeat a particular resolution is an action taken by a permanent member of the Council, veto use must also be in accordance with the Purposes and Principles of the UN as all of the powers of the UNSC and the permanent members derive from the Charter. Necessarily, the permanent members and the UNSC as a whole have no power to act over and above the parameters of the Charter or outside its Purposes and Principles. The Purposes and Principles in Articles 1 and 2 of the Charter include respecting “principles of justice and international law,” “promoting and encouraging respect for human rights,” “co-operation in solving international problems of [a] . . . humanitarian character,” and “good faith.” Many of the vetoes that have been, and are being, cast in the face of genocide, crimes against humanity,

⁵ Int’l L. Comm’n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (adopted), UN Doc. A/56/10 (2001). The ICJ has applied Article 41 in the *Wall* and *Chagos* Advisory Opinions, thereby suggesting acceptance of its legal standards. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Wall Case), Advisory Opinion, 2004 ICJ Rep. 136, para. 159 (July 9); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 ICJ Rep. 95, paras. 177, 182 (Feb. 25).

and/or war crimes are not “in accordance” with the UN’s Purposes and Principles. A veto that does not accord with the UN’s Purposes and Principles should be seen as *ultra vires* of the proper exercise of Security Council power.

Treaty Obligations

A third source of legal obligation that constrains use of the veto in the face of atrocity crimes is the treaty obligations of the individual permanent member states, such as those under the Genocide Convention and 1949 Geneva Conventions, to which all permanent members are parties. These treaties impose certain legal obligations, for example, “to prevent” genocide and to “ensure respect for” the 1949 Geneva Conventions. Any veto that allows the continuing perpetration of genocide or (during international armed conflict) “grave breaches,” or (during non-international armed conflict) Common Article 3 violations, would arguably run afoul of these legal obligation. The legal obligations are “due diligence” obligations for states to do their best to ensure the crimes are not committed, with the use of the veto being the antithesis of satisfying that obligation. The legal obligations are not solely internal ones (for a state to prevent the crimes within its own territory) but external ones (for a state to use due diligence to prevent the crimes within other states). It is possible to make similar arguments with respect to other war crimes (such as those contained in Additional Protocol I for states parties to it) and crimes against humanity, although the latter would rest on general obligations of international law, as there is not yet a finalized crimes against humanity treaty.

IV. Potential Approaches

As noted, the consideration of the legal context within which Article 27(3) operates adds an added dimension to supporting a veto use that recognizes its international peace and security necessity, as well as its place in the context of international law. As with the voluntary restraint initiatives and General Assembly Resolution 76/262, UN Member States interested in pursuing this balance should incorporate these legal considerations within ongoing and future initiatives.

Raising the arguments

UN Member States could consider making statements that the veto is not above all law but found within a system of international law and should only be used in a way that respects international law and the obligations in the UN Charter.

A General Assembly resolution

UN Member States could consider issuing a General Assembly resolution on this topic, reflecting that the veto is not above all law, but subject to the constraints of international law and the UN Charter.

Requesting an Advisory Opinion

UN Member States could consider the General Assembly making a request to the International Court of Justice (ICJ) for an Advisory Opinion on a question such as: does existing international law contain limitations on the use of the veto power by permanent members of the UN Security Council in situation where there is ongoing genocide, crimes against humanity, and/or war crimes?

V. Answers to Questions

Below are answers to questions that have arisen in meetings with States' representatives.

Do the arguments apply to all draft resolutions attempting to prevent or stop the commission of genocide, crimes against humanity, or war crimes? Yes, especially if the resolution has received nine affirmative votes. A related question is how one can be sure that these core international crimes are occurring, or that there is a serious risk of them occurring. The UN Charter appears to have designed this as a decision for the members of the Security Council to make, potentially guided by the findings of Commissions of Inquiry, Commissions of Experts, or Fact-Finding Missions. Thus, it is for at least nine members of the Security Council to consider the available information to be sufficient that atrocity crimes are occurring or there is a serious risk of them, occurring, and for Security Council members to be willing to take action to prevent or stop these crimes.

Why not include the veto threat in the suggested formulation of the question to the ICJ? The veto threat can be equally as problematic as the actual veto because it also may bring the Security Council to a complete impasse. However,

it is sometimes difficult to ascertain exactly what constitutes a veto threat. Thus, a more precise question to the ICJ might focus on veto use in the face of genocide, crimes against humanity, or war crimes. Progress on that topic could help undermine the potency of such veto threats.

Don't such legal obligations also constrain other states serving on the UNSC?

Yes, but each one is only 1/15th responsible for the outcome of the UNSC's work, whereas the vetoing permanent member(s) may be wholly responsible for the failure of the resolution. Accordingly, this document focuses on the permanent members' obligations, while the above arguments also suggest that no states should be blocking measures designed to curtail or alleviate the commission of genocide, crimes against humanity, or war crimes.

Isn't it true that raising legal arguments and even obtaining a favorable advisory opinion won't prevent abusive vetoes? Raising legal arguments could help increase the political costs of abusive vetoes and could constitute an expression of *opinio juris*, thereby driving the ICJ in the direction of a favorable ruling. While an ICJ Advisory Opinion would be non-binding, ICJ rulings are considered quite authoritative.

Could these arguments be raised before the ICJ through a contentious case?

Yes, a veto in the face of ongoing torture might be raised as a challenge related to the interpretation and application of the Torture Convention (Article 30), or a veto in the face of genocide might be raised as a challenge related to the interpretation and application of the Genocide Convention (Article IX). However, certain permanent members have reservations against the ICJ adjudicating such issues against them. Only one permanent member (the UK) has consented to the ICJ's general compulsory jurisdiction. Alternatively, a request for an Advisory Opinion might seek a ruling on the legality of a particular veto—although that still would be advisory.

Can a positive ruling by the ICJ be guaranteed? One cannot guarantee how the ICJ would rule either with respect to a contentious case or advisory opinion. However, the arguments outlined in this Concept Note (articulated more fully elsewhere)⁶ rely upon ICJ decisions such as the discussion of the obligation to

⁶ JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES (CUP 2020).

“prevent” genocide in the ICJ’s *Bosnia v. Serbia* decision.⁷ There are also ICJ cases examining the limitations of the Security Council’s power.⁸ Thus, there is helpful ICJ law to draw upon.

Why should a state that has already signed on to the French/Mexican Initiative and/or ACT Code of Conduct consider the arguments in this Concept Note? The remaining three permanent members are unlikely to join the French/Mexican initiative or ACT Code of Conduct. Thus, while these initiatives have created positive momentum and increased the political “cost” of vetoes in the face of genocide, crimes against humanity, or war crimes, they have not stopped such vetoes.

An opening exists for supporters of these initiatives to press these issues further by raising legality issues. For too long has the veto been treated as if it is above the system of international law, when it actually operates within the context of that system.

Another way of thinking of it is that the permanent members never, even in 1945, received unlimited veto power, as they could not be given the ability to sanction violations of international law. That was never a power states had, so states cannot have delegated such unlimited powers.

Have any UN Member States raised these arguments? Yes, many UN Member States have done so, both directly and indirectly. A more extensive compilation can be found in the author’s book, including, for example, numerous examples of legal arguments against Russia’s use of the veto to prevent measures to curtail chemical weapons use in Syria.⁹ Recent examples include:

Statement of the United Kingdom: “What has taken place in Syria to date is in itself a violation of the United Nations Charter. No purposes or principle of the Charter is upheld or served by the use of chemical weapons on innocent civilians.”¹⁰

⁷ Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn & Herz. v. Serb. and Montenegro), Judgment of 26 February 2007, ICJ Rep. 43, paras. 430–31 (Feb. 26).

⁸ See, e.g., Jennifer Trahan, *Veto Use and the UN Charter Obligation to Act in Accordance with the “Purposes and Principles” of the United Nations*, J. USE FORCE & INT’L L. (2022) (compiling cases).

⁹ See Trahan, *supra* note 5, ch. 4.2.4.2.

¹⁰ S/PV.8231, at 10–11.

Ambassador Bob Rae (**Canada**) who stated: “The use and threat of the veto in Syria and other situations where atrocity crimes are being perpetrated is shameful, and may be contrary to obligations under the UN Charter and international law.”¹¹

Norway, related to Russia’s veto of the condemnation of its own aggression, stated: “A veto cast on a resolution addressing this—[cast] by the aggressor itself—undermines the purpose of the Security Council. It is a violation of the very foundation of the UN Charter.”¹²

Mexico has referred to the way the veto is used as an “abuse of the law,”¹³ which would be the antithesis of satisfying the good faith obligation in Article 2.2 of the Charter (one of the UN’s Principles).

¹¹ Statement by H.E. Mr. Bob Rae, Ambassador and Permanent Representative of Canada to the United Nations, 64th plenary meeting, “Debate on the Responsibility to Protect and the Prevention of Genocide, War Crimes, Ethnic Cleansing, and Crimes Against Humanity” (May 17, 2021).

¹² Explanation of vote by Permanent Representative of Norway, Ambassador Mona Juul, on a draft resolution on Ukraine (Feb. 25, 2022), at [SC: Ukraine \(adoption\) - Norway in the UN](#).

¹³ See, e.g., Security Council Debate, “Upholding International Law within the Context of the Maintenance of International Peace and Security,” May 17, 2018, Provisional Verbatim Record, S/PV.8262, at 47 (“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”).