

**OVERVIEW DOCUMENT:
LEGAL LIMITS TO THE USE OF THE VETO**

Question at issue: Are there legal limits to the use of the veto by the Permanent Members of the U.N. Security Council blocking action in the face of genocide, crimes against humanity or war crimes? Or is the veto in such circumstances a *carte blanche* that can be utilized at the complete discretion of the permanent members?

Proposition: There *are* legal limits to the use of the veto power in the face of genocide, crimes against humanity or war crimes. Three arguments support this conclusion:

- 1) The veto power derives from the UN Charter, which is subsidiary to *jus cogens* norms. Thus, a veto that violates *jus cogens* norms, or permits the continued violation of *jus cogens* norms, would be illegal or *ultra vires*. The Charter (and veto power) must be read in a way that is consistent with *jus cogens*.
- 2) The veto power derives from the UN Charter, which states in Article 24(2) that the Security Council “[in] discharging [its] duties” “shall act in accordance with the Purposes and Principles of the United Nations.” A veto in the face of a draft resolution aimed at curtailing or alleviating the commission of genocide, crimes against humanity or war crimes does not accord with the Charter’s purposes and principles.
- 3) A permanent member of the Security Council that utilizes the veto power also has other treaty obligations, such as those under the Genocide Convention, which contains an obligation to “prevent” genocide. A Permanent Member’s use of the veto that would enable genocide, or allow its continued commission, would violate that state’s legal obligation to “prevent” genocide. A similar argument can be made as to allowing the perpetration of at least certain war crimes, such as “grave breaches” and violations of Common Article 3 of the 1949 Geneva Conventions. (Given that under Article 103 of the Charter, the Charter trumps inconsistent treaty obligations, this argument may only apply where treaty obligations also embody *jus cogens* norms or accord with the Charter’s purposes and principles.) Alternatively, these treaties and the veto power could (and should) be read consistently, so that there is no conflict, making article 103 inapplicable.

Goal of project: To ensure that the UN Security Council is able to act in the face of genocide, crimes against humanity and/or war crimes; therefore, to have the members of the General Assembly request an Advisory Opinion from the International Court of Justice (ICJ): Are there legal limits to the use of the veto power in the face of genocide, crimes against humanity or war crimes?

Initial goal: to form a group of NGOs and States who support this initiative and would be willing to work to convince the General Assembly to make this request of the ICJ.

Alternative concept: To put some of these legal concepts directly into a GA resolution that notes the legal obligations related to genocide, crimes against humanity and war crimes, and calls for veto restraint (and not ask for an Advisory Opinion).

-- Professor Jennifer Trahan, NYU Center for Global Affairs, jennifer.trahan@att.net

Supporting Individuals (in order of joining):

Hans Corell, former Under-Secretary General for Legal Affairs

Richard Goldstone, former Prosecutor of the International Criminal Tribunal for the former Yugoslavia & the International Criminal Tribunal for Rwanda,

Navanethem ("Navi") Pillay, former High Commissioner for Human Rights

Andras Vamos-Goldman, co-founder & former Executive Director, Justice Rapid Response

David M. Crane, former Chief Prosecutor, Special Court for Sierra Leone

Judge Christine Van den Wyngaert, formerly International Court of Justice (*ad hoc*), International Criminal Tribunal for the former Yugoslavia, International Criminal Court; presently Kosovo Specialist Chambers (signing in a personal capacity)

Zeid Ra'ad Al Hussein, former High Commissioner for Human Rights; former President of the Assembly of States Parties to the Rome Statute of the International Criminal Court; former Ambassador of Jordan to the United States

Supporting NGOs (in order of joining):

The Global Centre for the Responsibility to Protect

The International Center for Transitional Justice

Parliamentarians for Global Action

The World Federalist Movement - Institute for Global Policy

Open Society Justice Initiative

Global Justice Center

Syrian Justice and Accountability Center

Moroccan National Coalition for the International Criminal Court

Lawyers for Justice in Libya

Women's Initiatives for Gender Justice

Excerpt from the Eleventh Chautauqua Declaration (Aug. 28, 2018):

"Not[ing] with great concern the use of the Security Council veto to block appropriate responses to atrocity crimes and obstruct the efforts to provide justice to victims," signed by Sierra Leone Special Court former Chief Prosecutor David M. Crane; former Sierra Leone Special Court Prosecutor and Prosecutor of the Residual Court for Sierra Leone Brenda Hollis; and on behalf of Prosecutor Fatou Bensouda for the International Criminal Court, and Prosecutor Serge Brammertz for the Mechanism for International Criminal Tribunals.

