Could a Code of Conduct Work? The Prospects of the French Proposal Limiting the Veto on the United Nations Security Council

During the opening session of the Sixty-Eighth United Nations General Assembly in 2013, President François Hollande of France proposed that the permanent members of the Security Council should agree to "renounce their veto powers" in situations of mass atrocities. Two years later, President Hollande went one step further and officially committed France to this voluntary "code of conduct." Proposals to reform the Security Council veto have existed ever since the United Nations began in 1945, but could this code of conduct work? And, if so, how? This paper assesses the "French Proposal" and its prospects for success. It does so by examining the legal framework surrounding the veto power and why previous attempts to reform the veto have failed. It then considers how the French Proposal might be different, highlighting more recent changes that have occurred in the wider political context. Finally, the paper considers how the proposal might work in practice and, more importantly, which aspects need to be further defined.

INTRODUCTION

> "I am aware that objections of all kinds can be made to this proposal. Let me counter them with a powerful argument: a change such as this, so simple to implement, would allow us to preserve the fundamental credibility of the Security Council, which should be a pillar of peace and stability. It would convey the will of the international community to make the protection of human life a true priority." *Laurent Fabius, Minister of Foreign Affairs, France, October 4, 2013.*[1]

During the opening session of the Sixty-Eighth United Nations

1. Laurent Fabius, *A Call for Self-Restraint at the U.N.*, N. Y. TIMES (Oct. 4, 2013), http://www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html?mcubz=1.

General Assembly, President François Hollande of France proposed that the permanent members of the Security Council ("P5") agree to "renounce their veto powers" in situations of mass atrocities.[2] Two years later, at the Opening of the Seventieth United Nations General Assembly in 2015, President Hollande went further by officially committing France to this goal, promising "that France will never use its right of veto where there have been mass atrocities."[3] Given the growing support for such a voluntary code,[4] this paper analyzes the

2. François Hollande, Statement at the Opening of the United Nations General Assembly (Sept. 24, 2013), http://gadebate.un.org/68/france [hereinafter Hollande Statement 2013].

3. François Hollande, Statement at the Opening of the United Nations General Assembly (Sept. 28, 2015), http://gadebate.un.org/70/france [hereinafter Hollande Statement 2015].

4. There was a dramatic increase in public support for the idea of veto restraint in 2015. According to the Global Centre for the Responsibility to Protect, as of June 2016, ninety-six States have officially signed up to the "Political Declaration on Suspension of Veto" that has been presented by France and Mexico. *See* GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, SUPPORT TO THE FRENCH MEXICAN INITIATIVE ON VETO RESTRAINT IN CASE OF MASS ATROCITIES (June 15, 2016), http://www.globalr2p.org/media/files/veto-list.pdf. Furthermore, the Accountability Coherence and Transparency Group (ACT Group) has officially launched its "Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes" (ACT Code of Conduct) to which, as of June 10, 2016, 110 States and two UN Observers have signed up. *See* Letter from the Permanent Representative, Liechtenstein, to the Secretary General, United Nations (Dec. 14, 2015), https://www.globalr2p.org/media/files/n1543357.pdf (hereinafter ACT Code of Conduct); 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 (June 10, 2016), http://www.globalr2p.org/media/files/2017-01-25-coc-list-of-supporters.pdf. The ACT Code of Conduct will be explored further *infra*.

At a ministerial side-event on the Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes, held on October 1, 2015, twenty-eight Member States referred to the need for veto restraint in mass atrocity situations. *See* GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, REFERENCES ON THE NEED FOR VETO RESTRAINT BY THE UN SECURITY COUNCIL IN MASS ATROCITY SITUATIONS 1, http://www.globalr2p.org/media/files/veto-restraint-references-4.pdf (last visited Feb. 12, 2016). The Global Centre for the Responsibility to Protect calculates that, during twenty-nine meetings since 2008, "84 states from all regions of the world, representing 44 percent of the total UN membership, have supported the call for restraint on the use of the veto in mass atrocity situations." *Id*. Furthermore, in 2013 the European Parliament encouraged the High Representative of the Union for Foreign Affairs and Security Policy, Vice-President of the Commission and the Council "to propose to the five permanent members of the UN Security Council the adoption of a voluntary code of conduct which would limit the use of the right of veto in cases of genocide, war crimes, ethnic cleansing or crimes against humanity." *See European Parliament Recommendation to the Council of 18 April 2013 on the UN Principle of the 'Responsibility to Protect' ('R2P')*, (2012/2143(INI)) ¶ 2(f) (Apr. 18, 2013), http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-

prospects of success for this "French proposal."[5]

The paper first addresses the origin and expansion of the veto power, from both legal and political perspectives. It goes on to critique previous attempts to reform the veto and concludes that a combination of weaknesses—internal divisions among the groups advocating reform, inappropriately packaged deals, unclear proposals, and, fundamentally, resistance by the P5—have prevented success. Finally, in light of the emergence of the Responsibility to Protect doctrine ("R2P")[6] and recent progress on the "Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes" put forward by the Accountability Coherence and Transparency group, this paper addresses whether the time is now ripe for the French proposal.

The paper ultimately concludes on a positive note—it is more likely now, than ever before, that the French proposal can be realized. It is accepted that the proposal is still too vague, and a number of structural questions need to be addressed. But, as the world continues to bear witness to the Syrian crisis, and as the international community continues to reassesses how the UN can fulfill its purpose of maintaining international peace and security, world leaders are urged to take this small, but important, step towards ending mass atrocities.

0180&format=XML&language=EN.

5. It should be noted that France and Mexico jointly hosted Ministerial Side-Events at the UN in 2014 and 2015 on this issue of veto restraint. The proposal to limit the veto power has, therefore, been referred to as the "France/Mexico Initiative." *See, e.g.*, *UN Security Council Code of Conduct*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, http://www.globalr2p.org/our_work/un_security_council_code_of_conduct. For ease of reference in this paper, however, the proposal will be referred to as the "French proposal."

It should also be noted that this was not the first time that such a proposal had been raised. As will be further outlined below, Hubert Védrine, French Minister of Foreign Affairs, previously proposed a similar "code of conduct." *See* THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶ 6.21 (2001) [hereinafter ICISS Report]; and CITIZENS FOR GLOBAL SOLUTIONS, THE RESPONSIBILITY NOT TO VETO: A WAY FORWARD 8 (2014) http://globalsolutions.org/files/public/documents/RN2V_White_Paper_CGS.pdf [hereinafter CGS 2014]. *See also* THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT 198 (2000) ("...the current system allowing any Permanent UNSC member to paralyze UN action through the use of the veto must be adjusted in a judicious manner to deal effectively with cases of extreme humanitarian crisis.").

6. *See* G.A. Res. 60/1, ¶ 138-9 (Oct. 24, 2005) [hereinafter "Outcome Document"] (adopting the 2005 World Summit Outcome Document). *See also* S.C. Res. 1674, ¶ 4 (Apr. 28, 2006).

I. THE VETO POWER

A. Legal Origin and Political Justification

Any analysis of the veto power must begin with Article 27(3) of the Charter of the United Nations ("UN Charter"),[7] which requires the "concurring votes of the permanent members"[8] for any non-procedural Security Council decision.[9] Clearly, "Article 27(3) provides a firm and. . .explicit legal basis for the veto and the exercise thereof."[10] Through it, the UN Charter embedded the political hierarchy of 1945, seemingly in stark contradiction to the underlying "principle of the sovereign equality of all its Members."[11] The justifications were rooted in practical considerations.[12] Concerns were raised that the world's superpowers would not sign up without this safety valve.[13] Some scholars even contend, "[i]t is probably not an exaggeration to say that the existence of the veto was one of the principal reasons why the [United Nations] made it through the darker days of the Cold War period."[14] Furthermore, there was a great em-

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7. U.N. Charter art. 27(3).

8. The permanent members are designated in art. 23(1) of the U.N. Charter.

9. *See infra* Section I.B.1 (discussing the "double veto" and what is meant by the term "procedural").

10. 1 BRUNO SIMMA ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 933 (3rd ed. 2012).

11. U.N. Charter art. 2, ¶ 1; *see* HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 277 (1st ed. 1950) [hereinafter Kelsen] ("[t]here is an open contradiction between the political ideology of the United Nations and its legal constitution."); *see also* BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO 12 (1998) [hereinafter Fassbender] ("[c]ompared to the Covenant, the UN Charter entailed a significantly stronger formal recognition of inequality among states"); HANS KÖCHLER, THE VOTING PROCEDURE IN THE UNITED NATIONS SECURITY COUNCIL: EXAMINING A NORMATIVE CONTRADICTION AND ITS CONSEQUENCES ON INTERNATIONAL RELATIONS 2 (1991) [hereinafter Köchler].

12. For a modern day defense of the veto power *see* Brian Cox, *United Nations Security Council Reform: Collected Proposals and Possible Consequences,* 6 S.C.J. INT'L. L. & BUS. 89, at 120 (2009) ("[t]he Council was never intended as a tool to deal with internal conflicts, to prevent violence, or arguably to prevent all war. The purpose of the Security Council is to 'maintain international peace and security.' The veto is a cornerstone of this duty.").

13. Jan Wouters & Tom Ruys, *Security Council Reform: A New Veto for a New Century?*, 44 MIL. L. & L. WAR REV. 139, 157 (2005); CGS 2014, *supra* note 5, at 3; Fassbender, *supra* note 11, at 11; Köchler, *supra* note 11, at 9.

14. Wouters and Ruys, *supra* note 13, at 157. In contrast, Okhovat observes that the risk of the P5 exiting the UN now appears exaggerated "considering the current status of the UN and the level of support for it." Sahar Okhovat, *The United Nations Security Council:*

phasis, at the San Francisco Conference, that this privilege mirrored the superior responsibilities of the P5[15] and that, the United Nations ("UN") system needed to ensure Security Council decisions would be effectively implemented.[16] Undoubtedly, power politics were also at play.[17] Sydney Bailey, a leading commentator on the UN system, notes that "[t]he main argument used in support of the veto at San Francisco was that it was inconceivable that the United Nations could undertake military enforcement against a great power."[18]

Interestingly, there appears to have been an expectation that the veto power would rarely be used.[19] The Statement of the Four Sponsoring Powers on Voting Procedure in the Security Council on June 8, 1945, by the United States, Soviet Union, United Kingdom, and China, noted "[i]t is not to be assumed, however, that the permanent members, any more than the non-permanent members, would use their 'veto' power willfully to obstruct the operation of the Council."[20] Similarly, Professor Bardo Fassbender, Chair in Public International Law at the University of St. Gallen, has noted that there was an assumption that the great powers would cooperate.[21] Unfortunate-

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Its Veto Power and Its Reform 26 (CPACS Working Paper No.15/1, 2012), http://sydney.edu.au/arts/peace_conflict/docs/working_papers/UNSC_paper.pdf. Concerns that the P5 may exit the UN system might, therefore, be out-of-date.

15. UNCIO, *Statement by the Four Sponsoring powers on Voting Procedure in the Security Council*, *in* THE PROCEDURE OF THE UN SECURITY COUNCIL (Sydney D. Bailey & Sam Daws eds., 2005) [hereinafter Yalta statement]. France "subsequently indicated that it shared the views of [the Four Sponsoring Powers]." *Id.* Further, it is worth noting that the legality of this statement has been questioned, since it was not formally adopted at the San Francisco Conference, *see* SYDNEY D. BAILEY, VOTING IN THE SECURITY COUNCIL 18 (1969) [hereinafter Bailey], and Wouters and Ruys, *supra* note 13, at 144; *see also* Kelsen, *supra* note 11, at 272.

16. Bailey notes a concern about what the French described as "a divorce between the decisions of the Council and the enforcement of those decisions." Bailey, *supra* note 15, at 108 (quoting from U.N. GAOR, 1st Sess., second part, First Committee, 21st meeting (Nov. 16, 1946)).

17. Fassbender, *supra* note 11, at 167. *See also* Köchler, *supra* note 11, at 10.

18. Bailey, *supra* note 15, at 34.

19. *See* Bernard Emié, *Bernard Emié on Veto Restraint at the UN Security Council*, UNA-UK MAGAZINE (June 17, 2014), http://www.una.org.uk/magazine/summer-2014/bernard-emié-veto-restraint-un-security-council (quoting C. Attlee, British Prime Minister, 1945 "[a]t San Francisco we agreed to the creation of the veto, but I am quite certain that we all regarded this as something to be used only in the last resort, in extreme cases where the five Great Powers might be involved in conflict. We never perceived it as a device to be used constantly whenever a particular power was not in full agreement with the others.").

20. Yalta Statement, *supra* note 15, section I ¶ 8.

21. Fassbender, *supra* note 11, at 168.

ly, this has not been the case: the veto power has been used to block 227 draft resolutions,[22] with thirty-five vetoes registered in the period 1990-2014.[23] More specifically, regarding situations of mass atrocities, Gareth Evans, a former Australian Foreign Minister, international advisor, and leading thinker on the Responsibility to Protect doctrine, notes that since 2005, "there have been six clear cases . . . when the veto has been employed to block resolutions dealing with situations that could reasonably be described as mass atrocity crimes."[24]

Compared to the Council of the League of Nations, which operated on the basis of total unanimity,[25] the Security Council's veto power appeared greatly restricted. Hans Kelsen, the well-known legal theorist and philosopher, however, notes that this seemingly restricted veto simultaneously became much more powerful due to the Security Council's enhanced enforcement capabilities.[26] Kelsen goes on to explain that, in contrast to Article 25 of the UN Charter (which establishes legally binding obligations from Security Council decisions), members of the League who were unrepresented on the Council did not have to comply with Council decisions.[27] What is more,

22. SECURITY COUNCIL REPORT, SPECIAL RESEARCH REPORT, SECURITY COUNCIL WORKING METHODS: A TALE OF TWO COUNCILS 52 (2014), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/special_research_report__working_methods_2014.pdf.

23. *See* Dag Hammarskjöld Library, *Security Council - Veto List*, UNITED NATIONS http://www.un.org/depts/dhl/resguide/scact_veto_table_en.htm (last visited Mar. 5, 2016).

24. Gareth Evans, *The French Veto Restraint Proposal: Making it Work* 2–3 (2016), http://www.globalr2p.org/media/files/vetorestraintparis21jan25i15rev.pdf (discussing a panel presentation given on January 21, 2015 at Sciences Po, Paris, as part of the International Conference on Limiting the Use of Veto at the UN Security Council in the Case of Mass Atrocities. Evans cites to "UN draft resolutions S/2014/348, S/2012/538, S/2012/77, S/2011/612 (Middle East/Syria), S/2008/447 (Zimbabwe), and S/2007/14 (Myanmar).").

25. League of Nations Covenant art. 5 (giving, in effect, every Council member a veto).

26. Kelsen, *supra* note 11, at 274–5. An example of the Security Council's enhanced enforcement capabilities is found in Chapter VII of the U.N. Charter. The League of Nations only had the power to "*recommend* to the several Governments concerned [in the event that a Member of the League resorted to war in disregard of the Covenant] what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League." League of Nations Covenant art. 16 ¶ 2 (emphasis added). By contrast, under Chapter VII, the Security Council of the UN has the power to "*take such action* by air, sea, or land forces as may be necessary to maintain or restore international peace and security" should it decide that measures falling short of the use of force have proven to be inadequate to give effect to its decisions. U.N. Charter art. 42 (emphasis added). For a further discussion on this distinction *see* H. G. NICHOLAS, THE UNITED NATIONS AS A POLITICAL INSTITUTION 81–5 (5th ed., 1975).

27. Kelsen, *supra* note 11, at 276.

the UN Charter abolishes the right to self-help[28] (apart from the limited right of self-defense)[29] in situations where the Security Council fails to agree on action.[30] In a number of ways, therefore, art. 27(3) marked a great expansion of legal powers to the P5 vis-à-vis the rest of the international community.

B. The Veto Power as Customarily Practiced

1. "Double Veto"

Since 1945, developments at the UN have greatly expanded the P5's powers. A number of terms had been left undefined in Article 27(3) and, unsurprisingly, controversies later arose over the meaning of these terms. The first such difficulty related to the word "procedural" in Article 27(2). If the veto power only applied to "non-procedural" matters, then defining this word would become of vital importance. In fact, this was one of the key questions that the four Sponsoring Governments[31] responded to.[32] The Sponsoring Governments, somewhat naively, thought it "unlikely that there will arise in the future any matters of great importance on which a decision will have to be made as to whether a procedural vote would apply," but they decided that, in such cases, the veto power would be engaged. The P5, therefore, had two veto powers.[33] The veto could be used to stop an issue qualifying as "procedural" (veto one), and this would enable the veto to be used to decide the issue itself (veto two).[34]

This interpretation was met with criticism. The General Assembly passed a number of resolutions cautioning the Security Council on the possibility that voting practices could impede its work[35] and, later, called on the Security Council to adopt a list of "decisions deemed procedural" by the Interim Committee of the General As-

28. Codified by the League of Nations Covenant art. 15, ¶ 7.

29. U.N. Charter, art. 51.

30. Kelsen, *supra* note 11, at 269–70; Kelsen refers to a French proposal at the San Francisco Conference, which suggested the self-help right be retained at 270 (citing to U.N.C.I.O. Doc. 2, G/7 (o), Part II, at 2–3).

31. China, UK, USA and the USSR. *see* Yalta Statement, *supra* note 15.

32. Found in Question 19 of the questionnaire arising from Sub-Committee III/1/B, May 19 1945 during the San Francisco Conference. Köchler *supra* note 11, at 12.

33. Yalta Statement, *supra* note 15, Section II ¶ 2.

34. *Id.*

35. G.A. Res. 40 (I) (Dec. 13, 1946); G.A. Res. 117 (II) (Nov. 21, 1947).

sembly.[36] Yet, the Security Council failed to comply,[37] effectively creating the "double veto."[38] Although the "double veto" remains unresolved today,[39] it has been less problematic since 1959 following an "informal agreement" between the P5.[40]

2. Admissions

The veto power was particularly problematic during the Cold War in the context of admission of new members to the UN. Although the criteria for membership were clearly laid out in art. 4(1) of the Charter, P5 members used their vetoes to block admissions that contravened their political interests.[41] In 1948, the International Court of Justice ("ICJ") ruled that such behavior was contrary to the UN Charter,[42] yet the P5 continued the practice, ignoring further calls by the General Assembly that they refrain from doing so.[43] Interestingly, Jan Wouters[44] and Tom Ruys[45] note that in 1948 the United States (along with the United Kingdom, France, and China) "declared that they were prepared to refrain from applying the right of veto" in these types of cases;[46] with the U.S. representative stating that recommendations under art. 4(2) were "not likely to affect the vital in-

36. G.A. Res. 267 (III), (Apr. 14, 1949). *See also id.* at annex (giving the list of decisions).

37. Köchler, *supra* note 11, at 15.

38. *Id.*, at 18. *See* Kelsen, *supra* note 11, at 248, 258 (pointing out that how the preliminary question is phrased can have a substantial impact on voting requirements).

39. Wouters and Ruys, *supra* note 13, at 144.

40. *Id*, citing to BRUNO SIMMA ET AL, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 492 ¶ 44 (2nd ed., 2002). *See also* Köchler, *supra* note 11, at 19 (noting how the President of the Security Council managed to escape the "double veto" by reference to Rule 39 of the Provisional Rules of Procedure of the Security Council during the Famosa Case, November 27, 1950).

41. Wouters and Ruys, *supra* note 13, at 146.

42. Conditions of Admission of a State to Membership in the United Nations (art. 4 of Charter), Advisory Opinion, 1948 I.C.J. 57, 12 (May 28).

43. *See, e.g.*, G.A. Res. 296 (IV), K ¶ 1 (Nov. 22, 1949) (stating that the General Assembly "*[r]equests* the States permanent members of the Security Council to refrain from the use of the veto in connexion with the recommendation of States for membership in the United Nations."). *See also* Bailey, *supra* note 15, at 49–50 ("[s]ince the adoption of that resolution.... the veto has been used thirty times in connection with applications for Membership" (writing in 1969)).

44. Professor of International Law at University of Leuven.

45. Research fellow at Leuven University at the time of writing.

46. Wouters & Ruys, *supra* note 13, at 160 (citing 1948–49 U.N.Y.B. 426–27); *see also* Fassbender, *supra* note 11, at 336.

terests of the Great Powers to an extent sufficient to justify recourse to the right of veto."[47] The U.S. position had altered, however, by 1996, when the U.S. Minister Counselor for Political Affairs stated, regarding the new Balkan states, that "[t]here is relatively recent evidence . . . that consideration of regional and international security can have a direct and important bearing on all membership issues."[48] Clearly, legal interpretations of the UN Charter have political underpinnings, which have resulted in further expansions of P5 power.

3. Abstention of a "party" to a "dispute"

There is an exception to the veto built into Article 27(3), providing that "in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."[49] This imports "one of the most fundamental principles of legal procedure: that nobody should be a judge in its own cause"[50] upheld by the Permanent Court of Justice in the *Treaty of Lausanne* Advisory Opinion.[51] Yet, the undefined terms of "party" and "dispute," as well as the ambiguity over whether the Security Council is acting under Chapter VI or VII[52] have given the P5 considerable room to maneuver. In practice, this obligation has been ignored repeatedly.[53]

4. "Hidden Veto"

It is worth noting that the veto power goes far beyond the overt blocking of Security Council resolutions. It is well documented that the P5 use the threat of the veto as a bargaining chip in negotiations. Thus, the veto power is much more influential than initially ap-

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47. Wouters & Ruys, *supra* note 13, at 161.

48. *Id.* (citing U.S. Minister Counselor for Political Affairs, Statement to the Open-Ended Working-Group [on] the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council Decision-Making Process in the Security Council, Including the Veto (May 23, 1996), https://www.globalpolicy.org/component/content/article/200/32847.html).

49. Under Kelsen's interpretation, "[i]n decisions regarding a dispute, if taken under Chapter VI and under Article 52, paragraph 3, the votes of the parties to the dispute must not be counted." Kelsen, *supra* note 11, at 264.

50. *Id*. at 261.

51. Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 12, at 32 (Nov. 21).

52. Wouters & Ruys, *supra* note 13, at 146–7.

53. Köchler, *supra* note 11, at 21; Kelsen, *supra* note 11, at 332.

pears.[54] For example, Evans refers to the case of Kosovo in 1999 "where a veto has its effect simply through being threatened, and never actually exercised."[55]

5. "Concurrence"

The above discussion highlights how subsequent practice by the P5 greatly expanded the scope of the veto power. By contrast, regarding the phrase "concurring votes" in Article 27(3), the veto's impact was substantially reduced. It is interesting to note that the word "veto" is noticeably absent in the wording of Article 27(3). Its existence derives from the requirement for the "concurring votes of the permanent members." If all permanent members must concur, then any dissent will prevent passage of non-procedural decisions. The veto's scope, therefore, depends on how "concurring" is defined and, most importantly, whether the definition includes abstention by a permanent member.

In 1971, the ICJ held that "[b]y abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote" and that "[t]his procedure followed by the Security Council . . . has been generally accepted by Members of the United Nations and evidences a general practice of that Organization."[56] It now appears settled that abstention from a vote will not equate to a veto. An abstention will, therefore, act as a "concurring vote."[57] This interpretation enabled Security Council Resolution 84, authorizing "such assistance . . . as may be necessary" to the Republic of Korea, to be passed in the Soviet Union's absence.[58] Some scholars, however,

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54. Céline Nahory, *The Hidden Veto*, GLOBAL POLICY FORUM (May 2004), https://www.globalpolicy.org/component/content/article/185-general/42656-the-hidden-veto.html. *See also* Bailey, *supra* note 15, at 53; CGS 2014, *supra* note 5, at 5.

55. EVANS, *supra* note 24, at 3.

56. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 22 (June 21).

57. Kelsen, *supra* note 11, at 241. *See also* the explanation on the Security Council's website, "[i]f a permanent member does not fully agree with a proposed resolution but does not wish to cast a veto, it may choose to abstain, thus allowing the resolution to be adopted if it obtains the required number of nine favourable votes." U.N. SECURITY COUNCIL, VOTING SYSTEM AND RECORDS, http://www.un.org/en/sc/meetings/voting.shtml (last visited Mar. 6, 2017).

58. *See generally* S.C. Res. 84 (July 7, 1950).

question whether the UN Charter really supports this interpretation.[59]

II. CALLS FOR REFORM

A. History of Reform Efforts

Following the foregoing analysis, it is unsurprising that there have been repeated calls to reform the Security Council veto. The question of "equitable representation on and increase in the membership of the Security Council" (covering the question of the veto) has been on the General Assembly's agenda since 1979.[60] Serious discussions only really took off, however, following General Assembly Resolution 47/62 in 1992,[61] which led to the establishment of an Open-Ended Working Group in 1993.[62] This Working Group continued discussions until 2008, when, through General Assembly Decision 62/557,[63] they moved to intergovernmental negotiations (allowing decisions by a two third quorum) and where they seem set to continue for the foreseeable future. This development was also significant "as Member States for the first time agreed on a document [Resolution 62/557] as a basis for negotiations".[64]

Highlights of the discussions include the build-up to the UN's Fiftieth Anniversary in 1995,[65] when it was agreed that the Security Council should be expanded.[66] Similarly, there was another surge in

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59. *See* Fassbender, *supra* note 11, at 181–2.

60. Bardo Fassbender, *An Illusion Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council*, in 7 MAX PLANCK YEARBOOK OF UN LAW 183, 186 (2003) [hereinafter "Fassbender 2003"].

61. G.A. Res. 47/62, Preamble (Dec. 11, 1992) (building upon the Final Documents of the Tenth Conference of Heads of State or Government of Non-Aligned Countries, held at Jakarta from September 1–6, 1992).

62. G.A. Res. 48/26 (Dec. 3, 1993) ("[T]o consider all aspects of the question of an increase in the membership of the Security Council and other matters related to the Council").

63. G.A. Decision 62/557 (Sept. 15, 2008).

64. Alischa Kugel, *Reform of the Security Council—A New Approach?*, in DIALOGUE ON GLOBALIZATION BRIEFING PAPERS 12, 5 (Friedrich Ebert Stiftung ed., 2009) http://library.fes.de/pdf-files/iez/global/06696.pdf. For more information about the two-third quorum, *see id*., at 3.

65. JOACHIM MÜLLER, REFORMING THE UNITED NATIONS—THE CHALLENGE OF WORKING TOGETHER 17 (2010); Fassbender 2003, *supra* note 60, at 185–86.

66. A detailed discussion on proposals to expand the membership of the Security Council is beyond the scope of this paper. See, however, *infra* Section II.B.1 (discussing

motivation in the run up to the 2005 World Summit.[67] In 1997, the "Razali Plan"[68] (named after Ambassador Ismail Razali of Malaysia, Chairman of the Working Group), "widely regarded as the culmination of the most productive phase of discussion in the Working Group,"[69] raised some hopes but was ultimately unable to surmount the divisions existing at the time.[70] In fact, the decision to move discussions to the intergovernmental negotiations was only achieved through disarray.[71]

More recently, on September 14, 2015, in what some have called a "landmark" decision, the General Assembly adopted a text that reaffirmed "the central role of the General Assembly with regards to the question of equitable representation on and increase in the membership of the Security Council and other matters related to the Security Council." Intergovernmental negotiations will continue and Member States can decide to convene an open-ended Working Group on the issue. The real change, however, is that there is now a new UN text from which to work from and this arguably sets a more defined framework for negotiations.[72] The text has, however, sparked controversy, with some states arguing that it ignored the views of Member States (the text was passed without a vote).[73]

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such proposals in brief).

67. *See* Müller *supra* note 65, at 16–17.

68. Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council, U.N. Doc. A/51/47, Annex II (1997) [hereinafter Razali plan]. *See, id*., at 7 ¶ 4.

69. Fassbender 2003, *supra* note 60, at 192.

70. *Id.* at 193.

71. *See* Müller *supra* note 65, at 43–44 ("Amid the noise and with the room still in disarray, the Chairman of the Working Group asked for consensus … gaveled that decision almost immediately and closed the meeting. Several delegations were outraged.").

72. *See also* Question of Equitable Representation on and Increase in the Membership of the Security Council and Related Matters, U.N. Doc A/69/L.92 (Sept. 11, 2015) (containing the draft document that was adopted).

73. *See* Press Release, General Assembly Adopts, without Vote, 'Landmark' Decision on Advancing Efforts to Reform, Increase Membership of Security Council, U.N. Press Release, GA/11679 (Sept. 14, 2015), http://www.un.org/press/en/2015/ga11679.doc.htm.

B. Reasons for the Impasse

1. Failures of Hard Law Reform

It is clear that attempts to reform the veto have not failed for want of proposals. These have varied from elimination of the veto,[74] to limiting the veto to certain types of decisions, such as Chapter VII decisions,[75] or not applying the veto to Chapter VI decisions.[76] Other proposals have sought to require a minimum of two vetoes to block a resolution,[77] or to allow the General Assembly or Security Council to overrule a single veto by a majority decision.[78] Within discussions on enlarging the Security Council, there has been fierce debate as to whether new permanent members should be afforded the veto power.[79]

One of the key reasons why attempts to reform the Security Council's veto power have so far failed lies in Article 108 of the UN Charter. Article 108, in somewhat frustratingly clear terms, sets out the process by which amendments to the UN Charter are to be made.

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74. *See* Letter from the Permanent Representative of Islamic Republic of Afghanistan to the United Nations ¶ 2.6 (May 26, 2010), http://www.un.org/ga/president/64/issues/screform260510.pdf [hereinafter Letter from the Chair 2010] (including a proposal by the Non Aligned Movement ("NAM")). *See also* the Razali Plan *supra* note 68 (noting "an overwhelming number of Member States consider the use of veto in the Security Council anachronistic and undemocratic, and have called for its elimination"). *See also* Permanent Representative of Ethiopia, on behalf of the African Group, Statement at the General Assembly, U.N. Doc. A/57/PV.31 (Oct. 16, 2002). *See also* Fassbender 2003, *supra* note 60, at 211–2. *See generally* Köchler, *supra* note 11.

75. Letter from the Permanent Representative of the Arab Republic of Egypt, Chairman of the Working Group of the Non-Aligned Countries, to the United Nations (July 28, 1999) (U.N. Doc. A/53/47, Annex X). Wouters & Ruys note that this idea has been "taken over by individual countries such as Spain, Brazil, Pakistan, Colombia, Costa Rica, Ghana, Jamaica, Mexico, Peru, Lithuania, and the Slovak Republic." Wouters & Ruys, *supra* note 13, at 154.

76. Australia proposed this during the San Francisco conference (initially supported by France) and a similar proposal was made by China in 1948. *See* Wouters & Ruys, *supra* note 13, at 154. *See also*, EVANS, *supra* note 24, at 1.

77. Réformes des Nations Unies: Position Africaine Commune, O.A.U. Doc. NY/OAU/POL/84/94 Rev. 2, ¶ 33(e) (Sept. 29, 1994) (reproduced citation in Fassbender 2003, *supra* note 60, at 213).

78. Question of Equitable Representation on and Increase in the Membership of the Security Council, Statement by Ukraine, U.N. Doc. A/48/264, Add.2 (Aug. 2, 1993) (reproduced citation in Fassbender 2003, *supra* note 60, at 213). *See also* Wouters & Ruys, *supra* note 13, at 155.

79. *See* Müller, *supra* note 65, at 16–17, 45.

Most notably, any amendment needs to be "ratified" by "all the permanent members of the Security Council."[80] Here, we see yet another "double veto", whereby "[t]he sponsoring governments. . .ensured their permanent voting privilege."[81] In other words, the P5 have retained a veto power against possible amendments to the UN Charter by specifying that all P5 members must ratify the new proposal. Failure to ratify would, therefore, equate to a veto.

What is more, Fassbender argues persuasively that the UN Charter should be seen "as the constitution of the international community as a whole"[82] leading him to apply a strict interpretation to the formal amendment procedure.[83] Nevertheless, Article 27 was amended successfully in 1963,[84] when the number of non-permanent members on the Security Council was expanded from 6 to 10. Since then, however, no further amendments have been made. Considering P5 resistance to any legally binding amendments to the veto power,[85] structural reform of Article 27(3) is unlikely.[86]

Another reason why efforts have so-far failed, seems to be that "too many cooks spoil the broth." This is not to suggest that all Member States should not partake in reform discussions (as undoubtedly they should), but to highlight the practical difficulty caused by having so many proposals on the table.[87] There are "deep differences"[88] of opinion both regarding outcome and means,[89] which is further compounded by the tendency to group a number of different reform proposals into package deals.[90] Efforts to reform the veto

80. U.N. Charter art. 108.

81. Köchler, *supra* note 11, at 3.

82. Fassbender *supra* note 11, at 2.

83. *Id.* at 181–82. Fassbender does not view the accepted interpretation of the word "concurring" in U.N. Charter art. 27, para. 3 as legally binding, instead viewing it as an unlawful informal amendment.

84. G.A. Res. 1991 (XVIII), A ¶ 1 (Dec. 17, 1963). The amendment came into force on August 31, 1965.

85. *See infra* Section I.B.2 for a further discussion on P5 resistance.

86. Simma et al., *supra* note 10, at 928; Wouters & Ruys, *supra* note 13, at 154.

87. *See, e.g.*, Letter from the Chair 2010, *supra* note 74.

88. Fassbender, *supra* note 11, at 16–17.

89. *See*, Okhovat, *supra* note 14, at 43.

90. *See*, the Razali Plan, *supra* note 68. *But see* that China favors such a package deal: "Only an integrated approach and a package solution can accommodate the interests and concerns of Member States on different issues." U.N. General Assembly, Debate on the Work and Reform of the Security Council, Statement submitted by the Permanent Rep. of the People's Republic of China to the UN (Nov. 13, 2009), https://www.globalpolicy.org/security-council/security-council-reform/50016-statement-by-ambassador-zhang-yesui-permanent-representative-of-china-to-the-united-nations-at-debate-

have also been lost within the wider debate on Security Council enlargement—a debate which has been substantially impeded due to internal divisions.[91]

Finally, any review of attempts to reform the Security Council would not be complete without documenting the P5's resistance to any weakening of their position. In 1997, for example, the Bureau of the Working Group stated that "the permanent five have indicated that they will not accept or ratify any Charter amendments which aim at abolishing or limiting the veto."[92] Müller, writing in 2010, notes that "[t]he US strongly opposed modifying the veto arrangement, arguing that veto power was not subject to negotiation."[93] Similarly, Fassbender quotes a statement made by US Ambassador Siv, ". . .we will continue to oppose efforts to limit or eliminate the veto."[94] In 1999, the Representative of the Russian Federation similarly stated, "Russia continues to firmly oppose any restriction or curtailment of the veto, be it through amendment to the Charter or otherwise."[95] Clearly, in light of Article 108, structural reforms which would weaken P5 power are doomed from the outset.

2. Failures of Soft Law Reform

In response to the above difficulties, reformers have advocated

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of-the-64th-session-of-the-general-assembly-on-the-work-and-reform-of-the-security-council.html?itemid=915. *See also*, Press Release, General Assembly, Intergovernmental Negotiations on Security Council Reforms Will Continue During Sixty-Ninth Session, U.N. Press Release GA/11540 (Sept. 8, 2014), http://www.un.org/press/en/2014/ga11540.doc.htm. Russia is also against piecemeal reform. *See also*, UNA-UK, UN SECURITY COUNCIL AND THE RESPONSIBILITY TO PROTECT: VOLUNTARY RESTRAINT OF THE VETO IN SITUATIONS OF MASS ATROCITY (2016), https://www.una.org.uk/sites/default/files/Briefing%20-%20Veto%20code%20of%20conduct.pdf [hereinafter UNA-UK Briefing].

91. There are a number of different groups demanding reform, including the G4 (Germany, Japan, India and Brazil), NAM, the African Group, and the "Uniting for Consensus" Group.

92. Conference Room Paper, by the Bureau of the Working Group, U.N. Doc. A/AC.247/1997/CRP.8, ¶ 9 (reproduced citation in Fassbender, *supra* note 11, at 263).

93. Müller, *supra* note 65, at 14.

94. Question of equitable representation on and increase in the membership of the Security Council and related matters: Report of the Open-ended Working Group, Statement by Rep. of U.S., U.N. Doc. A/57/PV.27, 10 (Oct. 14, 2002) (reproduced citation in Fassbender 2003, *supra* note 60, at 214, n.103).

95. Open-Ended Working Group on Security Council Reform on Veto Issue, Statement by the Rep. of the Russian Federation, quoted as an unofficial translation in *Russia Vetoes the Veto*, GLOBAL POLICY FORUM (Mar. 24, 1999), https://www.globalpolicy.org/component/content/article/198/32893.html.

voluntary limitations on the veto power.[96] These voluntary limitations will be referred to as proposals for "soft law reform", as they do not require any formal amendment to the UN Charter, or legal changes. The French Proposal is an example of soft law reform because it simply calls for voluntary commitments from the P5. Such calls for restraint have, in fact, accompanied the veto since 1945. For example, in 1948, the United Kingdom "called upon the P-5 [sic] to exercise the veto only when they considered the question 'of vital importance, taking into account the interest of the United Nations as a whole, and to state upon what ground they consider this condition to be present.'"[97] Two years later, the Uniting for Peace Resolution[98] reaffirmed "the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto."[99]

More recently, the well-known International Commission for Intervention and State Sovereignty's report on "The Responsibility to Protect" ("ICISS Report") took up the French Foreign Minister Hubert Védrine's idea[100] of a "code of conduct" whereby the veto would not be used "with respect to actions that are needed to stop or avert a significant humanitarian crisis" in matters where the permanent members' "vital national interests were not claimed to be involved."[101] Similar calls have been made by the Secretary-General who, in 2004, seeing "no practical way of changing the existing members' veto powers," urged for its use to "be limited to matters where vital interests are genuinely at stake" and called for "the permanent members, in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses."[102] In 2009, the Secretary-General urged

96. Simma et al., *supra* note 10, at 928.

97. Wouters & Ruys, *supra* note 13, at 160 (citing to U.N. Doc. A/AC.18/17 (Feb. 10, 1948)). See also, G.A. Res. 267 (III), ¶ 3(c) (Apr. 14,1949) (urging the P5 "to exercise the veto only when they consider the question of vital importance, taking into account the interest of the United Nations as a whole, and to state upon what ground they consider this condition to be present"). Other resolutions have also called for restraint to be exercised by the P5. G.A. Res. 40 (I), ¶ 3 (Dec 13, 1946); G.A. Res. 117 (II), ¶ 3 (Nov. 21, 1947).

98. G.A. Res. 377 (V), Preamble (Nov. 3, 1950).

99. *Id*. For an interesting discussion on the current role of the Uniting for Peace resolution *see* Larry Johnson, *"Uniting for Peace:" Does It Still Serve Any Useful Purpose?*, AJIL UNBOUND, ASIL BLOG (July 15, 2014), http://www.asil.org/blogs/"uniting-peace"-does-it-still-serve-any-useful-purpose.

100. *See* "Timeline of Developments" in UNA-UK Briefing, *supra* note 90, at 2.

101. *See* ICISS Report, *supra* note 5, ¶ 6.21.

102. Rep. of the High-Level Panel on Threats, Challenges and Change, *Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, ¶ 256, U.N. Doc. A/59/565 (Dec. 2004) [hereinafter HLP Report 2004].

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 139 of the Summit Outcome, and to reach a mutual understanding to that effect."[103]

Why have such calls been ignored? Arguably, they have not. Political developments—particularly those requiring states to limit their power and which operate at the level of international law—take time. In this regard, it is interesting to review the status of recent attempts by the "Small 5" Group (S5)[104] to reform the Security Council's working practices (without the need for any amendments to the Charter), as an indicator of current political will.

In 2006, the S5 circulated a draft resolution, which, among a number of other recommendations, called on the P5 to not use the veto "in the event of genocide, crimes against humanity and serious violations of international humanitarian law."[105] This draft was "never formally discussed or acknowledged"[106] by the Council. More recently, in 2012, the S5 circulated another draft resolution, which similarly called on the P5 to refrain from using the veto in such circumstances, although the crimes listed were restricted to

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103. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 61, U.N. Doc. A/63/677 (Jan. 21, 2009) [hereinafter SG Report 2009]. For a similar proposal aimed at changing US policy, see GENOCIDE PREVENTION TASK FORCE, PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS 106 (2008), http://www.usip.org/sites/default/zfiles/files/genocide_taskforce_report.pdf, advocating that "[t]he U.S. ambassador to the United Nations should initiate a dialogue among the five permanent members" and that "[a] principal aim should be informal, voluntary mutual restraint in the use or threat of a veto in cases involving ongoing or imminent mass atrocities. The P5 should agree that unless three permanent members were to agree to veto a given resolution, all five would abstain or support it."

104. The Small 5 consists of Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland. Opaque, Non-inclusive' Security Council Must Pursue Lasting, Candid Interaction with Entire United Nations Membership, General Assembly Delegations Say, MEDIA-NEWSWIRE (Nov. 9, 2011), http://media-newswire.com/release_1162048.html.

105. G.A. Draft Res. A/60/L.49, Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: draft resolution, Improving the Working Methods of the Security Council, ¶ 14, (Mar. 17, 2006), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WMP%20A%2060%20L%2049.pdf.

106. SECURITY COUNCIL REPORT, SPECIAL RESEARCH REPORT NO. 3: SECURITY COUNCIL TRANSPARENCY, LEGITIMACY AND EFFECTIVENESS 15 (Oct. 18, 2007), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Research%20Report_Working%20Methods%2018%20Oct%2007.pdf. This report goes on to say "it is probably fair to say that some of the recommendations of the draft resolution served as an inspiration to many of the drafters of the July 2006 note" (referring to the Note by the President of the Security Council, U.N. Doc. S/2006/507 (July 19, 2006)).

"genocide, war crimes and crimes against humanity."[107]

The U.N.'s Office of Legal Affairs gave a legal opinion (upon the request of the President of the U.N.'s General Assembly) which stated that A/66/L.42/Rev.1 would require a two-thirds majority of the General Assembly to be passed.[108] The question had turned on whether A/66/L.42/Rev.1 concerned an "important question" that, on the basis of Article 18(2) of the U.N. Charter would require a two-thirds majority (as opposed to the normal majority of members present and voting).[109] The S5 withdrew this draft resolution a few days after the OLA decision.[110] According to Lehmann, this was the result of both the OLA decision and "a tactical maneuver by the [Uniting for Consensus] group" which abandoned its support for A/66/L.42/Rev.1.[111]

Nevertheless, the P5 did promise to consider the proposals[112] and the S5 had found that there was a positive reaction from nearly all Member States to the draft resolution.[113] According to the Accountability, Coherence and Transparency Group (ACT Group) (a group of 27 Member States), that was launched in 2013[114] and built on the work of the S5,[115] "the decision to withdraw draft resolution L.42 was not an end, but a starting point for a new approach."[116] Indeed,

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107. G.A. Rev. Draft Res. A/66/L.42/Rev.1, Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: revised draft resolution, Enhancing the Accountability, Transparency and Effectiveness of the Security Council, ¶ 20, (May 3, 2012), http://csnu.itamaraty.gov.br/images/26._A_66_L_42_Rev.2_Small-5.pdf.

108. *See* Legal Opinion of Patricia O'Brien Under-Secretary-General for Legal Affairs (May 14, 2012) (on file with author).

109. U.N. Charter, art. 18(2)–(3).

110. See Switzerland Withdraws Draft Resolution in General Assembly Aimed at Improving Security Council's Working Methods to Avoid 'Politically Complex' Wrangling, UN.ORG (May 16, 2012), http://www.un.org/press/en/2012/ga11234.doc.htm [hereinafter UN.ORG].

111. Volker Lehmann, *Reforming the Working Methods of the UN Security Council*: *The Next ACT*, FRIEDRICH EBERT STIFTUNG (Aug. 2013), http://library.fes.de/pdf-files/iez/global/10180.pdf.

112. UN.ORG, *supra* note 110.

113. *Id.*

114. *fACT sheet: The Accountability, Coherence and Transparency Group—Better Working Methods for Today's UN Security Council*, CENTER FOR UN REFORM (June, 2015), http://centerforunreform.org/sites/default/files/FACT%20SHEET%20ACT%20June%202015.pdf.

115. The Global Center for the Responsibility to Protect refers on its website to the "failed 'Small Five (S5) initiative.'" *See UN Security Council Code of Conduct*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (last visited Feb. 12, 2016) http://www.globalr2p.org/our_work/un_security_council_code_of_conduct.

116. *ACT: the Accountability, Coherence and Transparency Group, Better Working*

as will be explored further below, the ACT Group has now seen significant shifts in political support for their "Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes," including an official commitment by both France and the United Kingdom. The S5's experience of seeking soft law reform should, therefore, caution us against any quickly-made assumptions that a call for reform has been ignored (and will continue to be ignored)—obtaining political support takes time.

However, if previous proposals to limit the veto power have been ignored, perhaps it is because many of the proposals are too broad. On the one hand, it can be argued that indeterminate proposals are more likely to attain political support at the international level because states can hide behind the vagueness in wording and interpret the proposals in a way that best serves their interests. Yet, sweeping requests that the P5 "exercise restraint" or "refrain" from using the veto in situations that are not within their "vital interests" are too vague to have any impact. They fall straight into the same traps as Article 27(3) by including too many undefined terms (*e.g.*, What constitutes P5 "vital interests" and who decides?), despite the fact that as a soft law reform proposal, the French Proposal would arguably not be interpreted as a legal document.

Finally, previous requests are normally hidden within the same package deals referred to above.[117] Grouping proposals together complicates the negotiating process, and results in stronger proposals being lost amongst the controversies.

III. R2P OR RN2V?[118]

The international community's role in preventing mass atrocities, to which the French proposal relates, cannot be adequately assessed without reference to the Responsibility to Protect doctrine ("R2P"). In fact, international law professor Carsten Stahn, concludes that, "[t]he idea of responsibility to protect became part and parcel of the vocabulary of UN reform."[119] The idea, in its current nomenclature, arose in the ICISS Report, which signaled a movement away from a

Methods for Today's UN Security Council (Aug. 2013), https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/internationale-organisationen/ACT%20Fact%20Sheet.pdf.

117. The S5 proposals are a case in point. *See*, *supra* notes 107 and 109.

118. This acronym comes from CGS 2014, *supra* note 5 (responsibility not to veto).

119. Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99, 105 (2007) [hereinafter Stahn].

"right to intervene" to a "responsibility to protect"[120] and (re)defined "Sovereignty as Responsibility."[121] The ICISS Report argued that states have a responsibility to protect their citizens and, in cases where they failed to do so, the international community has a responsibility to step in. Since 2001, the concept of R2P has been taken up by the UN in various different fora[122] and forms the foundation for Article 4(h) of the Constitutive Act of the African Union.[123] In 2006, the Security Council passed Resolution 1674, reaffirming "the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[124] The growing consensus on R2P makes the prospects for success of the French proposal much stronger.

Arguably, the concept of R2P is not altogether new. Stahn documents a long trajectory of "just war" theories, dating back to Grotius[125] and documents how Hersch Lauterpacht, when writing the sixth edition of Oppenheim's International Law, broke away from previous editions by "noting that 'when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.'"[126] Nevertheless, R2P does not yet impose clear legal obligations on the international community[127] and some states remain concerned that

120. ICISS Report, *supra* note 5, ¶ 2.4.

121. *Id.* ¶ 2.14.

122. *E.g.* HLP Report 2004, *supra* note 102, at ¶¶ 201-2; U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 132, U.N. Doc. A/59/2005 (Mar. 21, 2005); Outcome Document, *supra* note 6, ¶¶ 138–9. For a more recent account, *see* SG Report 2009, *supra* note 103. The Global Centre for the Responsibility to Protect notes that "[t]he Security Council has invoked R2P in more than 45 resolutions since 2006." *About R2P*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (last visited Feb. 12, 2016), http://www.globalr2p.org/about_r2p.

123. Organization of African Unity (OAU), *Constitutive Act of the African Union* (July 11, 2000), *available at* https://au.int/web/sites/default/files/pages/32020-file-constitutiveact_en.pdf. *See also* DAN KUWALI AND FRANS VILJOEN, AFRICA AND THE RESPONSIBILITY TO PROTECT: ARTICLE 4(H) OF THE AFRICAN UNION CONSTITUTIVE ACT xvi (2014).

124. S.C. Res. 1674, *supra* note 6.

125. Stahn, *supra* note 119, at 111.

126. *Id.* at 113 (citing LESSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 280 (Hersch Lauterpacht ed., 6th ed. 1947)).

127. STAHN *supra* note 119, at 115-6 and 120; Anne Peters, *The Security Council's Responsibility to Protect*, 1 INT'L ORG. L. REV. 8, at 7 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1772702; *see also* SUSAN BREAU, HUMANITARIAN INTERVENTION: THE UNITED NATIONS AND COLLECTIVE RESPONSIBILITY 297

the concept could be abused by more powerful states.[128]

Such concerns have been compounded by recent operations by the North Atlantic Treaty Organization ("NATO") in Libya. Security Council Resolutions 1970 and 1973 referenced "the responsibility of the Libyan authorities to protect the Libyan population."[129] The Security Council, through Resolution 1973 and acting under Chapter VII of the UN Charter, authorized Member States to "take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi."[130] Interestingly, the reference to the "responsibility . . . to protect" was a reference to the responsibility of the Libyan authorities (rather than the international community) and the resolution did expressly exclude "a foreign occupation force of any form on any part of Libyan territory."[131] Nevertheless, the resolution refers, in the preamble, to the responsibility to protect and then proceeds to authorize "all necessary measures" for the protection of civilians and civilian populated areas.[132] This is clearly influenced by the R2P doctrine.[133]

The NATO operation attracted criticism, however, when it appeared to go beyond its mandate and facilitate regime change.[134] Ev-

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(2005).

128. Stahn notes, for example, that a number of states had reservations about the inclusion of R2P in the Outcome Document. Stahn, *supra* note 119, at 108. *See also*, *Outcome Document*, *supra* note 6; Ruan Zongze, *Responsible Protection: Building a Safer World*, CHINA INSTITUTE OF INT'L STUD. (June 2012), http://www.ciis.org.cn/english/2012-06/15/content_5090912.htm [hereinafter Zongze] (raising five key concerns about R2P).

129. S.C. Res. 1970, preamble ¶ 9, U.N. Doc. S/RES/1970 (Feb. 26, 2011); S.C. Res. 1973, preamble ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011) [hereinafter S.C. Res. 1973].

130. *Id*. at ¶ 4.

131. *Id.*

132. *Id.*

133. Dapo Akande has argued that the reference to "and civilian populated areas under threat of attack" meant that the use of force was authorized to prevent attacks even if those attacks were directed at legitimate military targets and that the resolution, therefore, focused on "stopping Gaddafi's forces from winning the civil war in Libya." *See* Dapo Akande, *What does UN Security Council Resolution 1973 Permit?*, EJIL: TALK! (Mar. 23, 2011), http://www.ejiltalk.org/what-does-un-security-council-resolution-1973-permit. This seems to suggest that, through what appeared to be neutral wording, the resolution enabled political action. Yet, the resolution does not specify from whom the "threat of attack" needed to emanate. As such, it arguably allowed political action against any use of force. This may be somewhat confusing when the force used to protect civilian populated areas, in itself, puts civilians at risk.

134. Gareth Evans, *The Consequences of Syria: Does the Responsibility to Protect Have a Future?*, E-IR'S EDITED COLLECTION (Jan. 27, 2014), http://www.e-ir.info/2014/01/27/the-consequences-of-non-intervention-in-syria-does-the-responsibility-to-

ans notes that the BRIC countries (Brazil, Russia, India, and China) "feel bruised by [the United States', United Kingdom's, and France's] dismissiveness during the Libyan campaign"[135]—referring to an unwillingness on the part of the United States, United Kingdom and France to discuss in the Security Council what the longer-term response of the international community should be—and that, arguably, this has impacted Russia's and China's position on Syria.[136] Furthermore, Evans has noted elsewhere that, with regard to the French proposal to restrain the veto power, what happened in Libya should remind us of the need for "some variation of the 'Responsibility While Protecting' proposal originally made by Brazil, which would require at least informal agreement on the way use-of-force mandates are initially agreed and then monitored and reviewed by the [Security] Council during their lifetime."[137]

In spite of the above, a number of commentators remain positive about R2P's future, noting for example in 2014 that "[s]ince Resolution 1970 on Libya, the [Security] Council has passed 13 Resolutions and issued four Presidential Statements invoking the Responsibility to Protect"[138] and that "[b]y setting a precedent in using R2P language . . . the Council paved the way for the label to be applied to more situations with mass atrocity concerns."[139]

To conclude, although R2P has recently faced criticism, the concept reflects a deeper shift in international law towards a greater focus on human rights protection. Prospects for the French Proposal should, therefore, be analyzed with this context in mind.

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protect-have-a-future/ [hereinafter Evans]; *see also* Lloyd Axworthy and Allan Rock, *A Reflection on Responsibility: What does Syria mean for RtP?*, DIPLOMATONLINE (Oct. 4, 2012), http://diplomatonline.com/mag/2012/10/a-reflection-on-responsibility-what-does-syria-mean-for-r2p/; *see also* Zongze, *supra* note 128.

135. Evans, *supra* note 134.

136. *Id.*; Russia and China have vetoed six draft resolutions on Syria. U.N. Doc. S/2016/1026 (Dec. 5, 2016); U.N. Doc. S/2016/846 (Oct. 8, 2016); U.N. Doc. S/2014/348 (May 22, 2014); U.N. Doc. S/2012/538 (July 19, 2012); U.N. Doc. S/2012/77 (Feb. 4, 2012); U.N. Doc. S/2011/612 (Oct. 4, 2011). *See Security Council—Veto List*, UN.ORG, http://research.un.org/en/docs/sc/quick (last visited Feb. 12, 2016).

137. EVANS, *supra* note 24, at 6.

138. Jaclyn D. Streitfeld-Hall, *The Responsibility to Protect: Can We Prevent Mass Atrocities Without Making the Same Mistakes?*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (June 2, 2014), http://www.globalr2p.org/publications/308.

139. *Id*. See also, Evans, *supra* note 134, who notes that "annual debates in the General Assembly continue to provide strong evidence that, disagreements over Libya notwithstanding, there is effectively universal consensus on basic R2P principles." She refers to meetings which took place in China and Russia respectively in October 2013 on R2P, the former showing "strong support" for Zongze's idea of "Responsible Protection." Zongze, *supra* note 128.

IV. P5 LEGAL OBLIGATIONS IN MASS ATROCITY SITUATIONS

As will be discussed below, the French proposal would not impose any legal obligations on the P5. Before addressing the proposal in more detail, it is worth noting what other legal obligations the P5 are under in responding to situations of mass atrocities. Clearly, the P5 must at all times, when exercising their duties as members of the Security Council, "act in accordance with the Purposes and Principles of the United Nations."[140] Arguably, however, "[t]here is no reason to assume . . . that individual members of the Security Council are not bound by positive obligations to prevent certain violations of international law by third actors such as, *inter alia*, the obligation to prevent genocide or to ensure respect for the Geneva Conventions when voting in the Security Council."[141] This is due to the fact that all of the P5 are parties to both the Genocide Convention[142] and Geneva Conventions.[143]

Regarding the Genocide Convention, the ICJ, in 2007, held that "a State's obligation to prevent, and the corresponding duty to act, arise in the instant the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."[144] Similarly, with regards to the Fourth Geneva Convention, the ICJ, in its 2004 Advisory Opinion on the Wall, noted that "every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with."[145] This led leading

140. U.N. Charter, art. 24, ¶ 2. Albeit this obligation falls on the Security Council as a collective.

141. Simma et. al., *supra* note 10, at 887; *see generally id.* at 885-7.

142. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, vol. 78, U.N.T.S. 277; *see* United Nations Treaty Collection, Depository for a list of states which have acceded to, succeeded to, or ratified the treaty, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV1&chapter=4&clang=_en#4.

143. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Aug. 12, 1949, vol. 75, U.N.T.S. 287; *see* the International Committee of the Red Cross for a list of state parties to the four Geneva Conventions, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp.

144. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugos.), 2007 I.C.J., 43, at 222 ¶ 431.

145. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 61 ¶ 158 (July 9, 2004). *See also* Gregory Khalil, *Just Say No to Vetoes*, N.Y. TIMES (July 19, 2004), http://www.nytimes.com/2004/07/19/opinion/just-say-no-to-vetoes.html (arguing that through this decision the ICJ "essentially affirmed a power to 'veto the veto.'").

commentators to conclude that "responsibility under international law is incurred if a State, as a member of the Security Council, manifestly fails to support or even delays possible Security Council measures aimed at preventing genocide and ensuring respect for the Geneva Conventions, which might have contributed to preventing such acts."[146]

V. THE FRENCH PROPOSAL

As noted above, the French proposal is not the first of its kind.[147] Yet, there does seem to be growing interest in, and awareness of, the idea ever since President Hollande referred to the proposal at the opening of the General Assembly in 2013.[148] Writing just over a week later, Laurent Fabius, France's then Minister of Foreign Affairs, further outlined the proposal:

> The criteria for implementation would be simple: at the request of at least 50 member states, the United Nations secretary general would be called upon to determine the nature of the crime. Once he had delivered his opinion, the code of conduct would immediately apply. To be realistically applicable, this code would exclude cases where the vital national interests of a permanent member of the Council were at stake.[149]

The threshold of crimes to trigger the code was described as "mass crime[s]"[150] and, subsequently, as "mass atrocities."[151] In light of the above analysis on R2P and the law regulating state responsibility in preventing mass atrocities, this proposal emphasizes that "the veto was [not] created . . . to hide gross human rights abuses under the cloak of 'national interest.'"[152] Furthermore, the fact that a P5

146. Simma et. al., *supra* note 10, at 887.

147. *Supra* note 5.

148. Hollande Statement 2013, *supra* note 2.

149. Fabius, *supra* note 1.

150. *Id*.; Hollande Statement 2013, *supra* note 2.

151. Hollande Statement 2015, *supra* note 3; *see* the title of a recent Ministerial Side-Event on "Regulating the Veto in Face of Mass Atrocities" (Sept. 30, 2015). *See*, *UN Security Council Code of Conduct*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (last visited Feb. 12, 2016), http://www.globalr2p.org/our_work/un_security_council_code_of_conduct.

152. Wouters & Ruys, *supra* note 13, at 163.

Member State has sponsored the idea, adds significant weight.[153]

The proposal is at present too vague, both structurally and conceptually, to be implemented.[154] Work needs to be done to address questions on how the proposal would operate in practice. This paper addresses some of these questions with the hope of assisting further debate and thinking on the proposal. What is more, it is strongly advised that this proposal remains free-standing and is not lost within other proposals to reform the Security Council.

Indeed, there is hope for success in light of the ACT Group's "Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes" ("ACT Code of Conduct"), which was circulated on September 1, 2015.[155] The text has already received widespread support from 105 Member States and one UN observer.[156] Most importantly, two P5 members have signed up to the ACT Code of Conduct: France and the United Kingdom.[157] The latter's support is particularly interesting as it has been noticeably quiet on debates regarding the French proposal. The Security Council Report notes that, as a condition of the United Kingdom's support, the restraint on the veto, under the Code, would only apply where the resolution in question was "credible."[158] In analyzing the possible parameters of the French proposal, this paper will draw heavily on the insights provided by the ACT Code of Conduct.

Furthermore, prior to the ACT Code of Conduct, on February 7, 2015, an "independent group of global leaders working together for

153. *But see* CGS 2014, *supra* note 5, at 4 (stating that "it is important to note that P5 members have sometimes been at the forefront of these efforts" in reference to the fact that "there have long been arguments made which seek to limit the use of the veto…").

154. *See* Kamrul Hossain, *The Challenge and Prospect of Security Council Reform*, 7 REGENT J. INT'L L. 299, 316 (2010) (stating that "[a]ny limits on the veto should be more clearly delineated").

155. *See* Explanatory Note on a Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (last visited Feb. 12, 2016) http://www.globalr2p.org/media/files/2015-09-01-sc-code-of-conduct-atrocity-rev-2015-10-23.pdf.

156. *See* ACT Code of Conduct, *supra* note 4.

157. *See 106 Signatories Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity and War Crimes*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (last visited Feb. 12, 2016), http://www.globalr2p.org/media/files/coc-signatories.pdf.

158. THE SECURITY COUNCIL REPORT, RESEARCH REPORT ON THE VETO (Security Council Report) (Oct. 19, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D274E9C8CD3CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf, at 5. The wording of the ACT Code of Conduct, including the use of the word "credible" is further discussed *infra* at 31-2.

peace and human rights"[159] ("the Elders") led by former Secretary-General Kofi Annan, adopted a statement on strengthening the United Nations ("Elders' statement").[160] The statement called on the P5 "to pledge themselves to greater and more persistent efforts to find common ground, especially in crises where populations are being subjected to, or threatened with, genocide or other mass atrocities" and, more specifically, to:

> undertake not to use, or threaten to use, their veto in such crises without explaining, clearly and in public, what alternative course of action they propose, as a credible and efficient way to protect the populations in question. This explanation must refer to international peace and security, and not to the national interest of the state casting the veto, since any state casting a veto simply to protect its national interests is abusing the privilege of permanent membership. And when one or more permanent members do feel obliged to cast a veto, and do provide such an explanation, the others must undertake not to abandon the search for common ground but to make even greater efforts to agree on an effective course of action.[161]

What is interesting about the Elders' statement is that it focuses on requiring the P5 to give an explanation for their use of the veto in situations of mass atrocities.[162] It does not require a pledge to never use the veto; it only requires a pledge to explain why a veto is used. This would enhance transparency and accountability but is arguably weaker than the French proposal and the ACT Code of Conduct, which both require the P5 not to use the veto power at all in specified circumstances.

159. *See About Us*, THE ELDERS (last visited Feb. 12, 2016), http://theelders.org/about.

160. THE SECURITY COUNCIL REPORT, *supra* note 158, at 5; *see also Strengthening the United Nations - Statement by The Elders* [hereinafter Elders' Statement] THE ELDERS (Feb. 7, 2015), http://theelders.org/sites/default/files/2015-04-22_elders-statement-strengthening-the-un.pdf, at 3.

161. Elders' Statement, *supra* note 160.

162. *See supra*, note 97, for similar requests that were made at a much earlier stage in the U.N.'s history.

A. How Would It Work?

1. What Constitutes "Mass Atrocities"?

A detailed discussion on this question is beyond the scope of this paper. Suffice it to say that the term needs to be clearly defined in law. Previous attempts to limit the veto have varied in the crimes they cover. The Secretary-General Report 2004, for example, referred to "genocide and large-scale human rights abuses"[163] whereas the Outcome Document covers "genocide, war crimes, ethnic cleansing and crimes against humanity."[164] The ACT Code of Conduct limits itself to "genocide, crimes against humanity and war crimes," going on to define war crimes as referring "in particular to war crimes committed as part of a plan or policy or as part of a large-scale commission of such crimes."[165]

Each of these crimes have specific legal definitions. In the context of the R2P doctrine, Philippe Sands QC, a professor of international law at University College London, recently cautioned that "there is a danger that the R2P doctrine may be compromised or undermined, through future political negotiations, in a way that narrows its application to certain crimes, for example genocide. That would be unfortunate, as it would signal that other crimes—for example, crimes against humanity and war crimes—are somehow unworthy of action," suggesting that "it may be better to have nothing, than a R2P that is limited to, say, genocide."[166] Similar concerns should be raised regarding the French proposal.

Furthermore, it is assumed that the "code of conduct" would apply to cases where there is an imminent threat of mass atrocities and not only those where mass atrocities have been committed (considering that the purpose of the proposal is to prevent mass suffering).[167]

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163. HLP Report 2004, *supra* note 102.

164. Outcome Document, *supra* note 6, at 30.

165. *See* ACT Code of Conduct, *supra* note 4, at operative ¶ 2 and preambular ¶ 6 respectively.

166. Philippe Sands, *The One and the Many: The Struggle between "Genocide" & "Crimes Against Humanity,"* lecture given at Columbia Law School (Dec. 4, 2014) (quotes on file with the author).

167. *See* ACT Code of Conduct, *supra* note 4, at ¶1, through which Member States of the United Nations pledge "not to vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, *or to prevent such crimes*" (emphasis added). *See also* Jane Stromseth, *Rethinking Humanitarian Intervention: the Case for Incremental Change, in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J. L. Holzgrefe

This should, however, be made clear. Evans suggests the following, to clarify the kinds of cases to which the French Proposal would apply: "situations where populations are experiencing, or at imminent risk of, genocide, crimes against humanity or major war crimes."[168]

2. Who Decides?

At present, the French proposal suggests that the Secretary-General would determine the nature of the crime on the request of fifty Member States in the General Assembly,[169] which has been described as an "innovative" approach.[170] It has also been suggested that the proposal require a two-thirds majority of the General Assembly.[171] Concerns have been raised that "[t]he secretary-general is a diplomat rather than a judge."[172] Yet, arguably the Secretary-General has had this type of fact-finding duty since 1945 as a result of Article 99 of the U.N. Charter.[173] Further concerns have been raised that re-

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& Robert O. Keohane ed., 2003), at 258–9, for a discussion of the array of "triggering conditions" for the doctrine of humanitarian intervention.

168. EVANS, *supra* note 24, at 4.

169. FABIUS, *supra* note 1; UNA-UK Briefing, *supra* note 90. *See also*, *The Veto*, SECURITY COUNCIL REPORT (Dec. 7, 2016), http://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php, which states that "[a]ccording to the proposed framework [of the French initiative], the U.N. Secretary-General would have the authority to make a determination on whether the situation amounts to one of those crimes, if necessary at the request of the U.N. High Commissioner for Human Rights or of 50 U.N. member states."

170. David Bosco, *France's Plan to Fix the Veto*, FOREIGN POLICY, (Oct. 4, 2013), http://foreignpolicy.com/2013/10/04/frances-plan-to-fix-the-veto.

171. UNA-UK Briefing, *supra* note 90.

172. Richard Gowan, *An Unlikely Push for Security Council Members to Give Up Their Veto Power*, AL JAZEERA (Sept. 24, 2014, 10:09AM), http://america.aljazeera.com/articles/2014/9/24/un-security-councilveto.html (noting that alternative proposals to use the ICJ may prove too slow); *see also* EVANS, *supra* note 24, at 4 ("It may not be wise to give the Secretary-General a direct 'certification,' as distinct from transmission-mechanism, role. Given the Secretary-General's ongoing role as a diplomatic broker, it might be preferable to avoid putting him or her in the position of making a quasi-judicial determination, as the present French proposal would require.").

173. U.N. Charter art. 99 (under which "[t]he Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security"); *see also* Stephen M. Schwebel, *The Origins and Development of Article 99 of the Charter - the Powers of the Secretary-General of the United Nations*, *in* JUSTICE IN INTERNATIONAL LAW, SELECTED WRITINGS OF STEPHEN M. SCHWEBEL, JUDGE OF THE ICJ 233-35, 244-45 (Stephen M. Schwebel ed. 1994) (concluding that "the Secretary-General has the right to make such inquiries and investigations as he may think necessary in order to determine whether or not to invoke his powers" and that "[i]t is difficult to see why the Secretary-General's investigatory authority would not extend to a matter

quiring the backing of fifty Member States will be too time-consuming in situations that would need quick responses.[174] In this regard, the Security Council Report notes that France remains "open to refining its proposal, including this trigger mechanism, emphasizing that its fundamental goal is to avoid paralysis in the Council in mass atrocity situations."[175]

An alternative approach was suggested by the European Parliament in 2004 of "an independent body endowed with legitimacy under international law . . . [to] establish that there is an imminent danger of [genocide, war crimes and crimes against humanity] being committed."[176] Similarly, Wouters and Ruys suggest that "a permanent Commission of Inquiry, consisting of eminent and independent experts" could be "entitled to pronounce on the nature and scope of ongoing crises" similar to the International Commission of Inquiry on Darfur and the International Fact-Finding Commission that were established pursuant to the 1977 First Additional Protocol to the Geneva Conventions.[177]

Evans has suggested a two-stage trigger. Firstly, a determination would be made by the Office of the U.N. Secretary General's Special Advisers on the Prevention of Genocide and R2P that a situation is one to which the "code of conduct" should apply. Secondly, there should be "a signed statement from at least fifty members of the General Assembly (including at least five members from each of the five recognized regional groups (African, Asia-Pacific, Eastern European, Latin American and Caribbean) and Western European and Others)" which, in effect, supports such a determination.[178] Evans argues that this could be a quick process, and that speed is crucial when dealing with the types of situation to which the "code of conduct" would apply. Evans also argues that it would provide a relatively objective process, in which the P5 could trust, and which reflects the support of a cross-section of the international community.

Interestingly, the ACT Code of Conduct proposes "no procedural trigger for the code to apply" but that "the facts on the ground would

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which the Security Council had declined to investigate").

174. Security Council Report, *supra* note 158, at 6.

175. *Id.*

176. European Parliament Resolution on the Relations Between the European-Union and the United Nations, EUR. PARL. DOC. 2003/2049(INI), 2004 O.J. (C 096) 20, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P5-TA-2004-0037&language=SL, (giving the examples of the ICJ and ICC.).

177. Wouters & Ruys, *supra* note 13, at 163–4. The Independent International Commission of Inquiry on the Syrian Arab Republic is a more recent example.

178. EVANS, *supra* note 24 at 4–5.

be the trigger" in that "any situation involving these crimes" would cause the code of conduct to apply.[179] Furthermore, with regards to who gets to decide if the triggering facts exist, the ACT Code of Conduct's application "is subject to the assessment of a particular situation by a State that has expressed its commitment to the Code of Conduct" but "the Secretary-General would serve as an important authority to bring such situations to the attention of the Council, and her or his assessment of the situation would carry great weight."[180] This appears to provide any Member State that is a signatory of the code the power to trigger its application.

It is important to note a clear distinction between the ACT Code of Conduct and the French proposal. Unlike the French proposal which focuses on commitments by the P5 not to use their veto power, the ACT Code of Conduct places an obligation on *all* U.N. Member States, in their potential capacity as members of the Security Council.[181] The whole focus of the ACT Code of Conduct is, therefore, much wider than the French proposal, making it more notable that both France and the United Kingdom have already signed on.

3. Vital Interests

The French proposal would allow an exception to the "code of conduct" where a P5 Member State's "vital interests" were at stake.[182] Ideally, this exception needs to be better defined. However, its inclusion in the proposal "might quell concerns of hesitant members of the P5."[183] It has been suggested that "vital interests" may be defined "more in line with" the U.N. Charter itself, which protects the inherent right to self-defense.[184] Perhaps, this could be one of the few components of the proposal that is best left undefined, with the hope that it will be limited by subsequent practice. Yet, there is a clear danger in leaving such an exception undefined. If "vital inter-

179. ACT Code of Conduct, *supra* note 4, Explanatory Note.

180. *Id.*

181. *Id.* at ¶1 (pledging "to support timely and decisive action by the Security Council aimed at preventing or ending the commission of genocide, crimes against humanity or war crimes").

182. UNA-UK Briefing, *supra* note 90.

183. *Putting Down Their Cards: Limiting the Veto in RtoP Cases*, INT'L COALITION FOR THE RESP. TO PROTECT (Oct. 28, 2013, 10:21 PM), http://icrtopblog.org/2013/10/28/putting-down-their-cards-limiting-the-veto-in-rtop-cases. Another idea regarding how to convince P5 members who are cautious about agreeing to a "code of conduct" is to include a sunset clause, *see* EVANS *supra* note 24, at 5–6.

184. INT'L COALITION FOR THE RESP. TO PROTECT, *supra* note 183.

ests" are defined too broadly, the French proposal will lack any application at all. This is, therefore, a component of the proposal which may need more attention and considered debate as to whether, and how, the term should be defined. Notably, neither the ACT Code of Conduct nor the Elders' statement provides for this "vital interests" caveat.[185]

B. Remaining Questions

1. Will any Response do?

There are a number of questions left unanswered. The key question is, assuming the existence, or imminent threat, of mass atrocities has been established, what happens next? According to Fabius Laurent, the "code of conduct" "would immediately apply."[186] Yet, the code of conduct simply holds that the veto power would not be used; it does not specify what action should be taken. Responses to mass atrocities, and the threat thereof, include a myriad of options, including diplomatic talks, peace negotiations, economic sanctions, no-fly zones and military interventions. Would the "code of conduct" favor more interventionist responses that involve the use of force?[187] If so,

185. The Security Council Report, *supra* note 158, at 5. Moreover, the Elders' statement—which requires P5 members to publicly explain any use of the veto in situations of mass atrocities—makes it clear that "any state casting a veto simply to protect its national interests is abusing the privilege of permanent membership." *See* Elders' Statement, *supra* note 160, at 3.

186. FABIUS, *supra* note 1.

187. *See e.g.*, ICISS Report, *supra* note 5, at XIII, which states, "[t]he Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage *of resolutions authorizing military intervention* for human protection purposes for which there is otherwise majority support." (emphasis added). This could indicate that there is a particular focus on the use of force. However, ¶ 6.21 refers more generally to a "'code of conduct' for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis. The idea essentially is that a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution." *Id.* at ¶ 6.21. This is much more generic in its frame of reference as to what purpose such a "code of conduct" would serve. *See also* EVANS, *supra* note 24, at 5, who argues that any such "code of conduct" should not be restricted to those resolutions as referred to in the ICISS Report at XIII, noting, "My instinct here is that the agreement should apply to any Security Council action at all taken in response to situations where populations are experiencing or at imminent risk of genocide, crimes against humanity or major war crimes." Evans also refers to the consequences of P5 members vetoing resolutions that fell short of military force. Gareth Evans, *Limiting the Security Council Veto*, PROJECT SYNDICATE (Feb. 4, 2015), http://www.project-

P5 Member States may be hesitant to commit. What safeguards are in place to ensure that intervention will only apply when it is deemed as "reasonably calculated to end the humanitarian catastrophe as rapidly as possible?"[188] Has it been agreed that this is the appropriate test?[189]

The P5 may disagree over the type of response, rather than that a response itself is needed. In this scenario, the veto provides the P5 with an assurance that they will not be out-voted in such debates. Perhaps, the "code of conduct" should be limited to a voluntary promise not to use the veto to block "a response" to situations of mass atrocities, including measures short of force. For example, Evans states that "[w]hat was needed in mid-2011 [regarding the situation in Syria] was not a Security Council decision mandating the use of coercive military force" rather it was the need for "a condemnatory statement."[190]

It is interesting to note, in this regard, that Russia officially voiced its opposition to the French proposal in September 2015. It accused the proposal of being "populist" but it focused on the concern over which resolutions the proposal would apply to. Russia's permanent representative to the U.N., Vitaly Churkin, was quoted as saying "[y]ou cannot say that every resolution, which is proposed in the situation of dire humanitarian need, is necessarily a good resolution, which is going to resolve the problem and which is not going to be used for some political purposes."[191] Therefore, it seems that Russia is concerned that the French Proposal will prevent P5 members from being able to block ineffective resolutions.

Arguably, however, such concerns ignore the fact that a draft resolution will still need nine votes to be passed.[192] All members of the

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syndicate.org/commentary/security-council-veto-limit-by-gareth-evans-2015-02.

188. KOSOVO REPORT, *supra* note 5, at 194.

189. Note that there are really two tests involved here. The first test deals with whether a *situation* is one to which the "code of conduct" applies. The second, focuses on whether a *resolution* is one to which the code applies. Perhaps further debate is needed on whether there really should be two tests, but it seems foreseeable that there could be a situation of mass atrocities (which passes the first test) in response to which a resolution is proposed. Still, the resolution, itself, fails to address the situation of mass atrocity (or which, perhaps in the view of some P5 members, would even make the situation worse). Under the "code of conduct" can the P5 veto such a resolution?

190. EVANS, *supra* note 134; or an arms embargo against President Bashar al-Assad's regime, *see* GOWAN, *supra* note 172.

191. *UNSC veto right is crucial balance tool to avoid 'disasters' – Russia's envoy Churkin*, RUSSIA TODAY (Sept. 2, 2015; 23:54), https://www.rt.com/news/314162-un-security-council-russia-churkin/.

192. U.N. Charter art. 27, ¶ 3.

Security Council should be trusted to seriously consider the impact of such a proposed resolution and to discuss alternative options.[193] The French Proposal needs to be clear that it is setting down a minimum bar: that when mass atrocities exist, or are imminently threatened, the Security Council must be able to respond. This does not preempt the type of response, which should be fact-specific and seriously discussed. The Proposal would, similarly, not allow the Security Council to evade the fact-finding and monitoring functions that it already performs, regarding the implementation of resolutions.

At first glance, the ACT Code of Conduct may, in this regard, seem problematic. By imposing the commitment on *all* Member States on the Security Council (not only the P5), the ACT Code of Conduct seems to remove the additional safeguard that results from the requirement of attaining nine votes to pass a resolution. If all members of the Security Council are obliged to refrain from voting against any draft resolution relating to a situation of mass atrocity, what is stopping an ineffectual (or potentially dangerous) resolution from passage?

Yet this would ignore the clever drafting of the ACT Code of Conduct. As quoted above, Member States would pledge "not to vote against a *credible* draft resolution before the Security Council on timely and decisive action *to end* the commission of genocide, crimes against humanity or war crimes, or *to prevent* such crimes."[194] Arguably, this wording restricts the ACT Code of Conduct to only those resolutions that are "credible" with regard to ending or preventing the specified crimes.

It is strongly advised that, through similar wording, the French Proposal could, and should, limit the consequences of the P5's commitment not to veto. This would help elicit support from those P5 members more resistant to the notion of a voluntary restraint on the use of the veto power. One option would be to structure the "code of conduct" so that the P5's obligation not to veto would only apply to "credible" or "meritorious" resolutions aimed at preventing or ending mass atrocities. However, this risks ushering in another exception to the French proposal—enabling the P5 to use their veto against resolutions *they* deem as not credible. The determination of what is or is not credible should not be left to the P5. Rather it should work as a limiting factor on all Security Council members when they vote on a proposed resolution. More work on this element of the French Proposal is needed.

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193. *See* EVANS, *supra* note 187 (making a similar point that the requirement of nine votes across the Security Council should limit the chances that an unmeritorious resolution will be passed).

194. ACT Code of Conduct, *supra* note 4, operative ¶ 2, (emphasis added).

In short, once the "code of conduct" applies, the P5 would be unable to veto resolutions. Resolutions seeking to prevent or end mass atrocities would, therefore, automatically be opened up to a vote of the whole Security Council. But all of the Security Council members should only assent to those resolutions that are likely to effectively address the situation (whichever normative words are used—"credible," "effective," "meritorious," or "reasonably likely to"). Although, as argued above, the Security Council members are already bound to seriously consider each resolution open to a vote, it may be worth expressly adding to the language in the French proposal to make this obligation explicit. This would also act as a reminder that the removal of the P5's veto power does not mean that ineffective resolutions will be adopted.

2. Practicalities:

a. Drafting Procedure

Questions may be raised regarding how the "code of conduct" will affect existing drafting practices in the Security Council. Due to the veto power, it is often the case that P5 Member States only open a draft resolution up to the rest of the Security Council once a P5 consensus has been reached. If the veto power were to be removed, will there be an advantage to the first draft resolution on the table? If a P5 Member State opposes a draft but proposes their own, would this be seen, in practice, as a veto? Presumably, the answer is no, because such a counter-proposal will not prevent the original draft from reaching nine votes.

b. A Flood of Proposals?

Some might query whether, as soon as the "code of conduct" applies to a situation, there would be a flood of draft resolutions opened up to the floor of the Security Council. Perhaps the only answer is that the P5, and all members of the Security Council, should be trusted to work diplomatically within what is, above all, a political process. This answer may not satisfy international lawyers, but it recognizes the realities on the ground. The P5 and non-permanent members of the Security Council do not operate in vacuums. Rather, they communicate between each other about the present matters facing the international community and how the U.N. should respond. If anything, the commitment not to veto resolutions on a particular matter may encourage more communication, particularly between per-

manent and non-permanent members, which would arguably add further transparency and democratic accountability to the U.N. system.

c. A Lack of Resources?

Others might query whether the Security Council could overcommit U.N. resources. Hopefully, cases of mass atrocities will be rare (although sadly this has not been the case over the past seventy years). In any event, the U.N. was established "to reaffirm faith in fundamental human rights" and "in the dignity and worth of the human person."[195] If the U.N. cannot be trusted to provide the resources to support the Security Council in dealing with situations of mass atrocities, then one should seriously question current levels of political commitment.

C. A Political Declaration Rather than a Legal Obligation

France has emphasized that the proposal would not require any amendment to the U.N. Charter, but would rather be a "voluntary commitment."[196] Not only are there serious doubts whether other P5 Member States will agree to such a "code of conduct,"[197] but even if they did agree, they would not be legally obligated to continue to do so. Nevertheless, political declarations can often bear great weight on the international stage. Schwebel notes that codes of conduct "can have a genuine impact on the behavior of States and enterprises."[198] Similarly, Okhovat notes that in the case of South Africa and Rhodesia, a General Assembly resolution, passed through the Uniting for Peace procedure, had noticeable political weight, even thought it was not legally binding.[199]

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195. U.N. Charter, preamble.

196. GOWAN, *supra* note 172.

197. SECURITY COUNCIL REPORT, *supra* note 22, at 52 (stating that "[a]lthough the three China-Russia vetoes on Syria have been described by UK Foreign Secretary William Hague as "inexcusable and indefensible" and "despicable" by then US Secretary of State Hillary Clinton, it seems highly unlikely at present that such a commitment [as proposed by the French proposal] will gain traction among any of the permanent members. Permanent members, for different national reasons, seem reluctant to challenge the use of the veto."). By contrast, and as mentioned above, the UK and France have signed up to the ACT Code of Conduct and France has officially committed itself to the French proposal.

198. Stephen M. Schwebel, *The Legal Effect of Resolutions and Codes of Conduct of the United Nations*, *in* JUSTICE IN INTERNATIONAL LAW, SELECTED WRITINGS OF STEPHEN M. SCHWEBEL, 512 (Stephen M. Schwebel ed. 1994).

199. OKHOVAT, *supra* note 14, at 27.

Therefore, even if the French Proposal will not result in any legal obligation on the P5, it can still have great political weight if P5 members were to voluntarily commit themselves to it. Furthermore, even if only selected P5 Member States signed up to the code, as France has done, it would put greater political pressure on the remaining P5.[200]

CONCLUSION

This paper has assessed the French Proposal to limit the veto power of the P5 members of the Security Council and its prospects for success. Having explained the legal framework surrounding the veto power and considered the reasons why previous attempts to the reform the veto power have failed, the paper then analyzed the potential for the French Proposal to overcome these obstacles based on a number of its distinguishing factors—namely, that it is limited to soft law reform and is a stand-alone proposal. The paper conducted this analysis, having regard to the wider context, highlighting, in particular, the increased acceptance of the R2P Doctrine and the recent developments surrounding the ACT Code of Conduct, and concluding that both are factors which increase the French Proposal's chances for success.

Finally, the paper considered how the proposal would work in practice and, most importantly, what aspects need to be further determined. The French Proposal currently leaves a lot undefined; but, it is crucial that the proposal is made as clear as possible. This will not be a simple task and the call for clarity should not be confused with a "one-size-fits-all" approach to situations of mass atrocity. A flexible mechanism can still have clear parameters. What constitutes "mass atrocities," who decides and whether any qualifying wording should be added to restrict the application of the proposal to "credible" resolutions, are all questions those debating the proposal should address. A clearer, and more defined, code of conduct is preferable, as it carries less risk and uncertainty for those bound by it, and this makes it more likely that the remaining P5 members will sign up to it.

How to respond to a situation of mass atrocities is the most pressing and difficult question facing the international community in the twenty-first century. The answer will, surely, be different in each case. Yet, it is imperative that the Security Council be more effective

200. *See* STROMSETH, *supra* note 167, at 265. *But see* GOWAN, *supra* note 172 (querying whether a unilateral promise not to use the veto by some of the P5 could be seen as a sign of weakness which could lead to their status as "second-class members of the P5").

in dealing with such situations. It must do so if it is to retain legitimacy as the principal protector of international peace and security.

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