CONCEPT NOTE: LEGAL LIMITS TO THE USE OF THE VETO

Question:

Are there legal limits to the use of the veto by the five permanent members of the U.N. Security Council blocking action in the face of genocide, crimes against humanity or war crimes?

Proposition:

There are legal limits to the use of the veto in the face of genocide, crimes against humanity or war crimes.

Goal of project:

To ensure that the UN Security Council is able to act in the face of genocide, crimes against humanity and/or war crimes; to that end, to have the General Assembly (GA) request an Advisory Opinion from the International Court of Justice (ICJ) on a legal question along the following lines: Does existing international law contain limitations on the use of the veto power by permanent members of the UN Security Council in situations where there is ongoing genocide, crimes against humanity, and/or war crimes?

Initial goal:

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

Alternative concept:

Instead of requesting an Advisory Opinion, the General Assembly may decide to put some of these legal concepts directly into a GA resolution that notes the legal obligations related to genocide, crimes against humanity and war crimes, and calls for restraint in the use of the veto in such cases.

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Legal Arguments

The veto power derives from the UN Charter, which is subsidiary to *jus cogens* norms. Thus, a veto that violates *jus cogens* norms, or permits the continued violation of *jus cogens* is *ultra vires*. The Charter (and veto power) must be read in a way that is consistent with *jus cogens*.

The UN Charter states in Article 24 that UN member states confer on the Security Council primary responsibility for the maintenance of international peace and security "in order to ensure prompt and effective action" and that "[in] discharging these duties, the Security Council shall act in accordance with the Purposes and Principles of the United Nations." A veto in the face of a draft resolution responding to genocide, crimes against humanity or war crimes does not accord with the Charter's "Purposes and Principles."

A permanent member of the Security Council that utilizes the veto power also has other binding treaty obligations, such as those under the Genocide Convention, which contains an obligation to "prevent" genocide. A permanent member's use of the veto that would enable genocide, or allow its continued commission, would violate that state's legal obligation to "prevent" genocide. A similar argument can be made as to at least certain war crimes, such as "grave breaches" and violations of Common Article 3 of the 1949 Geneva Conventions.

Supporting Individuals (in order of joining):

- Hans Corell, former Under-Secretary General for Legal Affairs and the Legal Counsel of the United Nations
- Richard Goldstone, former Prosecutor of the International Criminal Tribunal for the former Yugoslavia & the International Criminal Tribunal for Rwanda
- Navanethem, Navi Pillay, former High Commissioner for Human Rights
- Andras Vamos-Goldman, co-founder & former Executive Director, Justice Rapid Response
- David M. Crane, former Chief Prosecutor, Special Court for Sierra Leone
- Judge Christine Van den Wyngaert, formerly International Court of Justice (ad hoc), International Criminal Tribunal for the former Yugoslavia, International Criminal Court; presently Kosovo Specialist Chambers (signing in a personal capacity)
- Zeid Ra'ad Al Hussein, former High Commissioner for Human Rights; former President of the Assembly of States Parties to the Rome Statute of the International Criminal Court
- Irwin Cotler, former Minister of Justice and Attorney-General of Canada and longtime Parliamentarian; Chair of the Raoul Wallenberg Centre for Human Rights
- Xavier-Jean Keita, Principal Counsel, Office of Public Counsel for Defence, International Criminal Court
- Allan Rock, former Minister of Justice and Attorney-General of Canada, and former Canadian Ambassador to the United Nations
- Lloyd Axworthy, former Minister of Foreign Affairs of Canada and member of Parliament, former President and Vice Chancellor University of Winnipeg, and Chair of the World Refugee Council.
- Adama Dieng, former Under-Secretary General in charge of the Office of the Special Advisers on the Prevention of Genocide and of the Responsibility to Protect, former Registrar of the International Criminal Tribunal for Rwanda
- Errol Mendes, President, International Commission of Jurists, Canada
- Ivan Šimonović, former Minister of Justice of Croatia, former UN Assistant Secretary-General for Human Rights, and former Secretary-General's Special Adviser for the Responsibility to Protect

Supporting NGOs (in order of joining):

- The Global Centre for the Responsibility to Protect
- The International Center for Transitional Justice
- Parliamentarians for Global Action
- The World Federalist Movement - Institute for Global Policy
- Open Society Justice Initiative
- Global Justice Center
- Women's Initiatives for Gender Justice
- Syrian Justice and Accountability Center
- Moroccan National Coalition for the International Criminal Court
- Lawyers for Justice in Libya
- Justice International (Georgia)
- Nicaraguan United Nations Association
- Raoul Wallenberg Centre for Human Rights
- Central African National Coalition for the ICC
- *Association des Victimes de la RCA (AVED)*
- No Peace Without Justice
- *Avocats Sans Frontières*
- The Advocates for Human Rights
- The Center for Constitutional Rights
- The Public International Law & Policy Group (PILPG)

Supporting Statement:

The Eleventh Chautauqua Declaration of August 28, 2018: "Not[ed] with great concern the use of the Security Council veto to block appropriate responses to atrocity crimes and obstruct the efforts to provide justice to victims" signed by or on behalf of:

- Sierra Leone Special Court former Chief Prosecutor David M. Crane
- Sierra Leone Special Court Prosecutor of the Residual Court Brenda Hollis
- Then Prosecutor of the International Criminal Court Fatou Bensouda
- Prosecutor of the Mechanism for International Criminal Tribunals Serge Brammertz.