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**MAINTAINING INTERNATIONAL PEACE AND  
SECURITY:  
THE CASE FOR A RESPONSIBILITY NOT TO VETO**

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**Abstract**

This paper argues that the permanent members of the Security Council (the SC) should have a responsibility not to exercise their veto power when genocide, war crimes, crimes against humanity, or ethnic cleansing (together mass atrocities) are occurring or there is an imminent threat of them occurring. It looks at the origins of the SC and the evolution of the veto. It explains that the flaws associated with the veto threaten the legitimacy of the SC. It then discusses the concept of Responsibility to Protect (R2P) and links this to the veto power. The paper then investigates ways of reforming the veto. It shows that amendment is unlikely so other means need to be looked at. It investigates creative interpretation of the Charter, the Uniting for Peace resolution, and the creation of a code of conduct, and deems creating a code of conduct regulating veto use as the strongest of these options. The paper then analyses initiatives that limit the veto power before proposing a new code of conduct. The paper concludes that there needs to be a commitment by the permanent members of the SC to refrain from using the veto in mass atrocity situations.

**Key Words**

United Nations, Security Council, Responsibility to Protect, R2P, responsibility not to veto, mass atrocity, code of conduct, reform

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*I Introduction*

The United Nations (UN) was formed in 1945 when, after much discussion, its 50 founding member states adopted the Charter of the United Nations (the Charter) in San Francisco. The world had recently suffered through two world wars and this new international organisation was both a response to this and a commitment to suppress future armed conflicts.<sup>1</sup>

The UN Security Council (the SC) has a central place in the UN. It consists of fifteen member states, including five permanent members who have the power to “veto” decisions. It is this veto power that has become increasingly problematic. Investigating the weaknesses of the veto is not a new idea. This paper does more than that. It looks at the veto in light of the concept of Responsibility to Protect (R2P). It argues that in order to uphold R2P and fulfil the SC mandate of maintaining international peace and security,<sup>2</sup> the permanent members have a responsibility not to use the veto to prevent action when genocide, war crimes, crimes against humanity, or ethnic cleansing (together, mass atrocities) are occurring or there is an imminent threat of them occurring. The paper looks at a range of options for reform and takes a pragmatic approach by arguing that the most viable option for addressing the structural limitations of the SC is through a code of conduct. There has been a lack of comprehensive comparative analysis of initiatives regulating the veto.<sup>3</sup> This paper fills the gap by evaluating six veto reform proposals. It takes an original approach by combining the best parts of the proposals into a new code of conduct.

Part II of this paper looks at the origins of the SC and how the veto has evolved over the years. It shows that, despite some developments in how the SC voting operates, the power of the veto today remains fundamentally unchanged from its conception in 1945. Part II also addresses the key issues that arise from the use of the veto. It argues that the lack of representativeness of the SC, the lack of sovereign equality among member states, and the practical failures of the SC are contrary to the principles of the Charter thereby threatening the legitimacy of the SC.

Part III of this paper discusses the concept of Responsibility to Protect (R2P). It argues that R2P is an emerging norm and has the support of the member states of the UN. The concept of R2P is linked back to the veto. The veto has prevented timely action from the international community and has contributed to the continuance of

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<sup>1</sup> *United Nations Conference on International Organization* UN Doc 785, I/1/28 (1945) at 359.

<sup>2</sup> Charter of the United Nations, art 24(1). All subsequent references to a particular article will refer to the Charter of the United Nations, unless otherwise specified.

<sup>3</sup> There are currently reports by two different organisations on codes of conduct but there is a lack of scholarly analysis on this topic. See Citizens for Global Solutions *The Responsibility Not to Veto: A Way Forward* (2014), which provides a brief historical overview of some codes of conduct addressing R2P. See also Security Council Report *The Veto* (19 October 2015), which provides a historical overview of the responsibility not to veto and briefly compares three veto restraint initiatives.

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mass atrocities. This part of the paper helps to lay the foundation for the proposition that the veto should not be able to be used in such situations.

Part IV of this paper looks at ways to reform the veto. It begins by showing that although, theoretically, it is possible to amend the Charter, realistically, this is unlikely to happen. Therefore, this part presents other options. These are the creative interpretation of the Charter, the Uniting for Peace resolution, and the establishment of a code of conduct regulating the behaviour of the SC members. The strongest of these options is to adopt a code of conduct creating a responsibility not to veto.

Part V focuses on initiatives for limiting the veto power. It explains the six key initiatives then compares and critiques them before proposing a new code of conduct incorporating the best parts of these initiatives.

The paper concludes that there needs to be a commitment by the permanent members to refrain from using the veto in mass atrocity situations. There are different options for how this might look but a code of conduct that is signed by the permanent members is the best way to make positive change without amending the Charter.

## *II The United Nations Security Council and the Veto*

This part looks at the origins of the SC and the veto. It explains that the veto was vital to the successful formation of the UN because without the veto, the most powerful states would not join. It describes the evolution of the veto and shows that the veto remains just as significant today as it was at its formation.

### *A The Creation of the Security Council*

#### *1 Purpose*

According to the Charter, UN member states confer on the SC the “primary responsibility for the maintenance of international peace and security” and agree that the SC will act on behalf of all member states in carrying out this responsibility.<sup>4</sup> Although the SC has the *primary* responsibility for maintaining international peace and security, it does not have the sole responsibility. Under art 11 of the Charter, the General Assembly (the GA) may discuss and make recommendations to the SC regarding international peace and security. The GA may also call the attention of the SC to situations that are likely to endanger international peace and security.<sup>5</sup> The Secretary-General has a similar power.<sup>6</sup>

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<sup>4</sup> Article 24(1).

<sup>5</sup> Article 11(3).

<sup>6</sup> Article 99.

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The SC is the UN’s most powerful forum.<sup>7</sup> Its decisions are binding on the members of the UN, who agree to accept and carry out the SC’s decisions.<sup>8</sup> It is the role of the SC to determine the existence of threats or breaches to the peace, or acts of aggression.<sup>9</sup> It is only the SC that can order the use of force and it must be for the purposes of maintaining or restoring international peace and security.<sup>10</sup>

## 2 *Composition*

### (a) The non-permanent members

The SC is currently made up of fifteen member states including five permanent members. The ten non-permanent members each have a term of two years.<sup>11</sup> There were not always ten non-permanent members. When the SC was first created, there were six. As the number of UN member states grew, there was a call by the newly admitted “third world” members for greater representation.<sup>12</sup> The influx of new members, particularly from Africa and Asia had dramatically changed the UN and the calls for greater representation became “too loud to ignore”.<sup>13</sup> In 1963, the GA put forward Resolution 1991 regarding the composition of the SC. Its proposal for non-permanent members was that there would be:<sup>14</sup>

- Five from African and Asian States;
- One from Eastern European States;
- Two from Latin American States; and
- Two from Western European and other States.

In 1965, the proposed amendment to the Charter took effect after the resolution was ratified by two-thirds of GA members, including the permanent members, as per the required procedure in art 108 of the Charter.

### (b) The Permanent Members

The permanent members, also known as the P5, are China, France, Russia, the United Kingdom (the UK), and the United States of America (the US).<sup>15</sup> These countries

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<sup>7</sup> David M Malone “Security Council” in Thomas G Weiss and Sam Daws (eds) *The Oxford Handbook on the United Nations* (Oxford University Press, Oxford, 2007) 117 at 117.

<sup>8</sup> Article 25.

<sup>9</sup> Article 39.

<sup>10</sup> Article 42.

<sup>11</sup> Article 23(2). Each year, the GA elects five non-permanent members for a term of two years. See United Nations “How are the non-permanent members of the Security Council selected?” <[www.ask.un.org](http://www.ask.un.org)>.

<sup>12</sup> Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 2002) vol I at 437.

<sup>13</sup> Jonas von Freiesleben “Reform of the Security Council” in *Managing Change at the United Nations* (Center for UN Reform Education, New York, 2008) 1 at 2.

<sup>14</sup> *Question of equitable representation on the Security Council and the Economic and Social Council* GA Res 1991 A, XVIII (17 December 1963).

<sup>15</sup> Article 23(1).

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were the victors of the Second World War, which cemented their standing as the most powerful countries of that time. The arrangement of the SC was “designed to contrast with the Council of the League of Nations... that failed miserably in the security arena because it required agreement from all states”.<sup>16</sup> When it came to the discussions before the creation of the UN, none of the proposed Charter provisions “spurred greater acrimony” than those regarding the veto.<sup>17</sup> As Edward Luck commented:<sup>18</sup>

The dilemma for most delegations in San Francisco could not have been starker. On the one hand, they objected to the veto because it was inequitable and because it could prevent Council action when most needed. On the other hand, they realised that the viability and effectiveness of the UN – like the League before it – would depend heavily on the continued collaboration of the great powers.

US Senator, Tom Connally, famously responded to critics of the veto, “You may go home from San Francisco, if you wish, and report that you have defeated the veto...but you can also say, ‘We tore up the Charter!’”<sup>19</sup> Essentially, the veto was non-negotiable from the perspective of the powerful states that won the Second World War. The veto became an integral part of the composition of the UN and remains so today.

*B The Evolution of the Veto*

The veto is seen as the dominant structural feature of the present constitution of the UN.<sup>20</sup> Article 27 of the Charter, which sets out the veto provision without explicitly using the word ‘veto’, is “the decisive yardstick” regarding whether the SC will adopt a draft resolution.<sup>21</sup> Article 27 outlines that each member of the SC has one vote; SC decisions on procedural matters shall be made by nine members voting affirmatively; and SC decisions on non-procedural [substantive] matters shall be made by nine members voting affirmatively including the concurring votes of the permanent members. It also states that in decisions dealing with the pacific settlements of disputes, any party to the dispute shall abstain from voting.

What does art 27 mean by “concurring votes of the permanent members”? SC practice over its first few decades of existence resolved any uncertainty around this.<sup>22</sup> A

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<sup>16</sup> Thomas G Weiss “The Illusion of Security Council Reform” (2003) 26(4) Wash Quart 147 at 148.

<sup>17</sup> Edward Luck *UN Security Council: Practice and Promise* (Routledge, New York, 2006) at 13.

<sup>18</sup> At 14.

<sup>19</sup> Tom Connally *My Name is Tom Connally* (Thomas Y. Crowell, New York, 1954) at 283.

<sup>20</sup> Bardo Fassbender *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International, the Hague, 1998) at 8.

<sup>21</sup> Simma, above n 12, at 508.

<sup>22</sup> Michael J Matheson *Council Unbound: the Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (United States Institute of Peace, Washington DC, 2006) at 21.

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negative vote by a permanent member is deemed a veto but abstention, non-participation, and absences do not prevent a SC resolution from being passed.<sup>23</sup>

On 29 April 1946, the Soviet Union abstained over the "Spanish Question", which was about Francisco Franco's fascist dictatorship in Spain. The issue of Franco's government was brought to the attention of the SC, and in SC Resolution 4, there was "unanimous moral condemnation of the Franco regime" and an agreement to further investigate the matter.<sup>24</sup> The Soviet Union insisted that its voluntary abstention should not constitute a precedent yet since then, there has been "uniform practice" that abstentions by permanent members are not interpreted as constituting a veto.<sup>25</sup> Thus abstentions do not prevent a substantive decision from being made. There is also an obligatory abstention if the state is a party to a dispute,<sup>26</sup> which does not constitute a veto.

Refusing to participate in a vote is not classified as a veto. The UK was the first permanent member not to participate in a vote despite being present at the SC meeting.<sup>27</sup>

The absence of a member state from a SC meeting can be either deliberate or involuntary. If a member state deliberately does not attend, this is deemed an implied abstention.<sup>28</sup> If a member state is involuntarily absent, that is, it is delayed or prevented from attending, it is not deemed an abstention.<sup>29</sup>

Aside from what can be considered a "concurring" vote, there are other dimensions to the veto. Inherent in the power of the veto is more than just the ability to directly block a substantive decision of the SC:<sup>30</sup>

It is of the utmost importance to understand the following: the mere existence of the ever-present possible threat of the use of the veto by a permanent member has undeniably an influence on decision making in the SC as a whole, which is admittedly hard to measure but enormous.

Therefore, available statistics on the use of the veto do not give the full picture. The veto has such power that even if a permanent member merely threatens to use it, any resolutions made by the SC may be affected. There are inescapable power politics at play within the SC and it is clear that the veto is a strong and versatile tool for the permanent members.

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<sup>23</sup> Simma, above n 12, at 493-507.

<sup>24</sup> *The Spanish Question* SC Res 4, S/RES/4 (1946).

<sup>25</sup> Simma, above n 12, at 493.

<sup>26</sup> See art 27(3).

<sup>27</sup> Fassbender, above n 20, at 178.

<sup>28</sup> Simma, above n 12, at 501.

<sup>29</sup> At 501.

<sup>30</sup> At 514.



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The veto has developed since its birth in 1945. One of the key rationales underpinning the veto was that “the ability of Major Powers to cooperate not only at the time but in all the years to come” was a critical factor bearing on the success of the UN.<sup>31</sup> Initially, it was thought that the permanent members needed to be present and vote in favour of a draft resolution for it to pass but it has evolved over the years so that now abstention, non-participation, and absence do not equate to a veto. Despite its development towards a less restrictive approach, the veto still remains controversial today.

*C Problems with the Veto*

This section explains three key problematic aspects of the veto in order to provide an understanding of why there needs to be veto reform. These aspects are the representativeness of the permanent members, the inequality of UN member states, and the way that the veto has been used to prevent action in mass atrocity situations. This section argues that these aspects are all problematic because they threaten the legitimacy of the SC.

It is important to explain what is meant by ‘legitimacy’ because it is a “notoriously elusive term, over-used and under-specified.”<sup>32</sup> Legitimacy has both a normative and a sociological meaning. For an institution to have legitimacy in the normative sense is for it to have the right to rule and, in the sociological sense, it is for the institution to be widely believed to have the right to rule.<sup>33</sup> How do we assess these two categories of legitimacy? Joseph Weiler explains that normative legitimacy is moral, ethical, informed by political theory, and can be objectively measured. Social or sociological legitimacy is empirical, assessed with the “tools of social science”, and is a subjective measure, reflecting social attitudes. Rather than measuring popularity, it is about a deeper form of acceptance of the political regime.<sup>34</sup> The sociological legitimacy and consequently the normative legitimacy of the SC are threatened by the veto.

*1 Representativeness*

Legislative bodies are deemed representative “if their composition faithfully reflects their respective constituency.”<sup>35</sup> Although the non-permanent members are somewhat representative of all UN member states as there are required to be a certain number of representatives from each region,<sup>36</sup> the permanent members do not faithfully represent

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<sup>31</sup> Anjali Patil *The Veto: A Historical Necessity, 1946-2001: A comprehensive record of the use of the veto in the UN Security Council* (in-house Incorporated, New York, 2001) at 89.

<sup>32</sup> JHH Weiler “Europe in Crisis – on ‘Political Messianism’, ‘Legitimacy’ and the ‘Rule of Law’” (2012) Sing JLS 248 at 248.

<sup>33</sup> Allen Buchanan and Robert Keohane “The Legitimacy of Global Governance Institutions” (2006) 20(4) *Ethics and International Affairs* 405 at 405.

<sup>34</sup> Weiler, above n 32, at 248.

<sup>35</sup> Fassbender, above n 20, at 296.

<sup>36</sup> See above n 14.

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the current composition of the UN. The permanent membership of the SC, comprised of the victors of the war that ended in 1945, is dominated by Europe and does not reflect the 21st century world. There are no permanent members from Latin America, Africa, or Australasia. The current permanent members are neither the five biggest economies in the world nor the five most populous states in the world. Germany and Japan each have a larger economy than Russia, China, the UK, or France.<sup>37</sup> India, Indonesia, and Brazil each have higher populations than Russia, the UK, or France.<sup>38</sup>

On the other hand, David Bosco points out that the permanent members control more than 26,000 nuclear warheads, 99 per cent of all those in existence.<sup>39</sup> Therefore the permanent members are almost entirely representative of states that have nuclear weapons. In light of this, perhaps it is sensible for the permanent members to have veto power. They control the most powerful weapons in the world and due to the nature of the veto power, they must all agree for the weapons to be used.<sup>40</sup> This provides a safeguard on the use of nuclear weapons. However, according to art 25, all UN members agree to accept and carry out the decisions of the SC. This strongly suggests that the permanent members should be representative of the UN as a whole. This includes all 193 member states, not just those with nuclear weapons. How can the permanent membership become more representative of the 193 member states? Should it be based on geography? Should it be based on financial contribution to the UN or to the international political economy as a whole? Should it be based on population? Ian Hurd suggests that due to disagreement over which dimension of representation is the most important, any change may increase the legitimacy of the SC to one audience and reduce it for another thereby making the potential legitimating power of stronger representativeness small.<sup>41</sup>

Another factor to consider is that if there are more states wielding veto power for the sake of making the SC more representative, the SC will likely become less efficient. If there are more states with veto power, there is a higher likelihood that the veto will be used. More interests on the table mean that it is harder to reach an agreement.<sup>42</sup> Therefore, in situations where the SC needs to act quickly, it might not be able to. Hurd argues that all legitimation hypotheses, such as making the SC more representative in order to make it more legitimate, involve a trade-off between increasing the SC’s legitimacy and furthering other values such as efficiency, effectiveness, or power.<sup>43</sup> These trade offs involve political decisions about priorities

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<sup>37</sup> International Monetary Fund *World Economic Outlook* (April 2016).

<sup>38</sup> Central Intelligence Agency “The World Factbook” <[www.cia.gov](http://www.cia.gov)>.

<sup>39</sup> David Bosco *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (Oxford University Press, Oxford, 2009) at 3.

<sup>40</sup> The exception to this is self-defence. See art 51 of the Charter.

<sup>41</sup> Ian Hurd “Myths of Membership: The Politics of Legitimation in UN Security Council Reform” (2008) 14 *Global Governance* 199 at 209.

<sup>42</sup> At 212.

<sup>43</sup> At 212.

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and will vary according to the values and interests of each state.<sup>44</sup> If member states do not see the SC, particularly the permanent members, as truly representing them, then the perception of the SC as having the right to rule will diminish and then their actual right to rule will diminish. A potential consequence of this is UN member states refusing to carry out decisions of the SC as required under art 25 of the Charter, which would be detrimental to the effectiveness of the UN. The lack of representativeness of the wider UN amongst the permanent members is one example of a structural problem caused by the veto. Inequality between UN member states is another example.

2 *Sovereign Equality and the Rule of Law*

Article 2 of the Charter sets out the principles of the UN. The first principle states that "The Organization is based on the principle of sovereign equality of all its Members."<sup>45</sup> Hans Köchler claims that this pledge is "nullified by the provisions of art 27 [the SC voting provision] without any exculpation".<sup>46</sup> Sovereign equality can be thought of in two ways. The first is that there is equality between all member states. The second is a 'rule of law' equality, that is, that all are equal before the law and no state is above the law. Both of these conceptions of sovereign equality are breached by the permanent members having veto power.

In regard to the first conception of sovereign equality, Bardo Fassbender argues that by giving each permanent member the unilateral power to prevent a decision being made, a hierarchy between UN member states is established.<sup>47</sup> The veto gives the permanent member a specific weight in the decision-making process of the UN and, beyond that, other diplomatic fora.<sup>48</sup> Therefore, equality amongst the member states is lacking.

In regard to the second conception, the permanent members are not equal to other states before the law. The veto power practically exempts the permanent members from measures of enforcement under the Charter.<sup>49</sup> The veto allows the permanent members the capacity to prevent the operation of the UN enforcement system against itself, against any state which it chooses to support and protect, or in any other case in which it prefers not to participate or to have others participate in an enforcement venture under UN auspices.<sup>50</sup> The permanent members are therefore above the law. The veto also applies to amendments to the Charter, which will be discussed below.

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<sup>44</sup> At 212.

<sup>45</sup> Article 1(2).

<sup>46</sup> Hans Köchler "The Voting Procedure in the United Nations Security Council" in Hans Köchler (ed) *Democracy and the International Rule of Law. Propositions for an Alternative World Order. Selected Papers Published on the Occasion of the Fiftieth Anniversary of the United Nations* (Springer, New York, 1995) 2 at 23.

<sup>47</sup> Fassbender, above n 20, at 8.

<sup>48</sup> At 278.

<sup>49</sup> At 8.

<sup>50</sup> At 279.

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The permanent members have the decisive say about the future contents of the Charter, which is "a situation unheard of in the history of international law".<sup>51</sup>

From a realist perspective, there will always be some form of inequality when 193 states come together as certain states will inevitably hold more power than others. It is the inherent and inescapable nature of the world. This may be the case but by giving five states such strong power over the rest of the member states, it exacerbates the role of power politics within the UN. If the permanent members decide to exercise their power arbitrarily, they can do so because that is the nature of the system. If the permanent members are seen to be above the law compared to the rest of the international community, the sociological legitimacy of the SC's right to make decisions on behalf of member states is likely to be threatened. This extends to normative legitimacy. If a core principle espoused by the UN in its Charter, here sovereign equality, is contravened by the very nature of the SC as established in the same founding document, the actual right to rule is endangered.

### 3 *Practical Failures*

The issues of lack of representativeness and sovereign equality are important problems but it is vital to also look at the practical failures of the SC. There are instances where the veto has been used, which has prevented SC action, arguably costing many lives. This is exemplified by the response by the SC to Syria. This will be further elaborated on in the next section, which describes R2P. According to David Caron, when an institution fails to govern due to its inability to use its authority, especially an institution that represents or aspires to represent a system of order, this is a basis for alleging illegitimacy because it is failing to perform its basic mission.<sup>52</sup> The SC is tasked with maintaining international peace and security. That is its mission. When the SC fails to fulfil this mandate due to inaction as a result of being inhibited by the veto power, its legitimacy is challenged. Its sociological legitimacy is challenged because if it is not seen to be using its authority effectively, the international community will lose faith in it. Its normative legitimacy is challenged because if the international community loses faith in the SC as an institution due to the SC not putting international peace and security above power politics, then it is in danger of losing its actual moral right to rule.

### III *Responsibility to Protect*

Failure to act by the SC is particularly devastating when it occurs in mass atrocity situations, where the doctrine of R2P should be operating. This part explains the

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<sup>51</sup> At 280.

<sup>52</sup> David D Caron "The Legitimacy of the Collective Authority of the Security Council" (1993) 87 Am. J. Int'l L 552 at 560-561.

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origins of R2P and links R2P to the veto power of the permanent members in order to show the harm that the veto can cause.

A *The Establishment of R2P as an Emerging Norm*

The term ‘Responsibility to Protect’ has its origins in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS). This report was about humanitarian intervention and whether it is appropriate for states to take coercive, particularly military, action against another state in order to protect people at risk in that other state.<sup>53</sup> In 2005, UN member states committed to, inter alia, R2P.<sup>54</sup> The 2005 World Summit Outcome document outlines the R2P commitment in paragraphs 138 and 139.<sup>55</sup> The SC first endorsed R2P in 2006.<sup>56</sup> From 2009, the UN Secretary-General began releasing annual reports on R2P.<sup>57</sup>

Has R2P become an international law norm which states are expected to abide by? According to Peter Katzenstein, norms are “collective expectations for the proper behaviour of actors with a given identity”.<sup>58</sup> There is some disagreement as to whether R2P can be considered a norm. Alex Bellamy, writing in 2015 on the tenth anniversary of R2P, deemed R2P as an established international law norm.<sup>59</sup> Carsten Stahn, in 2007, regarded R2P as a political catchphrase instead of a legal norm.<sup>60</sup> The UN Secretary-General in his 2015 annual report on R2P detailed the significance of R2P in international law:<sup>61</sup>

The Security Council has adopted 30 resolutions and six presidential statements that refer to the responsibility to protect, and support for the

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<sup>53</sup> International Commission on Intervention and State Sovereignty (ICISS) *The Responsibility to Protect* (Ottawa, International Development Research Centre, 2001) at VII.

<sup>54</sup> United Nations “The 2005 World Summit” <www.un.org>.

<sup>55</sup> *2005 World Summit Outcome* GA Res 60/1, A/Res/60/1 (2005) at [138-139].

<sup>56</sup> *Protection of civilians in armed conflict* SC Res 1674, S/RES/1674 (2006).

<sup>57</sup> Report of the Secretary-General *Implementing the responsibility to protect* A/63/677 (12 January 2009); Report of the Secretary-General *Early warning, assessment and the responsibility to protect* A/64/864 (14 July 2010); Report of the Secretary-General *The role of regional and subregional arrangements in implement the responsibility to protect* A/65/877-S/2011/393 (28 June 2011); Report of the Secretary-General *Responsibility to protect: timely and decisive response* A/66/874-S/2012/578 (25 July 2012); Report of the Secretary-General *Responsibility to protect: State responsibility and prevention* A/67/929-S/2013/399 (9 July 2013); Report of the Secretary-General *Fulfilling our collective responsibility: international assistance and the responsibility to protect* A/68/947-A/2014/449 (14 July 2014); Report of the Secretary-General *A vital and enduring commitment: implementing the responsibility to protect* A/69/981-S/2015/500 (13 July 2015); Report of the Secretary-General *Mobilizing collective action: the next decade of the responsibility to protect* A/70/999-S/2016/620 (22 July 2016).

<sup>58</sup> Peter Katzenstein *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press, New York, 1996) at 5.

<sup>59</sup> Alex J Bellamy “The Responsibility to Protect Turns Ten” (2015) 29(2) *Ethics & International Affairs* 161.

<sup>60</sup> Carsten Stahn “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? (2007) 101(1) *Am. J. Int’l L* 99.

<sup>61</sup> Report of the Secretary-General *A vital and enduring commitment: implementing the responsibility to protect* A/69/981-S/2015/500 (13 July 2015) at [5].

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principle and the Special Advisers on the Prevention of Genocide and the Responsibility to Protect has been expressed in stronger terms and with increasing frequency in recent years. In several resolutions authorizing United Nations peace operations the Council has emphasized the need to support national authorities in upholding their responsibility to protect. The General Assembly has continued consideration of the principle, held a formal debate, and convened six annual informal interactive dialogues. The Human Rights Council has adopted 13 resolutions that feature the responsibility to protect, including three on the prevention of genocide and nine relating to country-specific situations. At a regional level, the African Commission on Human and Peoples' Rights has adopted a resolution on strengthening the responsibility to protect in Africa and the European Parliament has recommended full implementation of the principle by the European Union.

From the Secretary-General's description of the growing prevalence of R2P in the international sphere, it appears that R2P has become at least an emerging international law norm. This paper proceeds on that basis.

*B What is R2P?*

The three pillars of R2P set out by the UN Secretary-General summarising the relevant paragraphs in the World Summit Outcome document are:<sup>62</sup>

1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility; and
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

R2P does not strip states of their sovereignty. Instead, sovereignty is inextricably linked to responsibility.<sup>63</sup> It is the role of the state to protect its populations. The international community will not step in and challenge that sovereignty unless the state is clearly failing to protect its populations.

Under pillar one, states have the responsibility to protect their populations from mass atrocity crimes. Genocide, war crimes, and crimes against humanity are well-established in international law and appear in a range of conventions, as well as in the

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<sup>62</sup> United Nations Officer of the Special Adviser on the Prevention of Genocide "The Responsibility to Protect" <[www.un.org](http://www.un.org)>.

<sup>63</sup> See Francis M Deng and others *Sovereignty as Responsibility: Conflict Management in Africa* (The Brookings Institution, Washington DC, 1996).

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Rome Statute.<sup>64</sup> Ethnic cleansing is not independently recognised under international law but includes acts that can amount to the other three crimes, especially genocide and crimes against humanity.<sup>65</sup> Ethnic cleansing has also been defined by the Commission of Experts on the war in the former Yugoslavia.<sup>66</sup>

Mass atrocity crimes are considered to be the most serious crimes against humankind. This is "based on the belief that the acts associated with them affect the core dignity of human beings, particularly the persons that should be most protected by States, both in times of peace and in times of war."<sup>67</sup> There are UN Special Advisers on the Prevention of Genocide and on the Responsibility to Protect and one of their principal roles is to prevent mass atrocities.<sup>68</sup> They are supported by a joint office, the Office on Genocide Prevention and the Responsibility to Protect (the Office). The Office collects information and conducts assessments of situations worldwide that could potentially lead to mass atrocities, works on capacity building, and raises awareness among states and other actors about their responsibility to protect.<sup>69</sup> The Office has created a Framework of Analysis detailing risk factors and indicators for assessing the risk of mass atrocity crimes.<sup>70</sup> The Secretary-General explains that "with the help of the Framework, we can better sound the alarm, promote action, improve monitoring or early warning by different actors, and help UN member states to identify gaps in their atrocity prevention capacities and strategies."<sup>71</sup>

Under the second pillar of R2P, the international community is responsible for encouraging states to uphold their responsibilities. It is clear from the third pillar that the international community needs to be prepared to take action if states are clearly failing to protect populations from the mass atrocity situations set out in the first pillar. Although it would be the last resort, the third pillar envisages that force might be necessary provided it is in accordance with the Charter. Chapter VII of the Charter sets out the requirements before force is employed. It is the role of the SC to

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<sup>64</sup> Genocide is defined in art 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, art 6 of the Rome Statute of the International Criminal Court, art 4(2) of the Statute of the International Criminal Tribunal for the former Yugoslavia, and art 2(2) of the Statute of the International Criminal Tribunal for Rwanda. There are definitions of crimes against humanity in art 7(1) of the Rome Statute of the International Criminal Court, art 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia, and art 3 of the Statute of the International Criminal Tribunal for Rwanda. There are lists of war crimes in the 1949 Geneva Conventions and 1977 Additional Protocol I, art 8 of the Rome Statute of the International Criminal Court, arts 2 and 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia, and art 4 of the Statute of the International Criminal Tribunal for Rwanda.

<sup>65</sup> Report of the Secretary-General *Implementing the responsibility to protect A/63/677* (12 January 2009) at [3].

<sup>66</sup> *Final Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992)* UN Doc S/1994/674 (27 May 1994), at 33: "ethnic cleansing" is a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.

<sup>67</sup> United Nations *Framework of Analysis for Atrocity Crimes: a tool for prevention* (2014) at 1.

<sup>68</sup> At 2.

<sup>69</sup> At 4.

<sup>70</sup> United Nations *Framework of Analysis*, above n 67.

<sup>71</sup> At iii.

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determine whether there are threats to international peace and security and to decide what measures should be taken.<sup>72</sup> Article 42 of the Charter sets out that the SC "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security".

C *R2P and the Veto*

How does this link to the veto? The veto can prevent the SC from fulfilling its responsibility, on behalf of the international community, to take collective action to protect populations in mass atrocity situations. Any of the SC permanent members can block a resolution recognising that a mass atrocity situation exists and that timely action must be taken. This is a concerning prospect but it is necessary to look at real examples to determine whether it is a well-founded concern.

In 2007, China and Russia vetoed a SC resolution calling on the Government of Myanmar to:<sup>73</sup>

Cease military attacks against civilians in ethnic minority regions and in particular to put an end to the associated human rights and humanitarian law violations against persons belonging to ethnic nationalities, including widespread rape and other forms of sexual violence carried out by members of the armed forces.

The background to this was a great degree of unrest in Myanmar (also known as Burma). According to Human Rights Watch, the Burmese army, or Tatmadaw had been carrying out summary executions, looting, torture, rape and other sexual violence, arbitrary arrests and torture, forced labour, recruitment of child soldiers, and the displacement and demolition of entire villages as part of military operations against ethnic minority armed opposition groups.<sup>74</sup>

The SC resolution was sponsored by the US and the UK and received enough votes to pass but was thwarted by the vetoes.<sup>75</sup> Part of China's reasoning in voting against the resolution was that "the Myanmar issue is mainly the internal affair of a sovereign State" and "the current domestic situation in Myanmar does not constitute a threat to international or regional peace and security".<sup>76</sup> This is an interesting response because it raises the question of how "international peace and security", as per art 24 of the Charter, should be interpreted. China appears to limit this phrase to situations that have an effect outside of the country's own borders. This would mean that many

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<sup>72</sup> Articles 39-41.

<sup>73</sup> SC Draft Res S/2007/14 (12 January 2007).

<sup>74</sup> Human Rights Watch *They Came and Destroyed Our Village Again: the Plight of Internally Displaced Persons in Karen State* (vol 17, no 4(C), June 2005) at 6.

<sup>75</sup> United Nations News Centre "China and Russia veto US/UK-backed Security Council draft resolution on Myanmar" (12 January 2007) <[www.un.org](http://www.un.org)>.

<sup>76</sup> SC Meeting S/PV.5619 (12 January 2007).



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grave situations would be ignored because they are happening within the sphere of a sovereign state. This is concerning, particularly in light of other tragic historical events, such as the Rwandan genocide in 1994. Russia agreed that the Myanmar situation was not affecting international peace and security and should be dealt with by other UN organs instead of the SC.<sup>77</sup>

In applying the R2P doctrine to this, there would likely be ethnic cleansing in Myanmar due to the widespread systematic targeting of ethnic minorities such as the Karen and Rohingya people.<sup>78</sup> The Myanmar state has the primary responsibility to protect its populations from ethnic cleansing. The international community has a responsibility to encourage and assist Myanmar in fulfilling this responsibility. The international community has a responsibility to use appropriate diplomatic, humanitarian, and other means to protect the people in Myanmar. If Myanmar is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect the people in Myanmar, in accordance with the UN Charter. According to the Charter, it is the role of the SC to maintain international peace and security. One form of action to protect the populations in Myanmar would be sending in UN peacekeepers but the SC must approve this.<sup>79</sup> In the Myanmar situation, the veto has prevented any such action. Both the state and the international community have manifestly failed in their responsibility to protect.

Another example of the veto preventing action in a mass atrocity situation is the case of Syria. A violent civil war between those who supported President Bashar al-Assad and those who opposed him began in 2011. As at mid-June 2013, there were over 90,000 deaths according to a report commissioned by the Office of the UN High Commissioner for Human Rights.<sup>80</sup> As at September 2016, there were approximately 4.8 million registered Syrian refugees.<sup>81</sup> The Human Rights Council established the Independent International Commission of Inquiry on the Syrian Arab Republic on 22 August 2011.<sup>82</sup> The Commission of Inquiry found that the government of Syria "manifestly failed" in its responsibility to protect as "its forces have committed widespread, systematic and gross human rights violations, amounting to crimes against humanity, with the apparent knowledge and consent of the highest levels of the State".<sup>83</sup> Furthermore, in the note accompanying the report of the UN Mission to

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<sup>77</sup> SC Meeting S/PV.5619 (12 January 2007).

<sup>78</sup> Michelle Rae Eberhard "The Crisis in Burma" International Coalition for the Responsibility to Protect <[www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org)>.

<sup>79</sup> United Nations Peacekeeping "Mandates and the legal basis for peacekeeping" <[www.un.org](http://www.un.org)>.

<sup>80</sup> Megan Price and others *Updated Statistical Analysis of the Documentation of Killings in the Syrian Arab Republic: Commissioned by the Office of the UN High Commissioner for Human Rights* (Human Rights Data Analysis, 13 June 2013).

<sup>81</sup> United Nations Refugee Agency "Syria Regional Refugee Response" (4 September 2016) <[www.data.unhcr.org](http://www.data.unhcr.org)>.

<sup>82</sup> *Situation of human rights in the Syrian Arab Republic* HRC Res S-17/1, A/HRC/S-17/1 (23 August 2011).

<sup>83</sup> *Report of the independent international commission of inquiry on the Syrian Arab Republic* A/HRC/19/69 (22 February 2012) at [126].

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Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, the UN Secretary-General “condemns in the strongest possible terms the use of chemical weapons and believes that this act is a war crime”.<sup>84</sup>

Russia and China vetoed four resolutions regarding the Syrian conflict between 2011 and 2014.<sup>85</sup> These resolutions strongly condemned the grave human rights violations and use of force against civilians by the Syrian authorities. Both Russia and China were concerned with respecting Syria’s sovereignty, independence, and territorial integrity.<sup>86</sup> After the third veto, the UK stated that Russia and China had “failed in their responsibilities as permanent members”.<sup>87</sup> Justin Morris asserts that “Moscow’s ties to the Assad regime and consequential concerns over ulterior Russian strategic interests have rarely been far from the surface of Council debate.”<sup>88</sup> In the July 2012 SC meeting discussing the third draft resolution on Syria that Russia and China vetoed, France claimed that it was clear that “Russia merely wants to win time for the Syrian regime to crush the opposition”.<sup>89</sup>

The R2P doctrine applies because the UN has confirmed that the Syrian state has manifestly failed to protect its populations from war crimes and crimes against humanity. The same analysis that applied to the Myanmar situation above applies here. The Syrian government has a responsibility to protect its populations. They are failing to do so. The international community has a responsibility to take action in accordance with the Charter. It has failed to do so, at least in part because of the use of the veto by China and Russia. Syria remains an extremely unstable war zone to this day.

It is chilling that the veto can be used to prevent action where there are proven mass atrocities being committed. The veto must be reformed in order save lives and to prevent the UN, particularly the SC, from losing normative and sociological legitimacy due to its inaction in such grave circumstances.

#### *IV Reforming the Veto*

There are different ways through which the veto can be reformed. The most obvious is through directly amending the Charter. There are also ways to reform the veto aside from amending the Charter. These are analysed below.

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<sup>84</sup> *Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013* A/67/997–S/2013/553 (16 September 2013) at [1].

<sup>85</sup> SC Draft Res S/2011/612 (4 October 2011); SC Draft Res S/2012/77 (4 February 2012); SC Draft Res S/2012/538 (19 July 2012); SC Draft Res S/2014/348 (22 May 2014).

<sup>86</sup> SC Meeting S/PV.6627 (4 October 2011).

<sup>87</sup> SC Meeting S/PV.6810 (19 July 2012).

<sup>88</sup> Justin Morris “Libya and Syria: R2P and the spectre of the swinging pendulum” (2013) 89(5) *International Affairs* 1265 at 1275.

<sup>89</sup> SC Meeting S/PV.6810 (19 July 2012).

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A *Through Amending the Charter*

The drafters of the Charter clearly envisaged that there might be the need for amendment to the Charter in the future. Articles 108 and 109 of the Charter address this. In both articles, amendments have to be adopted by a vote of two-thirds of the members of the GA, including the permanent members but in art 109, there is the added requirement that a special conference to review the Charter can be called by two-thirds of the GA or nine members of the SC. The methods differ procedurally but not substantively.<sup>90</sup> There are no limitations as to which provisions in the Charter are amendable.

The Charter has been amended a small number of times. In 1963, the membership of the SC increased from 11 to 15 and the requisite majority for passing a resolution increased from seven to nine. Article 109 changed to reflect this increase so that now nine SC members instead of seven can call a conference to review the Charter. Article 61, which outlines the composition of the Economic and Social Council, was amended twice. Firstly, the membership increased from 18 to 27 and then eight years later, the membership of the Economic and Social Council increased from 27 to 54.

This shows that reform through amendment is possible but, historically, amendment has been focused on member numbers instead of anything more substantive. The number of UN member states has increased dramatically from 51 signatories in 1945 to 193 members in 2016 so it is logical that the memberships of particular UN organs have increased. Due to the increase in member states, arguably there should be an amendment to increase the number of permanent members with veto power. As discussed above, that would not increase the efficiency of the SC and it is doubtful whether it would strengthen the legitimacy of the SC.<sup>91</sup> Moreover, attempting to increase the number of permanent members with veto power ignores the power politics that are at play. The permanent members have veto power over any amendments to their veto power. No change can be made unless it is unanimously assented to by the permanent members, as per arts 108 and 109 of the Charter. Reform would require “a willingness to rise above [the permanent members’] own current sense of entrenched rights and privileges and find a grand bargain”.<sup>92</sup> The reality is that the system is fixed in favour of the permanent members who are highly unlikely to unanimously agree to give up their veto power. This unwillingness to give up the veto is exemplified by Michele Sison, on behalf of the US, stating at a recent GA meeting that the US did not support changes to the veto.<sup>93</sup> However, this does not mean that all permanent members are opposed to veto reform. As will be explained

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<sup>90</sup> Simma, above n 12, at 1180.

<sup>91</sup> See above at Part II(C)(1).

<sup>92</sup> Mark Malloch Brown “The John W. Holmes Lecture: Can the UN be reformed?” (2008)14(1) *Glob Gov* 1 at 8.

<sup>93</sup> *African Representation, Future of Veto Power, Intergovernmental Process Figure Prominently in General Assembly Annual Debate on Security Council Reform* GA Meeting, LXX, GA/11715 (30 October 2015).

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below, France is a strong supporter of veto reform and has put forward an initiative that attempts to limit the use of the veto. This shows that there is still hope for reform but positive change is unlikely to come about through directly amending the Charter so other avenues are investigated below.

*B Without Amending the Charter*

Commentators on global governance within the UN emphasise that many changes can and have been accomplished without amending the Charter, which shows that the Charter is flexible, adaptable, and allows innovation.<sup>94</sup> This section outlines ways through which the UN can be reformed without directly amending the Charter, including adopting a broad interpretation of the Charter, using the Uniting for Peace resolution, and creating a code of conduct regulating veto use.

*1 Interpretation*

The first non-amendment procedure is interpretation. In a 1946 article comparing the League of Nations Covenant to the UN Charter, a commentator suggests that the Charter will naturally go through a process of interpretation:<sup>95</sup>

But in a sense we do not yet know much about the Charter, because the text of a document is never a very safe guide to an understanding of the institution to which it relates. Constitutions always have to be interpreted and applied, and in the process they are overlaid with precedents and conventions which change them after a time into something very different from what anyone, with only the original text before him, could possibly have foreseen.

Decades later, this comment still rings true. Thomas Franck aligns the Charter with being a “living tree” because, while it can be amended formally, it also adapts and evolves by a “dynamic process of auto-interpretation by its principal organs – both juridical and political – as these apply the instrument in new situational contexts that could not have been anticipated by its authors”.<sup>96</sup> Fassbender similarly argues that the Charter is a constitution; it is a living instrument capable of being interpreted.<sup>97</sup> Fassbender states that an interpretation of the Charter based on the original will of the parties (‘static-subjective interpretation’) is inappropriate because it would “unduly intensify the subjection of the present and the future to what a bygone generation declared to be the law, and impede the solution of contemporary problems.”<sup>98</sup> He instead argues that interpretation of a Charter provision must aim at establishing, at

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<sup>94</sup> Margaret P Karns, Karen A Mingst, and Kendall W Stile *International Organizations: The Politics & Processes of Global Governance* (3<sup>rd</sup> ed, Lynne Rienner Publishers Inc, Colorado, 2015) at 148-149.

<sup>95</sup> JL Brierly “The Covenant and the Charter” (1946) 23 *Brit. Y.B. Int’L Law* 83 at 83.

<sup>96</sup> Thomas M Franck “In Extremis: are there legal principles applicable to the illegal use of force?” in Lal Chand Vohrah and others (eds) *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, the Hague, 2003) 309 at 309.

<sup>97</sup> Fassbender, above n 20, at 130.

<sup>98</sup> At 132.

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the time of interpretation, its “objective meaning in the light of the concrete circumstances of the case in question, thus taking account of the dynamic character and inherent incompleteness of any constitution”, which he labels as ‘dynamic-evolutionary’ or ‘objective interpretation’.<sup>99</sup>

The Vienna Convention on the Law of Treaties helps to determine how far a treaty agreement can be interpreted. Article 31 states that “a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>100</sup> It goes on to say that any subsequent practice establishing the agreement of the parties in relation to the treaty shall be taken into account.<sup>101</sup> According to Hervé Ascensio, the main guideline is “textual interpretation”, which is not a narrow literal interpretation because the context, the object, and the purpose of the treaty all interact with the ordinary meaning of the terms.<sup>102</sup>

An example of the Charter being interpreted in a way that goes beyond the black letter text is art 27(3) of the Charter. Under this article, decisions made by the SC need to have the “concurring votes of the permanent members”. On its face, as discussed above, if a permanent member abstains from a substantive decision, the resolution should not pass. However, abstentions do not prevent a decision from being made.<sup>103</sup> The subsequent practice of states has allowed for a broad interpretation of “concurring votes”.

It would be difficult to further interpret the veto provision in art 27(3) in order to take the veto power away from the permanent members in certain situations. Taking the ordinary meaning of the words, there is no room to read in a restriction on the veto power, except perhaps where it says “a party to a dispute shall abstain from voting”. Could “a party to a dispute” be extended to a state that has political interests in a certain situation, even if it is just an indirect interest? The purpose of the Charter as set out in the Preamble is, *inter alia*, to save succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights. This suggests that “a party to a dispute” could be interpreted broadly in light of the purpose and in the context of mass atrocity situations. Is this a good faith interpretation considering the importance of the veto to the creation of the UN? It must be noted that in art 27(3), a party to a dispute must only abstain regarding decisions under Chapter VI of the Charter, which deals with the pacific settlement of disputes, and under art 52(3), which deals with pacific settlement of disputes through regional arrangements. These are limited circumstances and exclude actions with respect to threats to the peace, breaches of the

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<sup>99</sup> At 132.

<sup>100</sup> Vienna Convention on the Law of Treaties 1151 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(1).

<sup>101</sup> Vienna Convention on the Law of Treaties, art 31(3)(b).

<sup>102</sup> Hervé Ascensio “Article 31 of the Vienna Convention on the Law of Treaties and International Investment Law” (2016) 31(2) ICSID Review at 386.

<sup>103</sup> Simma, above n 12, at 495.

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peace, and acts of aggression as per Chapter VII of the Charter. Moreover, it is highly unlikely that the permanent members would agree to interpret art 27 so broadly as to limit their veto right hence there would be no question of subsequent practice leading to subsequent agreement.

Creative interpretation of the Charter is possible but there are limits as to how far the interpretation of a term can be stretched. As shown above, the context and purpose of the Charter can be considered but this must be done in good faith and any interpretation cannot completely ignore the ordinary meaning of the words.<sup>104</sup> Therefore, whilst interpretation is a somewhat useful tool, it is unlikely to prevent the veto from being used in situations where mass atrocities are occurring.<sup>105</sup>

However, creative interpretation may be useful in another way. It has been successfully used in order to allow the GA to take some responsibility in maintaining international peace and security, which is primarily the mandate of the SC.<sup>106</sup> The International Court of Justice interpreted “primary responsibility” in art 24 of the Charter to mean that the responsibility is not exclusive to the SC.<sup>107</sup> Thus the GA may also be concerned with international peace and security.<sup>108</sup> The ‘Uniting for Peace’ resolution may provide another route to get around the veto without amending the Charter.

## 2 *Uniting for Peace*

On 3 November 1950, with 52 votes in favour and five against, the GA adopted Resolution 337 A (V), which is better known as the ‘Uniting for Peace’ resolution.<sup>109</sup> Put forward by the US Secretary of State, Dean Acheson, this was a response to the Soviet Union’s strategy of blocking “any determination” by the SC on measures to be taken to protect the Republic of Korea from North Korea during the Korean War.<sup>110</sup>

Under the Uniting for Peace resolution, if the SC, because of lack of agreement between the permanent members, fails to exercise its primary responsibility to maintain international peace and security, the GA can make recommendations to member states for collective measures including armed force when necessary.<sup>111</sup> This is limited to cases where there appears to be a threat to the peace, a breach of the peace, or an act of aggression, all of which are dealt with under Chapter VII of the

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<sup>104</sup> Vienna Convention on the Law of Treaties, above n 100, art 31(1).

<sup>105</sup> See José E Alvarez *International Organizations as Law-makers* (Oxford University Press, New York, 2005) for more on constitutional interpretation of charters.

<sup>106</sup> Article 24.

<sup>107</sup> *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 1962 at 163.

<sup>108</sup> At 163.

<sup>109</sup> *Uniting for Peace* GA Res 337, V, A/Res/377(V) (3 November 1950).

<sup>110</sup> Christian Tomuschat “Uniting for Peace, General Assembly resolution 377 (V)” Audiovisual Library of International Law <[www.legal.un.org](http://www.legal.un.org)>.

<sup>111</sup> *Uniting for Peace*, above n 109, at [1].

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Charter. Uniting for Peace allows an emergency special session of the GA to be called to consider the relevant matter.<sup>112</sup>

Transferring a matter from the SC to the GA is procedural so cannot be impeded by the veto.<sup>113</sup> Since the Korean War where it was first used, the Uniting for Peace procedure has been used 11 times: seven times by the SC transferring an issue to the GA, and four times by the GA after a majority of member states requested an emergency special session.<sup>114</sup> It is important to note two things here. Firstly, as per art 18 of the Charter, decisions of the GA on important questions, which include recommendations regarding international peace and security, need to be made by a two-thirds majority of the members present and voting. Secondly, the GA has no binding powers but instead can make non-binding recommendations. Despite the non-binding nature of the recommendations, if a GA resolution passes by a two-thirds majority, there will be a strong degree of legitimacy.<sup>115</sup>

The Uniting for Peace resolution ignited controversy over the respective roles of the GA and the SC.<sup>116</sup> The relationship between the Security Council and the GA is “fluid and intricate” and the Uniting for Peace resolution saw a change in the dynamic of this relationship.<sup>117</sup> By allowing the GA a role that potentially placed it in a superior position to the SC, the Uniting for Peace resolution overreached the GA’s constitutional authority.<sup>118</sup> States and commentators questioned the legality and consistency of the Uniting for Peace resolution with the Charter but subsequent practice confirmed a general acceptance of the procedure.<sup>119</sup>

The “most prominent instance” of Uniting for Peace occurred in 1956 during the Suez Crisis.<sup>120</sup> After Israel invaded the Sinai, the US introduced a draft resolution calling for the withdrawal of Israeli forces and for Britain and France not to intervene.<sup>121</sup> Britain and France vetoed the resolution. A majority of SC members voted for an

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<sup>112</sup> At [1].

<sup>113</sup> Citizens for Global Solutions *The Responsibility Not to Veto: A Way Forward* (2014) at 3. See also art 27(2) of the Charter which states that decisions of the SC on procedural matters shall be made by an affirmative vote of nine members. Compare to art 27(3) of the Charter which states that the affirmative vote of nine members needs to include the concurring votes of the permanent members.

<sup>114</sup> Dominik Zaum “The Security Council, the General Assembly, and War: The Uniting for Peace Resolution” in Vaughan Lowe and others (eds) *The United Nations Security Council and War* (Oxford University Press, Oxford, 2008) 154 at 160.

<sup>115</sup> ICISS, above n 53, at [6.30].

<sup>116</sup> Karns, Mingst, and Stile, above n 94, at 116.

<sup>117</sup> Sydney D Bailey and Sam Daws *The Procedure of the UN Security Council* (3rd ed, Oxford University Press, Oxford, 1998) at 281.

<sup>118</sup> Andrew J Carswell “Unblocking the UN Security Council: the Uniting for Peace Resolution” (2013) *J Conflict Security Law* 1 at 27.

<sup>119</sup> Christine Binder “Uniting for Peace Resolution (1950)” in *Max Planck Encyclopedia of Public International Law* (online ed, June 2013).

<sup>120</sup> Zaum, above n 114, at 155.

<sup>121</sup> SC Draft Res S/3710 (30 October 1956).

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emergency session of the GA.<sup>122</sup> Since it was a procedural matter, any negative votes by the permanent members did not prevent it from passing. In the emergency session, the GA adopted a resolution proposing an international emergency force to secure and supervise a ceasefire.<sup>123</sup> The same day, Israel agreed to a ceasefire and the next day, Britain and France agreed not to intervene.<sup>124</sup> This is the only time that Uniting for Peace has been used to initiate operational action.<sup>125</sup>

The last time Uniting for Peace was used was in 1997 when an emergency special session was called at the request of Qatar regarding Palestine.<sup>126</sup> Why has it not been used recently? Dominik Zaum argues that the permanent members are reluctant to use it because it undermines their veto, and decolonisation and the increase in the members of the UN has made the GA an increasingly unpredictable body.<sup>127</sup> Britain considered using Uniting for Peace regarding the Kosovo crisis but decided against it because of uncertainty around whether there would be approval for intervention by the required two-thirds majority in the GA and because it would be a "cumbersome procedure" as the resolution could not be easily modified.<sup>128</sup> Emyr Jones Parry, the Permanent Representative of the UK to the UN at the time, pointed out that although a GA resolution would have been persuasive, the UN Charter still specified that military action required SC endorsement, and:<sup>129</sup>

[I]n some ways a bare two-thirds majority would have been less persuasive than the majority (of 12 to three) actually secured in the Security Council on 26 March 1999. There was thus no ready means at the United Nations of securing direct approval for the NATO action in Kosovo.

The fact that the Uniting for Peace resolution was not used during the Kosovo war and has not been used during the Syrian crisis shows that it is not deemed an effective way to get around the SC veto. There are, however, mixed opinions on whether the Uniting for Peace procedure is, overall, a useful procedure. ICISS, whilst acknowledging the difficulty of getting a two-thirds majority in the GA on an issue where the veto has been used, sees Uniting for Peace as an "important additional form of leverage on the Security Council to encourage it to act decisively and appropriately".<sup>130</sup> Zaum, on the other hand, suggests that the trust that ICISS places in the persuasive power of the GA and the Uniting for Peace resolution is "probably

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<sup>122</sup> *Complaint by Egypt against France and the United Kingdom* SC Res 119, S/3721 (31 October 1956).

<sup>123</sup> GA Res 1000 (First Emergency Special Session) A/3354 (5 November 1956).

<sup>124</sup> Thomas M Franck *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, Cambridge, 2004) at 36.

<sup>125</sup> Martti Koskenniemi "The Police in the Temple: Order, Justice and the UN: A Dialectical View" (1995) 6 EJIL 325 at 340.

<sup>126</sup> SC Draft Res S/1997/199 (7 March 1997) and SC Draft Res S/1997/241 (21 March 1997).

<sup>127</sup> Zaum, above n 114, at 165.

<sup>128</sup> Select Committee on Foreign Affairs *Fourth Report* (UK House of Commons, 23 May 2000) at [128].

<sup>129</sup> At [128].

<sup>130</sup> ICISS, above n 53, at [6.30].



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misplaced”.<sup>131</sup> Similarly, Martti Koskenniemi believes that Uniting for Peace has not caused a “revolutionary transformation” of how the UN operates.<sup>132</sup>

The Uniting for Peace resolution is a potential way to bypass the SC veto. However, it has been used neither frequently nor recently and the recent practice of states suggest that it is not an effective way to circumvent the veto. Therefore, while it may provide an avenue to go down in extreme situations, it is unlikely to deliver a sustainable long-term solution to the problems caused by the veto power.

### 3 *Code of Conduct*

Codes of conduct are more commonly associated with commercial enterprises but are also relevant to any type of organisation, including an international organisation such as the SC. Codes of conduct encompass guidelines, recommendations, or rules with the intent to affect the behaviour of a company or organisation in order to enhance corporate responsibility.<sup>133</sup> For the purposes of this definition, “corporate responsibility” refers to an organisation being accountable to its stakeholders and fulfilling its mandate. Here, the relevant stakeholder group is those that the SC represents, which includes all member states of the UN as well as the populations within the member states. The relevant mandate is maintaining international peace and security. It must be noted that codes of conduct are not “instant international law”; they do not rise to the level of customary international law merely by being adopted by states.<sup>134</sup> However, they could rise to that level through state practice.<sup>135</sup> Discussion of whether a code of conduct regulating the veto would become customary international law is outside the scope of this paper.

There are risks in adopting a code of conduct. A risk for stakeholders is that the code of conduct is developed in bad faith, for example, it is developed for the sole purpose of deflecting public criticism.<sup>136</sup> If the code of conduct is not abided by in reality, there is little advantage to the stakeholders. A similar consequence arises if there is a lack of independent monitoring to ensure the code of conduct is properly implemented. A significant risk for an organisation adopting a code of conduct is that it is open to criticism if it fails to follow the code.<sup>137</sup> However, it is important to emphasise that codes of conduct are generally non-binding.

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<sup>131</sup> Zaum, above n 114, at 174.

<sup>132</sup> Koskenniemi, above n 125, at 340.

<sup>133</sup> Ans Kolk, Rob van Tulder, and Carlihn Welters “International codes of conduct and corporate social responsibility: can transnational corporations regulate themselves?” (April 1999) 8(1) *Transnational Corporations* 143 at 151.

<sup>134</sup> Hans W Baade “The Legal Effects of Codes of Conduct for Multinational Enterprises” in Norbert Horn (ed) *Legal Problems of Codes of Conduct for Multinational Enterprises* (Kluwer, Deventer, 1980) 3 at 28.

<sup>135</sup> At 37.

<sup>136</sup> Rhys Jenkins *Corporate Codes of Conduct: Self-Regulation in a Global Economy* (United Nations Research Institute for Social Development, Technology, Business and Society Programme Paper Number 2, April 2001) at 29.

<sup>137</sup> At 28.

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Christine Chinkin labels codes of conduct for international organisations as non-legal soft law.<sup>138</sup> Soft law provides for the shaping and sharing of values, which create expectations as to the restraints that states will accept upon their own behaviour or impose upon others.<sup>139</sup> Tadzysz Gruchalla-Wesierski explains that as non-legal soft law is not legally binding upon the parties, generally only non-legal (political) sanctions are available.<sup>140</sup> An example of a non-legal sanction or consequence is a loss of reputation.<sup>141</sup> As the Secretary-General pointed out in his first report on implementing R2P, since the tragedies in Cambodia, Rwanda, and Srebrenica, the political costs have risen for anyone seen to be blocking an effective international response to an unfolding genocide or other high-publicity crime relating to R2P.<sup>142</sup> The political costs would be even higher if there was a code of conduct in place that restricted the veto in such situations. If there was, and a permanent member breached it, that permanent member could gain a reputation for breaking the rules, albeit the non-legally binding rules. This may change the way that other states interact with that permanent member. It may also cause an escalation in the calls for SC reform. Preventing a backlash of public opinion may not be an incentive for all the permanent members to agree to a code of conduct but there are other advantages for an organisation adopting a code of conduct.

A key reason to adopt a code of conduct is for the sake of positive public perception. It shows that the organisation is committed to the principles it espouses; that it is committed to being accountable and being responsible. This would strengthen the legitimacy of the organisation. Part III of this paper explained that the legitimacy of the veto is threatened, at least in part because of the practical failures of the SC where it did not maintain international peace and security because the veto prevented any effective action being taken. If there is a code of conduct preventing this from happening, there is likely to be less practical failures, such as that the lack of an effective response to the Syrian crisis. Another advantage of taking initiative and adopting a code of conduct is for the sake of anticipatory self-regulation.<sup>143</sup> If a permanent member anticipated that, due to public pressure, the day might come when serious changes to the use of the veto could be made, such as the abolition of the veto or giving other states veto power, adopting a voluntary code of conduct limiting the veto in restricted circumstances could be a sign of good faith that could consequently halt political pressure for stronger reforms. As shown above, it is extremely unlikely

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<sup>138</sup> CM Chinkin "The Challenge of Soft Law: Development and Change in International Law" (1989) 38(4) *Int Comp Law Q* 850 at 851.

<sup>139</sup> At 865.

<sup>140</sup> Tadzysz Gruchalla-Wesierski "A Framework for Understanding "Soft Law" (1984) 30 *McGill LJ* 37 at 40.

<sup>141</sup> David Charny "Nonlegal Sanctions in Commercial Relationships" (1990) 104(2) *Harvard Law Rev* 373 at 393.

<sup>142</sup> Report of the Secretary-General *Implementing the responsibility to protect A/63/677* (12 January 2009) at [61].

<sup>143</sup> Ans Kolk and Rob van Tulder "Setting new global rules? TNCs and codes of conduct" (2005) 14(3) *Transnational Corporations* 1 at 4.

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that the veto will be abolished due to the permanent members having veto power over this but the sign of good faith in adopting a code of conduct retains strong symbolic value.

In order to determine how a code of conduct works, it is useful to look at examples of codes of conduct that have been created. In 1994, after the genocide in Rwanda, eight of the world's largest disaster response agencies agreed upon the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief (the Disaster Relief Code).<sup>144</sup> It is a voluntary code of conduct setting out ten principles which all humanitarian actors should adhere to when responding to disasters. It is self-policing, that is, there is no international association possessing authority to sanction signatories. The Disaster Relief Code appears "most institutionalised" when it comes to education.<sup>145</sup> Many organisations have made it part of their introductory courses.<sup>146</sup> However, the general view is that the degree to which the Disaster Relief Code actually reaches the field is insufficient.<sup>147</sup> This highlights how important it is to effectively implement codes of conduct. If a code of conduct is useful in theory but does not affect actions in reality, it loses its efficacy.

There is also a code of conduct for UN peacekeepers. Peacekeeping is guided by three key principles: consent of the parties; impartiality; and non-use of force except in self-defence and defence of the mandate.<sup>148</sup> "The Ten Rules: Code of Personal Conduct for Blue Helmets" (the Peacekeeper Code), which was introduced in 1998, expands on the duties of UN peacekeepers.<sup>149</sup> The training of peacekeepers incorporates the Peacekeeper Code.<sup>150</sup> Peacekeepers are also issued with "pocket cards" of the Peacekeeper Code.<sup>151</sup> The Peacekeeper Code is part of the UN's strategy to address all forms of misconduct including sexual exploitation and abuse.<sup>152</sup> If there is alleged misconduct by a peacekeeper, the Office of Internal Oversight Services, the independent investigative arm of the UN, will carry out an investigation.<sup>153</sup> Although an investigation may not be framed as investigating a breach of the Peacekeeper Code, it remains a way to indirectly enforce the Peacekeeper Code.

Although these two examples are not directed at states as a code of conduct regulating SC members would be, they show that, practically, effective implementation is critical. Both the Disaster Relief Code and the Peacekeeper Code are used in training

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<sup>144</sup> International Federation of Red Cross and Red Crescent Societies "Code of Conduct <[www.ifrc.org](http://www.ifrc.org)>.

<sup>145</sup> Dorothea Hilhorst "Dead letter or living document? Ten years of the Code of Conduct for disaster relief" (2005) 29(4) *Disasters* 351 at 363.

<sup>146</sup> At 363.

<sup>147</sup> At 363.

<sup>148</sup> United Nations Peacekeeping "What is peacekeeping?" <[www.un.org](http://www.un.org)>.

<sup>149</sup> United Nations Peacekeeping "Conduct and Discipline" <[www.un.org](http://www.un.org)>.

<sup>150</sup> United Nations Conduct and Discipline Unit "UN Strategy" <[www.cdu.unlb.org](http://www.cdu.unlb.org)>.

<sup>151</sup> United Nations Conduct and Discipline Unit "UN Standards of Conduct" <[www.cdu.unlb.org](http://www.cdu.unlb.org)>.

<sup>152</sup> United Nations Peacekeeping "Conduct and Discipline" <[www.un.org](http://www.un.org)>.

<sup>153</sup> United Nations Conduct and Discipline Unit "Statistics" <[www.cdu.unlb.org](http://www.cdu.unlb.org)>.

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but the Peacekeeper Code remains visible beyond training as every peacekeeper carries a pocket copy of the Code. There is also greater accountability with the Peacekeeper Code as peacekeepers can be indirectly investigated for breaches.

Any code of conduct restricting the permanent members' use of the veto needs to be implemented well. It should be well-publicised so that there is strong political pressure for the permanent members to adhere to it. However, as was mentioned above, political pressure may not be enough to make all of the permanent members agree to a code of conduct in the first place, let alone agree to *abide* by such a code. The lack of consensus amongst the permanent members that there needs to be a code of conduct regulating veto use and the lack of enforceable consequences if there is a code of conduct and it is breached are key obstacles to veto reform. In the absence of other viable long-term solutions and in light of there already being agreement between two permanent members that there needs to be veto restrictions,<sup>154</sup> a code of conduct is the best option for reforming the veto. Any proposed code of conduct needs to be clear and framed in a way that will be as acceptable as possible to all of the permanent members. A variety of different initiatives are discussed below in order to determine the best possible approaches to restricting the veto through a code of conduct.

## V *Responsibility Not To Veto Initiatives*

The concept of "Responsibility Not To Veto" refers to how the permanent members should have an obligation not to use the veto in certain situations. The call for a code of conduct regulating the veto began in 2001. On May 23, 2001, ICISS conducted a roundtable consultation with French government officials and parliamentarians in Paris. French Foreign Minister, Hubert Védrine proposed a code of conduct regulating the use of the veto by the permanent members.<sup>155</sup> In its 2001 report on R2P, ICISS endorsed the proposal of Védrine, which "essentially [was] 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" aimed at stopping or averting "a significant humanitarian crisis".<sup>156</sup> This is similar to the proposal officially put forward by France, which is explained below along with five other proposed initiatives. Although the six proposals are not all labelled as codes of conduct, for the purposes of this evaluation, the recommendations in each are analysed as if they formed codes of conduct. They are explained in chronological order and then contrasted and critiqued. Part V ends with a proposed code of conduct based on the best parts of the six analysed initiatives. The six initiatives were chosen

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<sup>154</sup> France and the UK agree that there needs to be restrictions on the veto. This will be elaborated on below.

<sup>155</sup> International Commission on Intervention and State Sovereignty *The Responsibility to Protect: Research, Bibliography, Background* (Ottawa, International Development Research Centre, 2001) at 379.

<sup>156</sup> ICISS, above n 53, at [6.21].

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for discussion because they are the most well-known and come from the most influential sources.

A *Explanation of the Initiatives*

1 *The Secretary-General’s High-level Panel, 2004*

In 2003, the UN Secretary-General established a High-level Panel on Threats, Challenges, and Change (the Panel), comprised of 16 members drawn from around the world, to examine “the major threats and challenges the world faces in the broad field of peace and security” and to make recommendations for a collective response.<sup>157</sup>

Of particular importance is the commentary on the veto in the report. It begins by highlighting that there are no practical ways to change the existing permanent members’ veto powers and then it urges that veto use should be limited to matters where “vital interests are genuinely at stake”.<sup>158</sup> The Panel “ask[s] 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”.<sup>159</sup>

2 *The Genocide Prevention Task Force, 2008*

The Genocide Prevention Task Force was co-convened by the United States Holocaust Memorial Museum, the American Academy of Diplomacy, and the US Institute of Peace. The privately funded group was co-chaired by former US Secretary of State, Madeleine K Albright, and former US Secretary of Defense, William S Cohen. It launched in November 2007 aiming to “spotlight genocide prevention as a national priority and to develop practical policy recommendations to enhance the capacity of the US government to respond to emerging threats of genocide and mass atrocities.”<sup>160</sup> It released its report of recommendations on 8 December 2008.<sup>161</sup> Of particular relevance is Recommendation 6-2 proposing that the Secretary of State should undertake “robust diplomatic efforts” toward negotiating an agreement between the permanent members regarding not using the veto in cases concerning genocide or mass atrocities.<sup>162</sup>

The report explains more concretely how this could be achieved. The US Ambassador should initiate dialogue among the permanent members with the goal of creating an

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<sup>157</sup> *Secretary-General Names High-Level Panel to Study Global Security Threats, and Recommend Necessary Changes* (press release, SG/A/857, 4 November 2013).

<sup>158</sup> United Nations Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change *A more secure world: our shared responsibility* (2004) at [256].

<sup>159</sup> At [256].

<sup>160</sup> United States Holocaust Memorial Museum “Genocide Prevention Task Force” <[www.ushmm.org](http://www.ushmm.org)>.

<sup>161</sup> Madeleine K. Albright and William S. Cohen *Preventing Genocide: A Blueprint for U.S. Policymakers* (Genocide Prevention Task Force, 2008).

<sup>162</sup> At 106.

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agreement of “informal, voluntary mutual restraint” of the use or threat of the veto in cases involving ongoing or imminent mass atrocities.<sup>163</sup> Furthermore, unless three permanent members agree to veto a given resolution, all five would abstain or support it, particularly when mass atrocities or genocide are imminent or underway.<sup>164</sup> If two-thirds of the GA pass a resolution finding that a crisis poses an imminent threat of mass atrocities, this adds “further impetus to an expeditious SC response without threat of a veto”.<sup>165</sup>

3 *The Small Five, 2012*

In 2012, a group of small states including Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland (together the Small Five or S5) put forward a proposal on improving the working methods of the Security Council. This addressed, inter alia, the use of the veto. The relevant measures recommended for consideration by the permanent members included:<sup>166</sup>

- Explaining the reasons when resorting to a veto or declaring its intention to do so, in particular with regard to its consistency with the purposes and principles of the Charter of the United Nations and applicable international law. A copy of the explanation should be circulated as a separate Security Council document to all Members of the Organisation.
- Refraining from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity.

The proposal from the S5 gained some traction but they later withdrew the proposal after political pressure. When interviewed, Paul Seger, Switzerland’s Ambassador to the UN, said that the permanent members “[old] us don’t put that resolution to a vote; it’s infringing on the prerogatives of the Security Council, it’s disruptive and could jeopardise the overall reform of the Security Council”.<sup>167</sup> Aside from the inescapable politics at play, there was another reason that the S5 withdrew its proposal. Under-Secretary-General for Legal Affairs and UN Legal Counsel, Patricia O’Brien, recommended that the resolution required the support of two-thirds of the GA member states instead of the simple majority that is typically needed for most GA votes.<sup>168</sup> This was because in 1998, the GA passed a resolution where any resolution or decision on the question of equitable representation of the SC or increasing the membership of the SC or “related matters” would not be adopted unless at least two-thirds of the GA agreed.<sup>169</sup> O’Brien deemed the S5 proposal as falling into the

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<sup>163</sup> At 106.

<sup>164</sup> At 106.

<sup>165</sup> At 106.

<sup>166</sup> *Improving the working methods of the Security Council* A/66/L.42.Rev.1, LXVI (15 May 2012) at [19]-[21].

<sup>167</sup> Colum Lynch “Rise of the Lilliputians” *Foreign Policy* (online ed, 10 May 2012).

<sup>168</sup> Colum Lynch “The Brobdingnagians win again” *Foreign Policy* (online ed, 16 May 2012).

<sup>169</sup> *Security Council: increase in membership* GA Res 53/30, LIII, A/Res/53/30 (23 November 1998).

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category of “related matters”.<sup>170</sup> In a speech to the GA, Seger said O’Brien’s ruling was, “with all due respect, utterly wrong and biased” and the threat of procedural and legalistic manoeuvres had “created a spirit of uncertainty and unease”.<sup>171</sup> In the face of these pressures, the S5 withdrew its proposal so it was not put to a vote in the GA.<sup>172</sup>

4 *France/Mexico, October 2013*

France and Mexico have also put forward an initiative regarding the veto. It is particularly interesting that France has led such an initiative considering France is a veto-wielding permanent member. A key rationale behind calling for veto reform, according to French Foreign Minister, Laurent Fabius, was for the UN and the SC to avoid losing legitimacy, especially in light of the inaction over the Syrian crisis.<sup>173</sup> France and Mexico presented a political statement for signature by members of the UN on the suspension of the veto in “situations of mass atrocities, when crimes of genocide, crimes against humanity and war crimes on a large scale are committed”.<sup>174</sup> The statement does not have specific steps for reform but an opinion piece in the New York Times in October 2013 by Fabius set out more specifically what veto reform could look like. The “ambitious yet simple proposal” states that the five permanent members should “voluntarily regulate” their veto right and instead of amending the Charter, there would be a “mutual commitment” by the permanent members.<sup>175</sup> Furthermore:<sup>176</sup>

In concrete terms, if the Security Council were required to make a decision with regard to a mass crime, the permanent members would agree to suspend their right to veto. 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.

As of 21 October 2015, the initiative is supported by 80 member states.<sup>177</sup>

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<sup>170</sup> Lynch “The Brobdingnagians win again”, above n 168.

<sup>171</sup> Paul Seger, Switzerland Permanent Representative to the UN “Small Five Statement” (New York, 16 May 2012).

<sup>172</sup> *Switzerland Withdraws Draft Resolution in General Assembly Aimed at Improving Security Council’s Working Methods to Avoid ‘Politically Complex’ Wrangling GA Meeting*, LXVI, GA/11234 (16 May 2012).

<sup>173</sup> Laurent Fabius “A Call for Self-Restraint at the U.N.” *The New York Times* (online ed, New York, 4 October 2013).

<sup>174</sup> *France/Mexico Political Statement on the Suspension of the Veto in Case of Mass Atrocities* (1 October 2015).

<sup>175</sup> Laurent Fabius, above n 173.

<sup>176</sup> Laurent Fabius, above n 173.

<sup>177</sup> Permanent mission of France to the United Nations in New York “France and UN Reform” (2 November 2015) <[www.franceonu.org](http://www.franceonu.org)>.

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5 *The Elders, February 2015*

The “Elders” have also put forward a proposal recommending veto reform. Founded by Nelson Mandela in 2007, the Elders are an independent group of global leaders working for human rights and peace.<sup>178</sup> Kofi Annan, former UN Secretary-General, chairs the Elders. In a statement on strengthening the UN, which was launched at the Munich Security Conference in February 2015, the Elders called on the permanent members to pledge themselves to “greater and more persistent efforts to find common ground”, especially in crises where populations are subject to or threatened with genocide or other mass atrocities.<sup>179</sup> According to the Elders’ proposal, the permanent members will undertake not to use, or threaten to use, their veto in these situations without explaining clearly and publicly a “credible and efficient” alternative course of action to protect the populations. This explanation must refer to international peace and security and not national interest “since any state casting a veto simply to protect its national interests is abusing the privilege of the permanent membership”.

In a speech a year after the launch of the Elders’ statement, Martti Ahtisaari, a member of the Elders, stated that the response to the Elders’ proposals had exceeded their expectations.<sup>180</sup> It remains to be seen how much support their proposals have.

6 *The ACT Group, October 2015*

The Accountability, Coherence and Transparency Group or ACT is a cross-regional group of small and mid-sized countries working together to improve the working methods of the UN. It began with 22 members, including New Zealand, and now has 27 members. It was formed against the “backdrop” of the stalled attempts to reform the composition and membership of the SC and the failure of the S5 after the “joint pressure” exercised by the permanent members.<sup>181</sup> Led by Lichtenstein, the “Code of Conduct regarding SC action against genocide, crimes against humanity, or war crimes” was officially launched on 23 October 2015. The explanatory note to the Code of Conduct clarifies ACT’s proposal. The Code of Conduct is not limited to the permanent members. It is for any member of the SC as well as any state that may, at some point, become a member of the SC.<sup>182</sup> Therefore, the Code of Conduct is not solely focused on the veto but “represents a broader pledge to support timely and decisive SC action” where mass atrocities are being committed. The Code of Conduct contains a “general and positive pledge” to support the SC in preventing or ending mass atrocities. Accompanying this is a more specific pledge for all SC members not to vote against “credible draft resolutions” that are aimed at preventing or ending

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<sup>178</sup> The Elders “Who are the Elders” <[www.theelders.org](http://www.theelders.org)>.

<sup>179</sup> The Elders “Strengthening the United Nations: Statement by the Elders” (7 February 2015) <[www.theelders.org](http://www.theelders.org)>.

<sup>180</sup> Martti Ahtisaari “Keynote Speech” (Youth & Leaders Summit, Sciences Po, 18 January 2016).

<sup>181</sup> Volker Lehmann *Reforming the Working Methods of the UN Security Council: The Next ACT* (Friedrich-Ebert-Stiftung, August 2013) at 2.

<sup>182</sup> *Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes* A/70/621-S/2015/978 (14 December 2015) [the ACT Code of Conduct].



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mass atrocities. The facts on the ground would determine if a mass atrocity situation existed and then the Code of Conduct would be triggered. Finally, after it is triggered, whether the Code of Conduct actually applies is subject to the assessment of the particular situation by the state that has signed up to the Code of Conduct but the UN Secretary-General could bring situations to the attention of the SC and his or her assessment would carry great weight.<sup>183</sup>

As at 10 June 2016, there were 112 supporters of the ACT Code of Conduct.<sup>184</sup> As well as France, which is a strong advocate for SC reform, the UK is another permanent member that has signed the Code of Conduct. UK Ambassador to the UN, Matthew Rycroft, explained that the UK has not used its veto since 1989 and added, “I am proud to say today that we will never vote against credible Security Council action to stop mass atrocities and crimes against humanity”.<sup>185</sup> Having two permanent members and the majority of UN member states backing the Code of Conduct is a significant achievement. It is an important step towards much-needed reform. The more states that support reform, the more political pressure that will be placed on the other three permanent members to agree to reform.

*B Comparative Analysis of the Initiatives*

This section looks at the similarities and differences between the six initiatives, which provides the foundation for the next section, which critically evaluates the initiatives.

*1 Similarities Between the Initiatives*

(a) Who the initiatives are aimed at

All of the initiatives apart from the ACT proposal are aimed at the permanent members. They attempt to get the permanent members to pledge themselves to limiting their veto use. The ACT proposal, on the other hand, is directed more broadly to any member of the SC, as well as any potential member of the SC. That means it is essentially directed towards all member states of the UN because all have the potential to gain SC membership. In this way, the ACT proposal could be characterised as a “bottom up” approach as it is an attempt to influence the behaviour of the permanent members through support by all member states whereas the other approaches could be characterised as “top down” in that they are an attempt to change the behaviour of the permanent members through their own initiative, that is, through self-regulation.<sup>186</sup>

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<sup>183</sup> The ACT Code of Conduct.

<sup>184</sup> Permanent Mission of the Principality of Liechtenstein to the United Nations New York *List of Supporters of the Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes, as elaborated by ACT* (10 June 2016).

<sup>185</sup> Matthew Rycroft, Ambassador of the UK Mission to the UN “I’m proud to say that the United Kingdom is signing up to the ACT Code of Conduct” (United Nations, 1 October 2015).

<sup>186</sup> Office for Foreign Affairs of Liechtenstein and The Elders *Meeting on the Reform of the United Nations* (5-6 September 2015) at 2.

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(b) Mass Atrocities

All six of the initiatives deal with mass atrocity crimes in some shape. Furthermore, the High Panel includes “large-scale human rights abuses”.<sup>187</sup> This will be further explored below.

2 *Differences Between the Initiatives*

The procedural triggers vary across the six initiatives. The Genocide Prevention Task Force initiative places a burden on the US Ambassador to the UN to initiate dialogue amongst the permanent members regarding veto reform. Furthermore, the veto should only be used if at least three of the permanent members supported it. This means that the veto would operate by a simple majority. This is a unique proposal amongst the six initiatives. It would prevent one or two permanent members from consistently exercising their vetoes when there is not a broad agreement across the permanent members that it is an appropriate use of the veto.

The Genocide Prevention Task Force initiative also has a role for the GA. If two-thirds of the GA find that there is an imminent threat of mass atrocities, this would add more weight against the permanent members exercising their veto power. Similarly, the France/Mexico initiative sees a role for the broader membership of the UN, by proposing that at the request of at least 50 member states, the UN Secretary-General would be called upon to determine the nature of the crime. The code of conduct would apply once the UN Secretary-General delivered an opinion confirming a mass atrocity situation. The ACT group also sees the UN Secretary-General as playing an important role. He or she would bring situations to the attention of the SC and his or her view on the situation would carry a lot of weight.

The S5 and the Elders both have a role for the permanent members to explain their vetoes but they are approached differently. With the S5 proposal, the permanent members would have to publicly explain why they have used the veto and how this fits in with the purposes and principles of the UN Charter, as well as applicable international law. The Elders go one step further and place an “onus” on the permanent member to explain publicly an alternative course of action if the veto power is used.<sup>188</sup> The explanation has to refer to international peace and security and cannot use the excuse of national interest to justify the veto. This directly contrasts with the France/Mexico initiative where permanent members can still use their veto if their “vital interests” are at stake.

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<sup>187</sup> United Nations Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, above n 158, at [256].

<sup>188</sup> Ahtisaari, above n 180.

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C Critique of the Initiatives

1 *Who the initiative is aimed at*

As explained above, the initiatives are all aimed at the permanent members but the ACT proposal extends this to all member states because all member states theoretically have the opportunity to be on the SC. This is sensible because even if all the permanent members agree, they might not form the necessary majority on the SC to allow a resolution to pass. The ACT proposal has the most support and this may be, at least in part, because it is aimed so broadly. Member states may be more open to signing up to it because it may directly affect them in the future. Nevertheless, it seems unnecessary to aim the code of conduct at all member states because historically, the key problem is with the permanent members and their use of the veto.

The American-based Genocide Prevention Task Force adds a condition that “unless three permanent members were to agree to veto a given resolution, all five would abstain or support it”. This has the potential to further strengthen ‘splinter groups’ or cliques within the SC. For example, hypothetically if the ‘Western’ countries of France, the UK, and the US usually vote the same way and China and Russia usually vote the other way, the Task Force proposal will create even larger gaps between the two groups. It will likely build dissension because China and Russia will hypothetically not be able to use their vetoes unless they can persuade one of the other permanent members to join their ‘team’. This exacerbates power politics and the permanent members are unlikely to unanimously agree that this is a useful provision to have in a code of conduct.

2 *Mass Atrocities*

In terms of what crimes the initiatives are concerned with, all focus on mass atrocities in some form. The High Level Panel appears to be the exception in how it has phrased when the veto would be prevented from being used. As well as genocide, it includes “large-scale human rights abuses”. The High Level Panel does not further define this term. It is vague and thus is not a useful term to include in a code of conduct.

Across the other initiatives, similar language is used to describe the crimes that they deal with. Each initiative specifically names genocide and refers to war crimes, crimes against humanity, or mass atrocities as a whole. As discussed above, R2P situations include where there are crimes of genocide, war crimes, crimes against humanity, or ethnic cleansing. The France/Mexico initiative explicitly recalls the World Summit Outcome 2005 and reiterates the commitment to take “collective action, in a timely and decisive matter, through the SC, in accordance with the Charter” when national authorities fail to protect their populations from genocide, crimes against humanity, or war crimes.<sup>189</sup> Similarly, the ACT proposal makes

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<sup>189</sup> France/Mexico, above n 174.

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explicit reference to the Office on Genocide Prevention and the Responsibility to Protect.<sup>190</sup> The others do not expressly refer to R2P. A code of conduct on the responsibility not to veto should make explicit reference to R2P. All member states, including the permanent members, already agreed at the 2005 World Summit that there is a responsibility to protect. This has been confirmed in both GA and SC meetings. By linking R2P more strongly with veto reform, it demonstrates actual support for what UN member states, inter alia, signed up for at the World Summit in 2005, which is that there is a responsibility to protect not just for a state within its own borders but also for the international community if a state is failing to protect its populations.

3 *Determining whether mass atrocities are occurring*

Even if there is an agreement in principle to refrain from using the veto in situations of mass atrocity, conclusively identifying whether such atrocities are occurring is another matter. The France/Mexico initiative and the ACT proposal each have a role for the UN Secretary-General. The France/Mexico initiative states that the code of conduct is triggered if the Secretary-General says there are mass atrocities. The France/Mexico initiative has been criticised for placing too much pressure on the Secretary-General to be the “ultimate arbiter” of whether or not the code of conduct applies.<sup>191</sup> This criticism ignores the fact that the Secretary-General does not operate in isolation. The Special Advisers on Genocide and Responsibility to Protect also have an important role. They collect information on situations where there may be a risk of genocide, war crimes, crimes against humanity, and ethnic cleansing.<sup>192</sup> A vital part of their role is to act as an early warning mechanism by alerting the Secretary-General who, in turn alerts the SC.<sup>193</sup> Therefore, the Secretary-General provides a well-resourced and well-informed voice and is well-placed to determine whether mass atrocities are occurring or whether there is an imminent threat of them occurring.

The ACT proposal states that the Secretary-General can bring situations to the attention of the SC and his or her view on the situation carries great weight. This reflects art 99 of the Charter, which states that the Secretary-General may bring to the attention of the SC “any matter which in his opinion may threaten the maintenance of international peace and security”. However, unlike the France/Mexico initiative, the Secretary-General does not have decisive say over whether the code is triggered. This leaves a gap for disagreement amongst SC members and allows the veto to still be exercised. This could make the ACT code of conduct more attractive to the permanent members but its flexibility may make it less effective than the France/Mexico

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<sup>190</sup> The ACT Code of Conduct, above n 182.

<sup>191</sup> Security Council Report *The Veto* (19 October 2015) at 6.

<sup>192</sup> Outreach Programme on the Rwanda Genocide and the United Nations “Background Information on Preventing Genocide” <[www.un.org](http://www.un.org)>.

<sup>193</sup> Framework of Analysis, above n 67, at 4.

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provision, which takes away any room for disagreement because SC members must follow the Secretary-General’s finding on whether mass atrocities are occurring.

On the topic of determining whether mass atrocities are occurring, the ACT proposal also highlights that the “facts on the ground” would be the trigger for the code of conduct. What sort of facts are they? Whose facts are they? Do they accurately reflect what is happening? Facts on the ground are central to determining whether mass atrocities are occurring or likely to occur but a significant issue arises if there is disagreement over exactly what the facts on the ground suggest. History demonstrates that disagreement over the ‘facts on the ground’ can be detrimental to the lives of those who are suffering especially when national interests are also at stake, as seen in Rwanda in 1994.

4 *Interests at stake*

The France/Mexico code of conduct is not applicable where the “vital interests” of permanent members are at stake. The rationale for this is that it is necessary in order to make the initiative “realistically applicable”.<sup>194</sup> This is essentially a way of ensuring that the proposal still leaves the permanent members a reasonable amount of discretionary power so that they are more likely to adopt the code of conduct. However, putting in the clause about “vital interests” largely defeats the purpose of having a code of conduct. Generally, when the permanent members veto resolutions, it is because passing the resolution would not be in line with their interests. Even if a permanent member paints its use of the veto in a different light, the realist school of thought considers that states are inherently self-interested and will make decisions that best suit their interests. For example, when Russia and China vetoed a third resolution on action in Syria, the United Kingdom Ambassador said, “They have chosen to put their national interests ahead of the lives of millions of Syrians”.<sup>195</sup>

Furthermore, it is unclear what would make an interest “vital” for the purposes of the France/Mexico initiative. Does it mean the permanent member needs to be directly involved? Does it incorporate being linked to one side of the conflict? If “vital interests” are limited to being directly involved, this could contradict art 27 of the UN Charter. This says that in decisions under Chapter VI of the Charter, which deals with the pacific settlement of disputes, a party to a dispute shall abstain from voting. This provision in the Charter would certainly prevail over any codes of conduct.

The High Level Panel similarly refers to “vital interests”. It urges that the veto should be limited to matters where vital interests are genuinely at stake. The next sentence urges the permanent members to refrain from using the veto in cases of genocide and human rights abuses. What if a permanent member’s vital interests are at stake in a

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<sup>194</sup> Fabius, above n 173.

<sup>195</sup> SC Meeting S/PV.6810 (19 July 2012).

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situation involving genocide? It is unclear what takes precedence and this weakens the effectiveness of this proposal.

The Elders’ proposal takes a different approach. Permanent members cannot use national interest as a convenient excuse to prevent the passage of a resolution. Instead, the responsibility to maintain international peace and security, the key task of the SC, takes priority. This fits more with the mandate of the SC and avoids the uncertainty and potential for abuse that reference to the “vital interests” in the France/Mexico initiative and the High Level Panel proposal could allow.

5 *Determinacy*

In addition to the questionable elements already discussed, there are further ambiguities inherent in the language used in the initiatives. In the ACT code of conduct, permanent members pledge not to vote against “credible” draft SC resolutions. What does credible mean? What is convincing to one state may not be deemed convincing to another state. For example, regarding the third resolution on Syria, which was vetoed by China and Russia, France said that the logic of the resolution was “simple and clear”.<sup>196</sup> What was credible to France was clearly less credible for China and Russia.

The Elders’ proposal also uses the word “credible”. States that use their veto have to explain an alternative course of action “as a credible and efficient way to protect the populations in question”. The idea of efficiency is more objectively measurable than the idea of credibility but there is the same problem as above. What is credible and efficient to one state may not be credible and efficient to another. It is largely subjective. This lack of certainty is unhelpful to a code of conduct as it allows too much room for the veto to continue to be used in mass atrocity situations.

D *A Proposed Code of Conduct*

Based on the above evaluation of the strengths and weaknesses of each of the initiatives, this section proposes a new code of conduct.

**Responsible Use of the Veto: a Security Council Code of Conduct**

We, the permanent members of the Security Council, pledge:

1. *To abide by our commitment to “Responsibility to Protect” as outlined in paragraphs 138 and 139 of the World Summit Outcome 2005. Each State carries the primary responsibility to protect its populations from genocide, war crimes, crimes against humanity, ethnic cleansing, and their incitement (collectively, mass atrocities). The international community has a responsibility to encourage and assist States in fulfilling this responsibility*

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<sup>196</sup> SC Meeting S/PV.6810 (19 July 2012).

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*and to use appropriate diplomatic, humanitarian, and other peaceful means to protect populations. We are prepared to take collective action on behalf of the international community to protect populations, in a timely and decisive manner and in accordance with the Charter, if a State is manifestly failing to protect its populations.*

2. *To allow the Secretary-General, after careful consideration and consultation, to determine whether mass atrocities are occurring or whether there is an imminent threat of them occurring. If the Secretary-General determines that mass atrocities are occurring or there is an imminent threat of them occurring, we agree not to use our veto power to prevent the passage of a Security Council resolution aimed at ending or preventing these mass atrocities.*
3. *To explain why we have used our veto power in all non-procedural situations. This explanation must refer to international peace and security and not merely to our own national interests.*

This proposal explains the responsibilities that the permanent members have. It is straightforward and unambiguous. The first limb reaffirms commitment to R2P. The second and third limbs do not completely strip the permanent members of veto power but instead create reasonable boundaries, which are that the veto cannot be used in mass atrocity situations and the veto must be sufficiently explained when used. Whilst no code of conduct is perfect, the proposed code is an improvement on the initiatives analysed above. The simplicity and clear, limited parameters of the proposed code may be deemed more attractive for permanent members than the other initiatives.

Regardless of which code of conduct is the most agreeable, there is a need for action. There is support for reform of the veto ranging from the Secretary-General to many member states. In his latest annual report on R2P, the Secretary-General emphasised that the permanent members “have a particular responsibility to demonstrate leadership” and he recommended adopting a code of conduct. As mentioned above, there are at least 112 supporters of the ACT Code of Conduct.<sup>197</sup> This shows that an overwhelming majority of states want change.

## VI Conclusion

The SC is the most powerful organ of the UN yet is plagued by structural problems. Of particular importance is the veto power that the permanent members possess. History shows that the veto has been used to block timely action in mass atrocity situations. Syria is a very well-known example of this.

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<sup>197</sup> Permanent Mission of the Principality of Liechtenstein to the United Nations New York, above n 184.

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The paper began by looking at the origins and evolution of the SC before showing that the inherent flaws of the veto and actual use of the veto negatively affect the legitimacy of the SC. In an address to the GA, the President of Lithuania, Dalia Grybauskaitė, commented that the ideals and principles of the UN are being threatened around the world. The world needs a strong and reformed UN or the UN "will cease to exist if people stop believing in it".<sup>198</sup>

Part III of the paper explained R2P and presented Syria and Myanmar as examples where, according to R2P, the international community should have taken action because the states were not protecting their populations from mass atrocities. Instead, the veto was used, preventing the necessary action that the SC needed to take, both to satisfy the R2P doctrine and to fulfil its central role of maintaining international peace and security.

In light of these failures, Part IV of the paper looked at ways that the veto can be reformed. It argued that amendment was unlikely. Creative interpretation of the Charter and utilising the Uniting for Peace procedure are not effective solutions to the issues presented by the veto. Instead, the most effective approach to veto reform is establishing a code of conduct outlining a responsibility not to veto.

Part V evaluated different codes of conduct then amalgamated the best parts of each to form a new code of conduct that is simple and may be more agreeable to the permanent members than the pre-existing ones discussed. Most of the permanent members are unlikely to be enthusiastic about any initiative that limits their powers but if there was enough political pressure and the proposed initiative was not overly restrictive, there is the possibility that the permanent members will agree to veto restraint. There are advantages to the permanent members in adopting a code of conduct. As well as demonstrating commitment to R2P, adopting a code of conduct restricting the veto will demonstrate commitment to the SC's mandate of maintaining international peace and security above the permanent members' own interests. This will likely strengthen the sociological and normative legitimacy of the veto-wielding permanent members and the SC as a whole. By pledging to refrain from vetoing in R2P situations, SC inaction such as that regarding Syria, would likely be avoided. Moreover, adopting a code of conduct would be a significant step towards satisfying those who are pushing for reform whilst preventing further large-scale loss of life due to inaction.

It is imperative that there is reform of the veto power or the SC risks losing legitimacy. As the Australian Ambassador and Permanent Representative to the UN commented, there is strong support for the codes of conduct that have circulated the

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<sup>198</sup> *United Nations Still Essential but Needs Reform to Be 'Fit for Purpose' in Coming Decades, Speakers Say as General Assembly Debate Continues* GA Meeting, LXX, GA/11694 (29 September 2015).



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GA and the onus is now on the SC to respond.<sup>199</sup> The permanent members need to take seriously their responsibility to maintain international peace and security and the most realistic and viable option is to adopt a code of conduct that restrains them from using the veto in situations of genocide, crimes against humanity, war crimes, and ethnic cleansing.

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<sup>199</sup> GA/11715, above n 93.

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