Preventing Genocide: Promoting the implementation of the Third Pillar of R2P by restraining the Veto power of P5

by

Jughraj Singh Baidwain

Faculty of Graduate Studies and Research
Faculty of Law
McGill University, Montreal

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ABSTRACT

The recent cases of Myanmar, Syria and Ukraine suggest that the international community has been failing to implement the third pillar of the 'Responsibility to Protect' (R2P) principle in mass atrocity situations. An analysis of these cases demonstrates that the veto power of the permanent members (P5) of the UN Security Council is a significant impediment to its implementation. Since genocide stands out as the gravest crime in human history, the repercussions of the lack of implementation of the R2P's third pillar due to P5 vetoes are particularly severe in genocide situations. Acknowledging the near impossibility of restraining the veto power of P5 members by an amendment of the UN Charter, this master's thesis focuses on three alternative avenues for restraining the veto power of P5 members in situations of genocide falling under the third pillar of R2P and thereby facilitating the implementation of the duty to prevent genocide. Firstly, drawing from the ICJ's elucidation of the duty to prevent genocide in the Bosnian Genocide Case, this thesis argues that the due diligence standards entailed by the duty to prevent genocide oblige P5 members not to veto R2P third pillar resolutions aimed at preventing or halting a genocide. Secondly, this thesis argues that the duty to prevent genocide can be characterized as a jus cogens norm according to the ILC's criteria for identification of jus cogens norm. As a result, P5 members cannot invoke Article 103 (supremacy clause) of the UN Charter to exercise their Article 27 veto power and defeat their duty not to veto R2P third pillar resolutions aimed at preventing or halting genocide. Finally, against the backdrop of arguments made in the first two chapters and drawing from some noteworthy past proposals for veto reform, this master's thesis delineates a workable and feasible proposal for restraining the veto power of P5 members in R2P third pillar situations of impending or ongoing genocide.

RÉSUMÉ

Les cas récents du Myanmar, de la Syrie et de l'Ukraine suggèrent que la communauté internationale n'a pas réussi à mettre en œuvre le troisième pilier du principe de la « responsabilité de protéger » (R2P) dans des situations d'atrocités massives. L'analyse de ces cas démontre que le droit de veto des membres permanents (P5) du Conseil de sécurité de l'ONU constitue un obstacle majeur à sa mise en œuvre. Le génocide étant le crime le plus grave de l'histoire de l'humanité, les répercussions de l'absence de mise en œuvre du troisième pilier de la R2P en raison des vetos du P5 sont particulièrement graves dans des situations de génocide. Reconnaissant la quasi-impossibilité de restreindre le pouvoir de veto du P5 par un amendement à la Charte des Nations Unies, cette thèse se concentre sur trois voies alternatives pour restreindre le pouvoir de veto du P5 dans les situations de génocide relevant du troisième pilier de la R2P et ainsi prévenir le génocide. S'appuyant sur l'élucidation par la CIJ du devoir de prévenir le génocide dans l'affaire du génocide en Bosnie, cette thèse soutient que les normes de diligence raisonnable qu'implique le devoir de prévenir le génocide obligent le P5 à ne pas opposer son veto aux troisièmes résolutions R2P visant à prévenir ou à mettre fin à un génocide. Par la suite, cette thèse soutient que le devoir de prévenir le génocide peut être qualifié de norme de jus cogens en appliquant les critères de l'ILC pour l'identification d'une norme de jus cogens. En conséquence, les membres du P5 ne peuvent pas invoquer l'article 103 (clause de suprématie) de la Charte des Nations Unies pour exercer leur pouvoir de veto en vertu de l'article 27 et contourner leur devoir de ne pas opposer leur veto aux résolutions du troisième pilier de la R2P visant à prévenir ou à arrêter le génocide. Enfin, dans le contexte des arguments avancés dans les deux premiers chapitres et en s'appuyant sur les importantes propositions passées de limitation du veto, cette thesis présente une proposition réalisable pour restreindre le pouvoir de veto du P5 dans les situations du troisième pilier R2P de génocide imminent ou en cour.

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INTRODUCTION

The 'Responsibility to Protect principle' (R2P), though a significant development with regard to the prevention of mass atrocities[1], has been a subject of extensive debate, with its third pillar being the most controversial and least implemented. The lack of implementation of the third pillar of R2P can be attributed, among others, to the repeated vetoing, by one or more of the permanent members (P5) of the UN Security Council, of the UN Security Council resolutions aimed at preventing or halting mass atrocities falling within the scope of the third pillar of R2P[2]. Given that genocide is the 'crime of all crime' and stands out as the most egregious among all mass atrocities, the failure to implement the third pillar of R2P and the resulting inaction by the international community[3] have the most detrimental impact in cases of potential or ongoing genocide. This master's thesis explores avenues to promote the implementation of the third pillar of R2P in situations of genocide by constraining the veto power of P5 members and thereby enabling the international community to fulfill its duty to prevent genocide.

a) A Prelude to The Formation and Definition of 'Responsibility to Protect'

Global history has been occasioned by cycles of violence driven by various factors such as geographical location, gender, race, ethnicity, and religion. Genocide, being the worst form of violence, has resulted in loss of life and severe detrimental social, economic, and environmental

[1] In this thesis, the phrase 'mass atrocities' refers mainly to the four categories of mass atrocities addressed by the 'Responsibility to Protect' principle, namely, "genocide, war crimes, ethnic cleansing, and crimes against humanity."

[2] Throughout this thesis, the article "the" has intentionally been omitted before abbreviations for stylistic consistency and to enhance readability. This choice is deliberate and not an oversight.

[3] The phrase "international community", though extensively used in the UN Documents, scholarly literature as well as by international judicial bodies, lacks a concrete definition under international law. Resultantly, it can mean different things in different contexts, such as, it may be used to refer to the 'Western powers' or to all the UN member states or it may also include other international players such as prominent NGOs etc. For the purpose of this thesis the phrase 'international community' has been used to refer to the UN member states including P5. For a comprehensive discussion of the concept of 'international community', see Michel Feher, *Powerless by Design: The Age of International Community* (Durham: Duke University Press, 2000).

impacts.[4] Commenting on the egregiousness of genocide, Lemkin said, "Genocide is not war! It is more dangerous than war".[5] Of all the mass atrocity crimes, genocide is considered to be the most horrendous and is, therefore, aptly referred to as the "crime of crimes"[6].

Thanks to the tireless lobbying of Raphael Lemkin, the Convention on the Prevention and Punishment of the Crime of Genocide[7] became the first international human rights treaty to be adopted by the UN General Assembly in December 1948. Article I of the Genocide Convention imposes on state parties to the Convention the obligation to prevent genocide and punish perpetrators of genocide. With its adoption, the international community was said to have taken the 'never again' vow; that is, it would never allow the commission of genocide in future.[8] Furthermore, the duty to prevent genocide has been widely acknowledged as a norm of customary international law.[9] Consequently, states not signatories to the Genocide Convention are also bound by the duty to prevent genocide under customary international law.

However, the decades following the adoption of the Genocide Convention witnessed millions falling victim to genocides and other mass atrocities committed in various countries of

[4] See Vadi Moodley, Alphonse Gahima & Suveshee Munien, "Environmental Causes and Impacts of the Genocide in Rwanda: Case Studies of the Towns of Butare and Cyangugu" (2010) 10:2 AJCR 103. See also Russell Schimmer, Roland A. Geerken & Ben Kiernan, "Tracking the Genocide in Darfur: Population Displacement as Recorded by Remote Sensing" (January 2008), online (pdf): < https://www.researchgate.net/publication/242170790_Tracking_the_Genocide_in_Darfur_Population_Displacement_as_Recorded_by_Remote_Sensing>.

[5] See Samantha Power, *A Problem from Hell: America and The Age of Genocide* (New York: Perennial, 2003) at 51, citing Raphael Lemkin, "The Importance of the Convention," Lemkin Thesiss, New York Public Library at 2.

[6] See *The Prosecutor v Jean Kambanda,* ICTR 97-23-S, Judgment and Sentence (9 September 1998) at para 16 (International Criminal Tribunal for Rwanda) online: https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-97-23/trial-judgements/en/980904.pdf [*The Jean Kambanda Case*]. See also Payam Akhavan, "The Crime of Genocide in the ICTR Jurisprudence" (2005) 3:4 J Int'l Crim Just 989 at 997 [Akhavan, "Genocide in the ICTR Jurisprudence"].

[7] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) [*Genocide Convention*].

[8] See Payam Akhavan & Rene Provost, "Moving from Repression to Prevention of Genocide" in Rene Provost & Payam Akhavan, eds, *Confronting Genocide* (Springer, 2011) 1 at 2.

[9] See Louise Arbour "The responsibility to protect as a duty of care in international law and practice" (2008) 34:3 Rev. Int. Stud. 445 at 450.

the world, such as Bangladesh, Ethiopia, Cambodia, and Uganda.[10] These events highlighted the abysmal failure of the international community to act on its obligation to prevent genocide under the Genocide Convention. Dismayed by these repeated episodes of mass atrocities and with the appalling scenes from the Nazi Extermination Camps still fresh in mind, many came to view the vow of 'never again' as an empty and unfulfilled promise.[11]

Of all the genocides known to have been committed after the adoption of the Genocide Convention, the Rwandan and the Bosnian genocides are widely considered to be the most appalling and shameful ones.[12] This is especially because these genocides occurred while the UN peacekeeping forces were on the ground, with the UN failing to provide them with the necessary reinforcements in a timely manner.[13] Additionally, there was an abundance of early warning signs of potential genocides in both these cases, which the major international actors opted to disregard, allowing the dire situations to worsen and eventually culminate in full-blown genocides.[14]

The blatant failure of the international community to prevent killings of the Tutsi minority by Hutus in Rwanda and of the Bosniak civilians by Serb forces in the Republic of Bosnia and

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[10] See Payam Akhavan, "Preventing Genocide, Measuring Success by What Does Not Happen" (2011) 22:1 Crim. L.F. 1 at 2 [Akhavan, "Preventing Genocide"].

[11] See generally Samantha Power, "Never Again: The World's Most Unfulfilled Promise" (18 January 2001) ("[g]enocide has occurred so often and so uncontested in the last fifty years that an epithet more apt in describing recent events than the oft-chanted "Never Again" is in fact "Again and Again"."), online: http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/genocide/neveragain.html. See also Krzysztof Kotarski & Samuel Walker, Privatizing Humanitarian Intervention? Mercenaries, PMCs and the Business of Peace" in Provost & Akhavan, *supra* note 8 at 239.

[12] See Wiebe Arts, "Preventing Genocide Through Military Intervention: Peacekeeping Troops in the "Responsibility to Protect Era" in Provost & Akhavan, *supra* note 8 at 117-118. See also James Crossland, "Europe's Rwanda: The Shame of the Srebrenica Massacre" (7 July 2020), online: https://www.ljmu.ac.uk/about-us/news/blog/2020/7/7/europes-rwanda-the-shame-of-the-srebrenica-massacre/.

[13] See Arts, *supra* note 12 at 117.

[14] See Gregory Stanton, "The Rwandan Genocide: Why Early Warning Failed" (2009) 1:2 JACAPS 6 ("In Rwanda, the U.N. DPKO and the U.S., as well as other governments, refused to discern the signs of genocide" at 20). See also Stephen Engelberg, Tim Weiner & Raymond Bonner "Massacres in Bosnia; Srebrenica: The Days of Slaughter" (29 October 1995) ("Before the Serbian conquest of Srebrenica, some calls for help were ignored, some rejected"), online: https://www.nytimes.com/1995/10/29/world/massacre-in-bosnia-srebrenica-the-days-of-slaughter.html. Power, *supra* note 5 (commenting on the Rwandan Genocide, Power notes that "the case for a label of genocide was the most straightforward since the Holocaust") at 362.

Herzegovina sparked significant outcry and outrage worldwide, subjecting UN and its broader membership to severe criticism.[15] Acknowledging the failure of the UN to prevent genocide in Rwanda, Kofi Annan, the then Secretary General of the UN, remarked, "[t]he genocide in Rwanda should never, ever have happened. But it did. The international community failed Rwanda, and that must leave us always with a sense of bitter regret and abiding sorrow".[16] Similarly, in his 1999 report on the Bosnian Genocide, while expressing his regret on the UN's failure to prevent the Bosnian genocide, Annan noted, "[t]hrough error, misjudgement and an inability to recognize the scope of the evil confronting us, we failed to do our part to help save the people of Srebrenica from the Serb campaign of mass murder."[17]

The horrors of the Rwandan and the Bosnian genocides and the international censure of UN for its failure to prevent them directed the attention of UN and its broader membership towards the obligation to prevent and punish genocide under the Genocide Convention and customary international law, leading to various vital developments such as the establishment of special criminal tribunals for Rwanda and Bosnia and the International Criminal Tribunal in 2002. Akhavan notes that these were remarkable steps taken to eradicate the hitherto entrenched culture of impunity for genocide perpetrators[18].

One of the most notable developments in response to the Bosnian and Rwandan genocides, in line with the obligation of states to prevent genocide, is the establishment of the 'Responsibility

[15] See e.g. Diana Johnstone, *Fools' Crusade: Yugoslavia, NATO, and Western Delusions* (London: Pluto Press, 2002).
[16] See United Nations Press Release (26 March 2004), online: https://press.un.org/en/2004/sgsm9223.doc.htm. For a detailed analysis of the UN's failure to prevent the Rwandan Genocide, see Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, 1999, UN Doc S/1999/1257 ("[t]he United Nations failed the people of Rwanda during the genocide in 1994" at 51), online(pdf): https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20S19991257.pdf.
[17] See Report of the Secretary-General pursuant to General Assembly resolution 53/35: The fall of Srebrenica, 44th Sess, UN Doc A/54/549 (1999) at para 503.
[18] Akhavan, "Preventing Genocide", *supra* note 10 at 2.

to Protect' principle.[19] Therefore, while the 'Responsibility to Protect (R2P)' principle addresses four major crimes of mass atrocities, namely, "genocide, war crimes, ethnic cleansing and crimes against humanity", it originated mainly in response to the manifest failure of the international community to prevent and halt the Rwandan and the Bosnian genocides during the last decade of the 20th century.[20] This principle was formulated by "the International Commission on Intervention and State Sovereignty" (ICISS) and was officially adopted during the 2005 UN World Summit, an unprecedented gathering of the largest number of "Heads of States and Governments in history".[21] R2P "is an international norm that seeks to ensure that the international community never again fails to halt the mass atrocity crimes of genocide, war crimes, ethnic cleansing and crimes against humanity."[22] According to the ICISS itself, prevention is the central component of R2P.[23]

Marking a stark departure from the traditional understanding of sovereignty based on the Westphalian principle (the right of states to govern themselves without any external interference), R2P reconceptualizes sovereignty as including a responsibility of individual states to protect their people against mass atrocities (Pillar I).[24] The primary duty of states, therefore, is to protect their people from mass atrocities. The international community is to support states in discharging that responsibility (Pillar II). In case a state is unwilling or unable to protect its people from mass atrocities, R2P allows the international community to intervene in such a state to protect vulnerable

[19] Numerous terms have been employed in scholarly writings to describe the 'Responsibility to Protect'. "Doctrine", "principle", "concept" and "mechanism" of the 'Responsibility to Protect' are some of the commonly used terms. For better consistency, this thesis will use the phrases 'Responsibility to Protect' principle or 'R2P' principle.

[20] See Arts, *supra* note 12 at 117-18.

[21] See Global Centre for the Responsibility to Protect, "What is R2P?", online (blog): https://www.globalr2p.org/what-is-r2p/.

[22] *Ibid*.

[23] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, (Ottawa: International Development Research Centre, 2001) at 8. [*ICISS Report*].

[24] The notion of sovereignty as the responsibility of states to protect their population has been inspired by Francis Deng's redefinition of sovereignty (See Francis M. Deng et al, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC: Brookings Institution Press, 1996).

populations (Pillar III).[25] While acting under the third pillar, the international community can resort to military intervention only as a resort and must observe the principles of "right intention, proportional means and reasonable prospects" during such intervention[26]. In this way, R2P attempts to harmonize the seemingly contradictory principles of non-intervention and humanitarian intervention.[27]

b) Discourse Surrounding R2P And Its Third Pillar

While some viewed the establishment of R2P as a watershed event in the prevention of genocide[28], others approached it with skepticism, fearing that it might disrupt the long-existing normative order based on the Westphalian principles of sovereignty.[29] Various aspects of R2P such as its legal status, potential impact, scope, and challenges surrounding its operationalization continue to be the subject of debates among international legal scholars. Some scholars have expressed concerns that R2P might serve as a justification for Western powers to legitimize military intervention in other nations by framing it as a response to mass atrocities.[30] Others complain that R2P is a vague principle and that its vagueness leads to challenges in its operationalization and results in a wide range of interpretations by different scholars and states.[31]

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[25] See 2005 World Summit Outcome Document, UNGA, 60th Sess, 2005, UN Doc A/RES/60/1 at paras 138-89 [*World Summit Outcome Document*]. See also *ICISS Report, supra note 23.*

[26] See *ICISS Report, supra note 23* at 6, 7, 35-37.

[27] See Gelijn Molier "Humanitarian Intervention and The Responsibility to Protect After 9/11" (2006) 53:1 Netherlands International Law Review 37 at 47.

[28] See e.g. Lee Feinstein, *Darfur and Beyond: What is Needed to Prevent Mass Atrocities* (New York: Council of Foreign Affairs, 2007) at 10.

[29] See generally Noele Crossley, "Is R2P Still Controversial? Continuity and Change in the Debate on 'Humanitarian Intervention'" (2018) 31:5 Camb. Rev. Int. Aff. 415.

[30] See e.g. Mahmood Mamdani, "Responsibility to Protect or Right to Punish?" (2010) 4:1 J. Interv. Statebuilding 53, online (pdf): https://www.tandfonline.com/doi/pdf/10.1080/17502970903541721. See also Alex J. Bellamy, "The Responsibility to Protect and the Problem of Military Intervention" (2008) 84:4 RIIA 615 ("it is not hard to see why many governments continue to suspect that R2P is simply a 'Trojan horse' for the legitimization of unilateral intervention" at 617), online: http://www.jstor.org/stable/25144868. Thomas G. Weiss, *Humanitarian intervention: Ideas in Action* (Malden, MA: Polity, 2012) at 106.

[31] José E. Alvarez, "The Schizophrenias of R2P" in Philip Alston & Euan MacDonald, eds, *Human Rights, Intervention and the Use of Force* (Oxford: Oxford University Press, 2008) 275 at 277. See also Karen Smith, "R2P and the Protection of Civilians: South Africa's Perspective on Conflict Resolution" (March 2015), online:

Some have even gone to the extent of arguing that R2P, rather than preventing mass atrocities and protecting populations vulnerable to such atrocities, may, in fact, create conditions conducive to mass atrocities and thereby, cause "some genocidal violence that otherwise would not occur".[32] Still others argue that unless some form of veto restraint in mass atrocity situations is achieved, R2P will lack implementation and will, therefore, fail to achieve its objectives.[33] Additionally, some have pointed to 'logistic obstacles' in the enforcement of R2P for want of a permanent stand-by force that would not have to depend on 'merciful contributions' of troops by UN members and that could be deployed in a timely manner to prevent mass atrocities, lack of resources such as field hospitals, armoured vehicles etc. and "insufficient numbers of well-trained personnel to use them".[34] Concerns have also been expressed that R2P, without providing any added value, may divert resources from important UN programs.[35]

From among the three pillars of R2P, the first two pillars, in comparison with the third pillar, are less contentious and generally accepted by states.[36] The implementation of the first two pillars of R2P does not necessarily require authorization by the UN Security Council and, therefore, their implementation cannot be thwarted by veto exercise by one or more of the P5 members. The third pillar, on the other hand, has sparked considerable debate among both states and international

<https://www.jstor.org/stable/pdf/resrep25927.pdf>. Andrew Garwood-Gowers, "R2P Ten Years After the World Summit: Explaining Ongoing Contestation over Pillar III" (2015) 3:4 Glob. Responsib. Prot. 300, online: <https://doi.org/10.1163/1875984X-00704005>.

[32] See Alan J. Kuperman, "Rethinking the Responsibility to Protect" (2009) 10:1 Whitehead J Diplomacy & Intl Relations 33 at 36.

[33] See e.g. Brian D. Lepard, "Challenges in Implementing the Responsibility to Protect: The Security Council Veto and the Need for a Common Ethical Approach" (2021) 25 J. Ethics 223. Richard Illingworth," Responsible Veto Restraint: A Transitional Cosmopolitan Reform Measure for the Responsibility to Protect" (2020) 12:4 GR2P 385 at 387.

[34] See Arts, *supra* note 12 at 122.

[35] See Alex J. Bellamy "The Responsibility to Protect—Five Years On" (2010) 24:2 Ethics Int Aff 143 at 148.

[36] See Melinda Negrón-Gonzales & Michael Contarino, "Local Norms Matter: Understanding National Responses to the Responsibility to Protect" (2014) 20:2 Glob. Gov. 255 at 258. See also Yasmine Nahlawi, *The Responsibility to Protect in Libya and Syria: Mass Atrocities, Human Protection and International Law* (Abingdon, Oxon; New York, NY: Routledge, 2020) at 6.

legal scholars.[37] It has been subject to varying interpretations by different states and legal scholars, resulting in a lack of consensus on its scope and the form of action to be taken under it by the international community to prevent and halt genocide and other mass atrocities.[38] Furthermore, some states such as Japan and China have sought to localize the third pillar to align it with their local practices and have, thereby, sought to modify the third pillar.[39] Concerns have also been expressed that the third pillar may cause an imbalance of power between the UN Security Council and the UN General Assembly as "the Security Council would receive additional authority to supervise the internal affairs of member states."[40]

However, addressing the various strands of debate surrounding the operational aspects and conceptual underpinnings of R2P and its third pillar is beyond the scope of this thesis. Rather, with particular focus on genocide prevention, this master's thesis delves into one aspect of broader initiatives aimed at promoting the implementation of R2P in genocide situations, that is, limiting the veto power of P5 members in R2P situations of impending or ongoing genocide falling under the third pillar of R2P, and thereby, ensuring swift passage of resolutions aimed at preventing or halting genocide.

c) The Third Pillar's Implementation Gap and The Role of the Veto Power

[37] For an exploration of discussions regarding the third pillar of R2P, see Daniel Fiott & Joachim Koops, eds, *The Responsibility to Protect and the Third Pillar: Legitimacy and Operationalization* (London, UK: Palgrave Macmillan, 2015). See also Garwood-Gowers, *supra* note 31 at 316**.** The reports on 'Regional roundtables and national consultations' in Thomas G. Weiss & Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background (Supplementary Volume)* (Ottawa: International Development Research Centre, 2001) 349-98. Jennifer M. Welsh, "Norm Robustness and the Responsibility to Protect" (2019) 4:1 J. Glob. Secur. Stud. 53 at 57.
[38] *Ibid.* See e.g. Zheng Chen & Hang Yin, "China and Russia in R2P debates at the UN Security Council" (2020) 96:3 Int. Aff. 787 at 789 (discusses China's and Russia's interpretation of R2P).
[39] Gonzales & Contarino, *supra* note 36.
[40] Gregor P. Hofmann, *Ten Years R2P – What Doesn't Kill a Norm Only Makes It Stronger? Contestation, Application and Institutionalization of International Atrocity Prevention and Response* (Peace Research Institute Frankfurt, 2015) at 9.

As elucidated in the preceding section, the third pillar is the most controversial and, therefore, least implemented of the three pillars of R2P. Under the third pillar, an action by the international community to prevent or halt genocide generally requires authorization by the UN Security Council.

The United Nations, and within it, the UN Security Council is primarily responsible for the "maintenance of international peace and security".[41] This responsibility of the UN Security Council is largely undisputed and has been affirmed by ICISS in its report on R2P and also by the UN General Assembly in the 2005 World Summit outcome document.[42] As mentioned above, authorization by the UN Security Council remains at the heart of a legal action that could be taken by the international community under the third pillar of R2P. As Genser aptly points out, "The Security Council's specific role in implementing R2P primarily lies within Pillar III: to facilitate the collective response of the international community when a state fails to meet its Pillar I responsibility of protecting its own population".[43] Therefore, any discussion about improving the implementation of the third pillar of R2P cannot be de-linked from the UN Security Council.[44]

The UN Security Council is one of the six principal organs of the UN. It is the only UN body empowered by the UN Charter to pass binding resolutions, thereby making it the most potent, powerful and important organ of the UN system.[45] The five permanent members ("The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America") of the total fifteen members of the UN Security Council have been entrusted with a unique and unbridled power to unilaterally veto and, thereby defeat

[41] *Charter of the United Nations,* 26 June 1945, Can TS 1945 No 7 [UN Charter].
[42] See *ICISS* Report, *supra* note 23 at 9. *World Summit Outcome Document, supra* note 25 at para 79.
[43] See Jared Genser, "The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement" (2018) 18:2 Chi. J. Int'l L 420 at 431-32.
[44] See *ICISS* Report, *supra* note 23.
[45] *UN Charter, supra* note 41, art 25.

any resolution dealing with a substantive matter[46]. Consequently, in situations of genocide and other mass atrocities falling under the third pillar of R2P and crying for international help, the veto power virtually allows P5 members to play a 'God-like' role by deciding whether or not to save lives by authorizing intervention.[47]

Unfortunately, as exemplified by the past mass atrocity situations that occurred in the aftermath of the adoption of R2P in countries like Syria, Myanmar and, more recently, Ukraine, historical precedents regarding authorization by the UN Security Council for actions under the third pillar are far from encouraging. Resolutions aimed at addressing mass atrocity situations falling under the third pillar of R2P (from now on referred to as the R2P third pillar resolutions) have been frequently defeated by one or more P5 members through the exercise of their veto authority[48].

The challenge posed by the veto power of P5 members in implementing the third pillar of R2P is particularly evident in the case of the ongoing Syrian crisis, which began in 2011 and persists to this day. The persecution of civilians in Syria by the commission of war crimes and crimes against humanity, perpetrated by both the Syrian government and rebel forces, is a "textbook case for application of R2P doctrine".[49] Numerous warnings of looming genocide in Syria have also been issued.[50] Genocide Watch notes that "[b]oth the Syrian state and at least three

[46] *Ibid*, art 25. Further discussions on the 'privileged position' of P5 will be found at in 28-34, *below*.
[47] See Samuel Toten, "The state and future of genocide studies and prevention: An overview and analysis of some key issues" (2011) 6:3 Genocide Studies and Prevention: An Intl J 211 at 219.
[48] See Illingworth, *supra* note 33 at 408.
[49] See Theresa Reinold, "The 'Responsibility Not to Veto' Secondary Rules and the Rules of Law" (2014) 6:3 Glob. Responsib. Prot. 269. See also Global Centre for the Responsibility to Protect, "Nine Years of Atrocities, Impunity and Inaction" (14 March 2020), online: < https://www.globalr2p.org/publications/syria-nine-years-of-atrocities-impunity-and-inaction/>.
[50] Genocide Watch, "Genocide Emergency: Syria" (September 2020), online: <https://www.genocidewatch.com/_files/ugd/137a5c_d99b7abb2bc84b13a88d1580eb8a88ba.pdf>.

other groups are committing genocide, crimes against humanity, and war crimes daily"[51]. However, despite the clear evidence of the commission of mass atrocities and repeated warnings of an imminent genocide, more than sixteen UN Security Council resolutions aimed at addressing the Syrian crisis have been vetoed to date.[52] Most recently, Russia vetoed, in July 2023, a resolution that sought an extension of "a key Syria aid route", thereby putting thousands of civilian lives at grave risk of starvation.[53]

The suffering endured by Rohingyas in Myanmar, constituting another clear example of a situation falling under the third pillar of R2P, are as equally harrowing as that of innocent civilians in Syria. With thousands of Rohingyas having been killed and even more being forced to flee their homes and communities, mass atrocities against Rohingyas that began in 2017 have now extended into the sixth year now[54]. While many states have acknowledged the persecution of Rohingyas by the Myanmar military as genocide[55], not much has been done to relieve the suffering of Rohingya victims.[56] Vetoes have been exercised by China and Russia against resolutions addressing violence against minorities in Myanmar as far back as 2007.[57] Draft resolutions within the UN Security Council, aimed at addressing Myanmar's worsening human rights conditions, faced repeated

[51] Genocide Watch, "Genocide Alerts: The Syrian Arab Republic", online: <http://genocidewatch.net/page/5/?s=syria>.

[52] See United Nations Media Coverage and Press Release, "In Meeting Following Russian Federation's Veto of Cross-Border Aid Text, General Assembly Speakers Highlight Humanitarian Consequences for Millions" (19 July 2023), online: https://press.un.org/en/2023/ga12517.doc.htm.

[53] See Aljazeera, "Russia Vetoes UN Vote to Extend Syria Aid Route" (11 July 2023), online: < https://www.aljazeera.com/news/2023/7/11/russia-vetoes-un-vote-to-extend-key-syria-aid-route>.

[54] See U.S Committee for Refugees and Immigrants, "Never Again and Never Forget the Rohingya Genocide" (25 August 2023), online: < https://refugees.org/never-again-and-never-forget-the-rohingya-genocide/>.

[55] See Fortify Rights, "U.N. Member States: Acknowledge the Rohingya Genocide, Refer Myanmar to the International Criminal Court" (March 21, 2022), online: https://www.fortifyrights.org/mya-inv-2022-03-21/.

[56] See UN Human Rights Office of the High Commissioner, "UN Expert Demands Accountability for the Rohingya an End to 'Paralysis of Indifference" (24 August 2023), online: < https://www.ohchr.org/en/press-releases/2023/08/un-expert-demands-accountability-rohingya-and-end-paralysis-indifference#:~:text=Those%20nations%20who%20support%20human,in%20their%20hour%20of%20need.>.

[57] Russia and China vetoed a resolution that harshly criticized "Myanmar for human rights abuses" (see "China, Russia Veto Security Council Resolution on Myanmar Sought by United States" (2007) 101:2 AJIL 484).

vetoes from China and Russia.[58] A resolution stressing, among others, the need to protect minorities was finally adopted in December 2022 but was deemed by many as 'too weak'.[59]

More recently, Russia's repeated use of the veto against resolutions addressing the ongoing Ukrainian crisis, which again is apparently a case of mass atrocities, has generated significant global outrage.[60] As concerns about the potential commission of genocide by Russia against Ukrainians are being raised[61], international scholars and states are vehemently advocating for restrain of veto within the context of R2P. The global outcry regarding the Ukrainian crisis and the passionate advocacy of international scholars and numerous states on veto reforms have recently led to the adoption of a landmark UN General Assembly resolution on veto use, which stipulates that a meeting of the UN General Assembly is to be convened by its President "within 10 working days of the casting of a veto by one or more permanent members of the Security Council, to hold a debate on the situation as to which the veto was cast" and that the UN Security Council is to be invited to submit a report on the exercise of veto "to the General Assembly at least 72 hours before the relevant discussion in the Assembly".[62] While the practical implications of this

[58] See Security Council Report, "Myanmar: Vote on Draft" (21 December 2022), online <https://www.securitycouncilreport.org/whatsinblue/2022/12/myanmar-vote-on-draft-resolution.php>.
[59] See Special Advisor Council, "UN Security Council Resolution on Myanmar Welcome but Weak" (22 December 2022), online: < https://specialadvisorycouncil.org/2022/12/un-security-council-resolution-myanmar-weak/>.
[60] See Shelby Magid & Yulia Shalomov, "Russia's Veto Makes a Mockery of the United Nations Security Council" (15 March 2022), online: https://www.atlanticcouncil.org/blogs/ukrainealert/russias-veto-makes-a-mockery-of-the-united-nations-security-council/.
[61] See New Lines Institute for Strategy and Policy & Raoul Wallenberg Centre for Human Rights, "An Independent Analysis of the Russian Federation's Breaches of The Genocide Convention in Ukraine and the Duty to Prevent" (May 2022), online: https://newlinesinstitute.org/wp-content/uploads/English-Report-2.pdf. See also Alex Hinton, "A Year On, We Have Clear Evidence of Genocide in Ukraine" (19 February 2023), online: <https://thehill.com/opinion/international/3859439-a-year-on-we-have-clear-evidence-of-genocide-in-ukraine/>.
[62] See *Standing Mandate for a General Assembly Debate When a Veto Is Cast in the Security Council*, UNGA, 76th Sess, UN Doc A/L.52/Add.1 (2022) GA Res 76/262.

resolution for the veto use in mass atrocities are yet to be seen, some members of the UN General Assembly have dubbed it a "historic veto resolution."[63]

That said, the debate concerning the veto power of P5 members is not a recent development and has been ongoing since the inception of the United Nations[64]. However, the adoption of the R2P principle has rekindled this debate, with numerous international legal scholars now questioning the continued existence of the veto power and calling for its restraint in mass atrocity situations. Stewart notes that the provisions of the UN Charter on the veto power of P5 members, allowing them to "block collective action" and shield "themselves and their allies from accountability", are the most widely criticized provisions of the Charter.[65] Soon after the adoption of the R2P principle, Wheeler expressed concerns that the absence of a mechanism for veto restraint would weaken the implementation of R2P.[66] While stressing the need to develop the principle of R2P further, Quinton-Brown refers to the menace of veto in mass atrocity situations as the "tyranny of the P5 minority" that allows P5 members to place their self-interests over "the humanitarian concerns of the Council as a whole."[67] Melling and Dennet note that the practice of repeated veto by P5 members in situations of mass atrocities provides "an umbrella of protection

63 See United Nations Meeting Coverage and Press Releases, "General Assembly Holds First-Ever Debate on Historic Veto Resolution, Adopts Texts on Infrastructure, National Reviews, Council of Europe Cooperation" (26 April 2023), online: https://press.un.org/en/2023/ga12500.doc.htm.

64 See Bolarinwa Adediran, "Reforming the security council through a code of conduct: A Sisyphean task?" (2018) 32:4 Ethics Int. Aff. 463. For a detailed overview of the San Francisco negotiations on veto, see Jean E. Krasno, *The Founding of United Nations* (Academic Council on the United Nations System, 2001).

65 See Stewart Patrick, "Cutting the Global Knot: The Global Perspectives on UN Security Council Reforms" in Stewart Patrick, ed, *UN Security Council Reform: What the World Thinks*, (Carnage Endowment for International Peace, 2023) at 6.

66 See Nicholas J. Wheeler, "A Victory for Common Humanity: The Responsibility to Protect after the 2005 World Summit" (2005) 2:1 J. Int. Law Int. Relat. 95. Alex J. Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", Ethics & International Affairs 20(2): 143–69 (2006).

67 See Patrick Quinton-Brown, "Mapping Dissent: The Responsibility to Protect and Its State Critics" (2013) 5:3 Glob. Responsib Prot. 260 at 273.

and potential impunity" to perpetrators of mass atrocities.[68] Similarly, Grover argues that the UN Security Council is under an obligation to act under R2P to prevent and end mass atrocities and that when it blocks the 'collective action' aimed at preventing genocide and other mass atrocity crimes, it becomes complicit in such crimes.[69] Based on his analysis of four cases of mass atrocities (Yemen, Syria, Myanmar, and North Korea), Genser notes that the exercise of the veto power or even a threat of its exercise can block "R2P response from the beginning or even after initial steps have been taken by the Security Council to implement its R2P mandate".[70] Arguing along similar lines, Wyatt states that the "veto power continues to provide a constitutional mechanism whereby intervention can be precluded despite transgressions under the umbrella of both international and international humanitarian law."[71]

The discussions above highlight the significant hindrance posed by the veto power of P5 members to implementing the third pillar of R2P. A broad consensus exists among the majority of UN member states and international legal scholars regarding the necessity to curtail the veto power of P5 members in R2P situations, especially those falling within the third pillar of R2P[72]. States and international scholars have made several recommendations and proposals in this regard. Numerous academics are tirelessly endeavouring to develop more polished and workable proposals and recommendations aimed at limiting the veto authority of P5 members in mass atrocity situations and persuading P5 members to endorse such recommendations.

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[68] See Graham Melling & Anne Dennet," The Security Council Veto and Syria: Responding to Mass Atrocities Through the "Uniting for Peace" Resolution" (2018) 57 Indian J Intl 285 at 290.
[69] Sonja Grover, "R2p And the Syrian Crisis: When Semantics Becomes a Matter of Life or Death" (2005) 19:9 Int. J. Hum. Rights 1112 at 1118.
[70] See Genser, *supra* note 43 at 478.
[71] See Samuel James Wyatt, *The Responsibility to Protect and a Cosmopolitan Approach to Human Protection* (London: Palgrave Macmillan, 2019) at 220.
[72] See Brian Cox, "United Nations Security Council Reform: Collected Proposals and Possible Consequences" (2009) 6:1 SC J Int'l L & Bus 89, online: https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1035&context=scjilb.

Nevertheless, some debate exists regarding the method to be adopted to restrain the veto power of P5 members. While some argue for formal amendment of the UN Charter, others focus on informal changes in the practice of the veto exercise of P5 members.[73] However, restraining or abolishing the veto power through UN Charter amendments is extremely challenging as the veto power of P5 members also extends to the Charter amendments.[74] Commenting on the improbability of any formal amendment being made in the UN Charter to curb the veto power of P5 members, Webb states that "it would probably be easier to dissolve the UN than to amend the veto power under the charter"[75]. On the other hand, the prospects of bringing about informal changes in the practice of the UN Security Council are much better, as the historical precedents in this regard are much more promising than those regarding formal amendments.[76] For instance, the interpretation of Article 27(3) of the UN charter has evolved through the practice of the UN Security Council to mean that a voluntary abstention by a P5 member from voting on a resolution is not to be counted as a negative vote.[77]

This master's thesis explores the ongoing discourse surrounding the restraint of the veto power of P5 members in genocide situations falling under the third pillar of R2P. Acknowledging the remote possibility of charter amendments happening anytime soon, this thesis investigates alternative approaches for restraining the veto power of P5 members in such situations. As mentioned above, genocide is characterized as "the crime of all crimes" and is the most horrendous of all mass atrocity crimes. Therefore, the adverse effects of the rampant use of veto are most

[73] See Erkki Kourula & Tapio Kanninen. "Reforming the Security Council: The International Negotiation Process Within the Context of Calls to Amend the UN Charter to the New Realities of the Post-Cold War Era" (1995) 8:2 LJIL 337.
[74] *UN Charter, supra* note 41, arts 108-09.
[75] See Philippa Webb, "Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria" (2014) 19:3 J. Confl. Secur. Law 471 at 481.
[76] *Ibid.*
[77] *Ibid.*

manifest and detrimental in situations of genocide. The gravity of the crime of genocide is most aptly captured by Destexhe when he notes that "[g]enocide is a crime on a different scale to all other crimes against humanity and implies an intention to completely exterminate the chosen group. Genocide is therefore both the gravest and the greatest of the crimes against humanity"[78]. Additionally, as noted in the later part of this thesis, genocide is the only mass atrocity crime that has a separate convention that codifies the crime of genocide and explicitly imposes on states the duty to prevent it.[79] No such convention exists for war crimes and crimes against humanity and there exists no clear obligation of states under international law to prevent such crimes.[80] Therefore, while R2P applies to the four mass atrocity crimes ("genocide, war crimes, crimes against humanity and ethnic cleansing"), arguments in this thesis have been made with a particular focus on genocide prevention. As explained below, this thesis explores three possible avenues for restraining the veto power of P5 members in genocide situations falling under the third pillar of R2P, namely, veto restraint by application of due diligence entailed by the duty to prevent genocide, the duty to prevent genocide as a jus cogens norm, and the delineation of a workable veto reform proposal.

d) An Overview of Arguments

Chapter I of this master's thesis analyzes the duty of genocide prevention's due diligence standards elucidated by ICJ in the Bosnian Genocide Case[81] to understand their implications for

[78] Alain Destexhe, *Rwanda and Genocide in the Twentieth Century,* translated by Alison Marschner **(**New York: New York University Press, 1995) at 4.
[79] Further discussion on this topic can be found at 91-94, *below.* See also Manuel J. Ventura, "The Prevention of Genocide as a Jus Cogens Norm? A Formula for Lawful Humanitarian Intervention" in Charles Chernor Jalloh & Olufemi Elias, eds, *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (Leiden: BRILL, 2015) 289 at 333.
[80] *Ibid.*
[81] *Case Concerning Application of The Convention on The Prevention and Punishment of The Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* [2007] ICJ Rep 191 [*Bosnia v. Serbia*].

the veto power of P5 members in genocide situations falling under the third pillar of R2P. To this end, Chapter I begins with a general discussion of the 'due diligence principle'. It then proceeds to analyze the due diligence standards established by ICJ in the Bosnian Genocide case as an essential component of the duty to prevent genocide under the Genocide Convention. According to ICJ, there are two main factors relevant to determining the applicability of the duty to prevent genocide to a state, namely, the knowledge of genocide and the capacity to influence génocidaires. P5 members, owing to their veto power and having access to various UN mechanisms, occupy a special position within the UN system. Heieck refers to this as the "privileged legal position" of P5 members.[82] Chapter I notes that, on account of their special position within the UN system, P5 members are better placed than most other states to obtain knowledge of potential or ongoing genocide and to influence génocidaires. P5 members are, therefore, obligated to do everything within their power to prevent or halt genocide if they are to satisfy the genocide prevention's due diligence standards. Trahan notes that owing to the special position of P5 members in the UN, the duty of due diligence is particularly high for them.[83] Applying the due diligence standards to genocide situations falling under the third pillar of R2P and thereby requiring international intervention, Chapter I argues that P5 members are obligated not to veto resolutions authorizing such intervention to duly discharge their duty to prevent genocide and meet the due diligence standards associated with the said duty. In this way, due diligence standards of the duty to prevent genocide curtail the veto power of P5 members in genocide situations falling under the third pillar of R2P and, therefore, facilitate the implementation of the third pillar and thereby advance the overarching goal of the prevention of genocide.

[82] See John Heieck, *A Duty to Prevent Genocide: Due Diligence Obligations Among P5* (Cheltenham, UK: Edward Elgar Publishing Limited, 2018) at 51 [Heieck, *A Duty to Prevent Genocide*]

[83] See Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, ed (Cambridge: Cambridge University Press, 2020) at 213.

Chapter I then rebuts a belief held by a group of international scholars that R2P is just a political doctrine devoid of any legal status and that it weakens the duty of states to prevent genocide by placing it with other mass atrocity crimes.[84] To this end, Chapter I employs Hart's distinction between "laws that impose duties" and "laws that confer powers" to argue that R2P is more than just a political doctrine and can be characterized as a "law that confers powers". By so arguing, it shows that as the principle of due diligence is employed to strengthen the implementation of the third pillar of R2P in genocide situations, R2P, as a "law that confers powers", can also be employed to strengthen the obligations of P5 members flowing from due diligence standards. This can be achieved by providing the legal foundation for actions of one or more P5 members acting, in cooperation with other willing states, outside the deadlocked UN Security Council to prevent or halt genocide.

After establishing, by virtue of due diligence standards articulated in the Bosnia Genocide Case, that P5 members are under a duty not to veto the R2P third pillar resolutions, Chapter I acknowledges that this duty can be defeated, by virtue of Article 103 ('supremacy clause) of the UN Charter, by the veto power of P5 members granted by Article 27 of the Charter. This challenge presented by Article 103 of the UN Charter in enforcing the duty of P5 members not to veto R2P third pillar resolutions is addressed by the arguments put forth in the second chapter.

Chapter II of his thesis argues that the duty to prevent genocide satisfies the International Law Commission's (ILC) criteria for the identification of jus cogens norms and can, therefore, be characterized as a jus cogens norm of international law. To this end, Chapter II begins with a brief analysis of the nature of jus cogens norms before elucidating ILC's criteria for their identification.

[84] See Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 56-59. See also Jay Crush, "The Responsibility to Protect in International Law" (31 May 2013), online: <https://www.e-ir.info/2013/05/31/the-responsibility-to-protect-in-international-law/>.

Taking into account the lack of a uniform criteria for the identification of jus cogens norms, Kotzé states that "the identification…of specific jus cogens norms [has] been left to states, courts, and epistemic communities such as the International Law Commission (ILC) and scholars." [85] Acknowledging the methodological complexities associated with the identification of jus cogens norms, Chapter II adopts ILC's criteria for their identification to determine whether the duty to prevent genocide can be characterized as a jus cogens norm. After having acknowledged the general application of Article 53 of the Vienna Convention beyond the Convention itself, ILC based its jus cogens identification criteria on the definition of jus cogens norms provided under the said article. Johnston and Thirlway note that though the Vienna Convention is binding only on states that are parties to it, Article 53 of the Vienna Convention has been generally employed in defining and identifying jus cogens norms.[86] According to ILC, there are two criteria that are to be satisfied by a norm before it can be characterized as a jus cogens norm of international law, i.e., the norm in question must be a "norm of general international law" and it must be "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Chapter II elaborates on these criteria by referencing pertinent legal literature and citing ILC's reports on jus cogens norms. It then proceeds to apply these criteria to the duty to prevent genocide and argues, by referring to the relevant legal literature and the observed state practices regarding these criteria, that the duty to prevent genocide fulfills these criteria and can, therefore, be characterized as a jus cogens norm.

[85] See Louis J Kotzé, "In Search of a Right to a Healthy Environment in International Law: Jus Cogens Norms" in John H Knox & Ramin Pejan, eds, *The Human Right to a Healthy Environment*, ed (Cambridge: Cambridge University Press, 2018) 136 at 147.

[86] See Katie A Johnston, "Identifying the Jus Cogens Norm in The Jus Ad Bellum" (2021) 70:1 ILQ 29 at 32. See also H Thirlway, *The Sources of International Law*, 2nd ed (Oxford: Oxford University Press 2019) at 163.

Subsequently, Chapter II analyzes the implications of imputing jus cogens status to the duty to prevent genocide for the veto power of P5 members in genocide situations falling under the third pillar of R2P and argues that the jus cogens duty to prevent genocide imposes on P5 members an obligation not to veto R2P third pillar resolutions aimed at preventing or halting genocide. It then takes note of the conflict between the duty of P5 members to prevent genocide under the conventional and customary international law on the one hand and the veto right of P5 members under Article 27 of the UN Charter on the other hand and argues that while Article 27 (veto right) may prevail over the conventional and customary international law obligation of P5 members to prevent genocide by virtue of Article 103 of the UN Charter, it is subservient to the jus cogens norm of the duty to prevent genocide. Therefore, Chapter II argues that P5 members cannot invoke Article 103 of the UN Charter to defeat their duty (established in the previous chapter) not to veto the R2P third pillar resolutions aimed at preventing or halting genocide.

Chapter III of this thesis puts forward a 'Code of Conduct' (proposed CoC) as a means of informally restraining the veto power of P5 members in situations involving genocide and falling under the third pillar of R2P and argues that this proposed CoC represents a more refined and viable proposal compared to previous proposals for veto restraint situations of in mass atrocity. To this end, Chapter III begins with an analysis of the significant and feasible but unsuccessful past proposals for veto restraint such as the France-Mexico proposal, the ACT group proposal, and Illingworth's 'Responsible Veto Restraint' proposal. and points out the shortcomings of these proposals. Chapter III then builds on these proposals to propose a novel 'CoC' for veto restraint which addresses the deficiencies of past proposals. This is done by narrowing the scope of the proposed CoC to only genocide situations, adopting a more democratic approach, eliminating ambiguous 'get-out' clauses for P5 members, and providing a stringent trigger mechanism.

Additionally, CoC is proposed in light of arguments made in the previous chapters setting forth the legal duty of P5 members not to veto R2P third pillar resolutions aimed at preventing or halting genocide. This legal basis lends added credibility to the proposed CoC, rendering it more compelling. Chapter III ultimately addresses some of the doubts commonly expressed in the relevant literature regarding the proposals for informal veto restraint.

Finally, Chapter III sums up this thesis and briefly discusses some other alternative avenues that can be explored to restrain the veto power of P5 members in genocide situations falling under the third pillar of R2P.

The overarching argument of the thesis may seem to lean towards advocating interventionism including the use of force. However, it's important to clarify that the emphasis on intervention, including military intervention, is not meant to diminish the significance of alternative non-interventionist approaches in preventing genocide. Instead, the apparent interventionist stance of the argument arises from the thesis's specific focus on implementing the third pillar of R2P in genocide situations by addressing the issue of limiting the veto power of the P5 members of the UN Security Council.

As mentioned above, any measures outlined in R2P resolutions must align with the principles of "right intention, last resort, proportional means, and reasonable prospects." This means that any measure proposed under the third pillar of R2P, including international intervention in a state and the use of force, must adhere to the principle of 'last resort.' This entails exhausting all non-interventionist measures or having reasonable grounds to believe that such measures would not be sufficient to prevent genocide before resorting to intervention.

Therefore, it's crucial to emphasize that non-interventionist measures hold primary importance, and the measures under the third pillar of R2P, including military intervention, come into play only

when other avenues have been explored, and there are reasonable grounds to believe that they would not be effective in preventing genocide.

CHAPTER I

PREVENTING GENOCIDE: RESTRAINING THE VETO POWER OF P5 MEMBERS BY WAY OF DUE DILIGENCE STANDARDS OF THE DUTY TO PREVENT GENOCIDE

1.1 Introduction

Chapter I concerns itself with the due diligence standards flowing from the duty of genocide prevention under the Genocide Convention and its implications for P5 members' duty to prevent genocide. Chapter I specifically focuses on the judgment of ICJ in the Bosnian Genocide case to ascertain the due diligence standards that are to be satisfied by states while discharging their duty to prevent genocide. It then analyzes the repercussions of these due diligence standards for P5 members. The due diligence standards entailed by the duty to prevent genocide affect the duty of P5 members to prevent genocide while acting both within and without the UN Security Council. However, this chapter mainly concerns itself with the implications of due diligence standards entailed by the duty to prevent genocide for P5 members acting within the UN Security Council, with the aim of analyzing their effects on the veto power of P5 members. In particular, Chapter I demonstrates that the due diligence standards that are to be satisfied by P5 members to effectively discharge their duty to prevent genocide require them, among other things, not to veto resolutions aimed at preventing or halting a genocide falling under the third pillar of R2P.

Chapter I then rebuts a belief developing among a group of international legal scholars that R2P is just a political doctrine and that by placing the crime of genocide along with other international crimes such as war crimes and crimes against humanity, pioneers, and proponents of R2P have weakened the duty of prevention associated with the crime of genocide. Hart makes a helpful distinction between 'laws that impose duties' and 'laws that confer powers', which helps to better understand the legal status of R2P. By employing Hart's classification of laws, this

chapter argues that R2P is more than just a political doctrine and has a legal status as a law that confers power. By so arguing, it shows that as the principle of due diligence is employed to strengthen the duty to prevent genocide in situations covered by the third pillar of R2P, R2P can also be used to strengthen the obligations of P5 members flowing from due diligence standards and thereby, to strengthen the duty to prevent genocide.

Scholarly writings employ a variety of terms to describe due diligence. "Notion," "principle," "duty," and "concept" are some of the commonly used terms. This chapter will use the term 'principle of due diligence' for better consistency. Also, for the sake of clarity, the term 'due diligence obligations' in this chapter refers particularly to obligations such as the duty to cooperate in preventing genocide that are to be observed by states to satisfy the due diligence standards entailed by the duty to prevent genocide.

1.2 Due Diligence in International Law

Due diligence is a broad and dynamic principle, and while a comprehensive discussion of the due diligence principle in international law goes far beyond the scope of this work, it is essential to briefly analyze its basic characteristics before proceeding to examine its invocation by ICJ in the Bosnian genocide case and its implications for the duty of P5 members to prevent genocide.

The principle of due diligence is not alien to international law. It has long been employed in various international law regimes as a part of the duty to prevent a specific act.[87] The explicit mention of due diligence in international law can be traced as far back as the Alabama Arbitration case of 1872, wherein the arbitration tribunal, while expounding the term due diligence in the Treaty of Washington, stated that "due diligence…ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure

[87] See Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 29-30.

to fulfil the obligations of neutrality on their part".[88] Though initially applied as a concomitant of the duty to states to prevent harm to aliens within their territories, the due diligence principle has evolved and progressed to other regimes of international law and is now widely employed in different fields to serve various purposes such as preventing harm caused by private individuals, protecting aliens, preventing transboundary environmental harm and more recently, countering terrorism.[89] That said, the due diligence principle has been borrowed from municipal legal systems and has been modified and adapted to better serve the dynamic needs of international law.[90]

The due diligence principle is highly flexible with no uniform and legally binding definition.[91] The flexibility of the due diligence principle makes it possible to apply it with necessary adaptations to different fields of international law.[92] Its content is, therefore, context-specific with its characteristics varying from one field of international law to another. Broadly speaking, it refers to the obligations of states to take reasonable measures within their capacity to prevent harm from occurring or to alleviate its repercussions after it has occurred, provided that

[88] See *Alabama claims of the United States of America against Great Britain* (1872) RIAA (Reports of International Arbitral Awards) 125 at 129 (Arbitrators: Charles Francis Adams et al.). See also Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge, United Kingdom; New York, NY: Cambridge University Press, 2021) at 83.

[89] See generally Duncan French & Tim Stephens, ILA Study Group on Due Diligence in International Law, *First Report* (7 March 2014) at 2-4, online: <https://olympereseauinternational.files.wordpress.com/2015/07/due_diligence_-_first_report_2014.pdf>.

[90] See also Joanna Kulesza, *Due Diligence in International Law,* vol 26 ed by Malgosia Fitzmaurice, Phoebe Okowa & Sarah Singer (Boston: BRILL, 2016) at 19.

[91] See Medes Malaihollo, "Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights" (2021) 68:1 Neth. Int. Law Rev. 121 ("due diligence obligations are flexible, and their content may change over time in light of new developments and changes to the risk involved" at 144-45), online(pdf): https://www.researchgate.net/publication/351156713_Due_Diligence_in_International_Environmental_Law_and_International_Human_Rights_Law_A_Comparative_Legal_Study_of_the_Nationally_Determined_Contributions_under_the_Paris_Agreement_and_Positive_Obligati. See also French & Stephens*, supra* note 89 at 29 Citing Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in The Area (Request for Advisory Opinion Submitted to The Seabed Disputes Chamber), List Of Cases: No. 17, Advisory Opinion (1 February 2011) (International Tribunal For The Law Of The Sea). Kulesza*, supra* note 90 at 259.

[92] See Kulesza*, supra* note 90 at 259, 269.

the state in question has the knowledge or ought to have had knowledge of the harmful conduct causing harm. Barring a few exceptions, such as due diligence in preventing genocide, due diligence obligations in international law are essentially territorial in nature; that is, states are to exercise due diligence in preventing harmful conduct within their territory or under their jurisdiction that may cause foreign harm.[93] Therefore, it is the state of origin of the risk of transboundary harm that is to exercise due diligence in preventing such harm. However, a state's due diligence obligation to prevent such harmful conduct is not absolute and is dependent on knowledge (either absolute or constructive) by a state of such harmful actions being carried out in its territory or under its jurisdiction.[94]

While there is no uniform legally binding definition of due diligence in international law, and while it remains context-specific, some components of the due diligence principle, such as knowledge of harmful conduct on the part of the state and the capacity of the state to prevent such harmful conduct, are common to all fields of international law.[95] These components form a general framework of the due diligence principle and have also been invoked by ICJ in determining the responsibility of Serbia and Montenegro in the Bosnian Genocide Case. These components will be briefly discussed in the following section.

1.3 The Bosnian Genocide Case

"Case Concerning Application of The Convention on The Prevention and Punishment of The Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)"[96], hereinafter referred

[93] See Kulesza, *supra* note 90 at 46. See also Federica Violi, "The Function of the Triad 'Territory,' 'Jurisdiction,' and 'Control' in Due Diligence Obligations" in Heike Krieger, Anne Peters, & Leonhard Kreuzer, eds, *Due Diligence in the International Legal Order,* 1st ed (Oxford: Oxford University Press, 2021) 75.
[94] See Kulesza, *supra* note 90 ("[t]he due diligence obligation arises for the state upon it obtaining knowledge of an unauthorized, risky activity carried out within state territory, under its jurisdiction or control" at 192).
[95] See French & Stephens, *supra* note 89 at 7.
[96] See *Bosnia v. Serbia, supra* note 81.

to as the Bosnian genocide case, is a seminal case in which ICJ elucidated the due diligence standards associated with the duty of states to prevent genocide. ICJ, in this case, was tasked with ascertaining the responsibility of Serbia under the Genocide Convention for the genocide committed in Srebrenica. The court, after having considered the evidence adduced by the applicants, ruled that Serbia bore no direct responsibility for the Srebrenica genocide, nor was it complicit in the commission of said genocide, and that the international responsibility of Serbia under Article III of the Genocide Convention could not be engaged[97].

ICJ then turned to examine whether Serbia committed a breach of its duty to prevent genocide under Article I of the Genocide Convention. While analyzing the duty to prevent genocide under the Genocide Convention, ICJ stated in most clear terms that despite the close relationship between the duty to punish genocide and the duty to prevent genocide, the latter is an independent duty with its own separate legal existence and that it is "both normative and compelling".[98] Explicating further the duty to prevent genocide, ICJ noted that the principle of due diligence is of 'critical importance' in assessing whether or not a state has satisfied its duty to prevent genocide under the Genocide Convention.[99] While explaining the due diligence standards, ICJ stated that in assessing whether a state has satisfied the due diligence standards while discharging its obligation to prevent genocide, several factors are to be taken into consideration.[100] The court identified two main factors in this regard, which can also be regarded as the general components of the due diligence standards;

1.3.1 Capacity

[97] *Ibid* at paras 413-24.
[98] *Ibid* at para 427.
[99] *Ibid* at para 430.
[100] *Ibid.*

The first of these factors, according to ICJ, is the capacity of states "to influence effectively the actions of persons likely to commit, or already committing, genocide"[101]. The capacity of states to influence the actions of actual or potential génocidaires depends on various parameters such as "the geographical distance of the state concerned from the scene of the events" and, "the strength of the political links as well as links of all other kinds, between the authorities of that state and the main actors in the event".[102] Depending on these parameters, the said capacity varies from one state to another and so do the due diligence standards that must be satisfied by a state in discharging its duty to prevent genocide. Therefore, the scope of a state's duty to prevent genocide is greatly dependent on its capacity to effectively influence the actual or potential génocidaires. That said, a state whose responsibility to prevent genocide is in issue cannot claim that even if it had done everything within its power, it could not have prevented or halted genocide. As the court duly pointed out, "the obligation in question is one of conduct and not of result".[103] This means that the state is under an obligation to take all reasonable measures within its capacity to prevent genocide and is not under an obligation to achieve the desired results. A state, that has employed all the reasonable means to prevent genocide, would have discharged its due diligence obligations and cannot be held responsible if the genocide still occurs. On the other hand, a claim (even if proved) that even if the state had done everything within its power, it could not have prevented or halted genocide is not tenable. This is especially so because there are high chances that several states cooperating with

[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*

each other and making collective efforts towards the prevention of genocide would generally succeed in achieving the desired results[104].

1.3.2 Knowledge

The second element of the due diligence standards entailed by the state's duty to prevent genocide is the state's knowledge of an ongoing or impending genocide. Generally speaking, the due diligence obligations of a state to prevent an unlawful activity are triggered when a state acquires or should normally have acquired knowledge of such an activity being carried out within its territory or jurisdiction.[105] Therefore, according to the due diligence standards, the knowledge that is required to trigger a state's duty to prevent an unlawful activity can be actual or constructive.[106] Actual knowledge refers to knowledge that a state actually has of an unlawful activity, while constructive knowledge refers to the knowledge that a state should normally have of an unlawful activity.[107]

The second element of due diligence standards (Knowledge) required for triggering a state's duty to prevent unlawful activity has been applied by ICJ to the duty of states to prevent genocide. ICJ has noted that a state could be held responsible for breaching its obligation to prevent genocide when a "state was aware or should normally have been aware" of an ongoing or a potential genocide and failed to take reasonable measures within its capacity to prevent such genocide.[108] It follows that to engage the responsibility of a state breaching its obligation to prevent genocide, it is not necessary that a state knew with certainty about an ongoing or impending genocide. It is sufficient if it should normally

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[104] *Ibid.*
[105] *Ibid* at paras 438, 431. See also Monnheimer, *supra* note 88 ("a key element triggering international due diligence obligations is the foreseeability of harmful events" at 192).
[106] *Bosnia v. Serbia, supra* note 81 at para 431.
[107] See Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 32. See also Monnheimer, *supra* note 88 at 117-18.
[108] *Bosnia v. Serbia, supra* note 81 at para 432.

have had such knowledge in the circumstances of a given case. Therefore, what is required by the due diligence standards for triggering a state's duty to prevent genocide is not certainty on the part of states that genocide is imminent but awareness that it may be committed.[109] However, owing to the erga omnes character of the duty to prevent genocide, there is no requirement that the said genocide, whose knowledge is being imputed to the state, was committed within the territory or jurisdiction of the state whose responsibility is in the issue.

The duty to cooperate is another important aspect of the due diligence standards of the duty to prevent genocide recognized by ICJ in the Bosnian Genocide case. The duty to cooperate with respect to a particular state in a given genocide situation is triggered once the above two components of the due diligence standards are found to be applicable to that state. While ICJ explicitly recognized the duty of states to cooperate with the "international penal tribunals" in bringing perpetrators of genocide to justice[110], the due diligence duty of states to cooperate among themselves in preventing genocide can be implied from the court's determination that as there are high chances that the collective action of several states cooperating with each other towards the prevention of genocide would generally succeed in achieving the desired result a state cannot claim that even if it had done everything within its power, it could not have prevented or halted genocide.[111] The support for this determination can also be found in ICJ's 1951 Reservations to the Genocide Convention advisory opinion, wherein ICJ emphasized "the co-operation required in order to liberate mankind from such an odious scourge".[112]Accordingly, the duty of states to

[109] *Ibid.*
[110] *Ibid* at paras 439-50.
[111] *Ibid* at para 430.
[112]See Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, [1951] ICJ Rep at 15, online: <https://www.icj-cij.org/public/files/case-related/12/012-19510528-ADV-01-00-EN.pdf>. [*Advisory Opinion on Reservations to the Genocide Convention*]

cooperate in preventing genocide is concomitant with the duty of states to use all measures reasonably available to them in preventing genocide and, therefore, forms part of the due diligence standards to be satisfied by states while discharging their respective duties to prevent genocide.

ICJ employed the above-discussed analysis of the due diligence standards associated with the duty to prevent genocide to determine Serbia's responsibility for breaching its obligations to prevent genocide under Article I of the Genocide Convention. Regarding the elements of knowledge, ICJ held that in light of the information that was available to Serbia before the genocide started, it is clear that the Serbian authorities were aware of the possibility of genocide being committed.[113] Hence, the knowledge element of the due diligence standards was satisfied, and Serbia's duty to prevent genocide was triggered. Regarding the capacity of Serbia to take measures to prevent genocide, ICJ noted that the Belgrade authorities had strong "political, military and financial links" with the Republic Srpska and its army, which put them in a solid position to influence the Bosnian Serbs who were responsible for planning and committing genocide.[114] ICJ held that despite Serbia having information that pointed to an impending genocide and despite Serbia's capacity to influence the actions of génocidaires, Serbia did not take any measures within its power to prevent the Srebrenica genocide. Given these findings, ICJ concluded that Serbia breached its obligation to prevent genocide.[115]

From the foregoing, it can be concluded that the due diligence standards entailed by the duty to prevent genocide oblige all state parties to the Genocide Convention, possessing the requisite knowledge of ongoing or impending genocide and also having the capacity to effectively influence génocidaires, to do everything within their power to prevent an impending genocide and

[113] *Bosnia v. Serbia, supra* note 81 at para 436.
[114] *Ibid* at para 434.
[115] *Ibid* at para 438.

to halt an ongoing genocide. The following section will analyze the implications of the due diligence standards entailed by the duty to prevent genocide for P5 members, particularly for their veto power, when dealing with situations of genocide under the third pillar of R2P. It will then argue that the said due diligence standards oblige them not to veto resolutions aimed at preventing genocide.

1.4 Application of ICJ's Due Diligence Framework to P5 members

The duty to prevent genocide and its concomitant due diligence standards apply to all the state parties to the Genocide Convention. In addition, the obligation to prevent genocide is a norm of customary international law and an obligation erga omnes.[116] Schabas notes that the duty to prevent genocide under the Genocide Convention and under customary international law is essentially the same.[117] Therefore, the duty to prevent genocide and its concomitant due diligence standards apply also to states that are not parties to the Genocide Convention.

It is worth mentioning that all P5 members have ratified the Genocide Convention. As held by ICJ, the obligation of states to prevent genocide entails some due diligence standards that are to be observed by them while discharging the said obligation.[118] Since P5 members are parties to the Genocide Convention, the due diligence standards entailed by the duty to prevent genocide apply to them whether acting within or without the UN Security Council.

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[116] See United Nations Office on Genocide Prevention and the Responsibility to Protect, "the Genocide Convention", online: <https://www.un.org/en/genocideprevention/genocideconvention.shtml#:~:text=That%20obligation%2C%20in%20addition%20to,have%20ratified%20the%20Genocide%20Convention>. See also "ICJ Releases Legal Q & A on Crime of Genocide" (27 August 2018), online: *International Commission of Jurists* https://www.icj.org/icj-releases-legal-q-a-on-crime-of-genocide/.

[117] See William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed (Cambridge: Cambridge University Press, 2009) at 533.

[118] See *Bosnia v. Serbia, supra* note 81 at para 430.

The implications of these due diligence standards vary from one state to another depending mainly on two parameters (the state's knowledge of a potential genocide and its capacity to influence the potential génocidaires). These parameters will be discussed in the context of P5 members before proceeding to determine the implications of the due diligence standards for these states.

1.4.1 Imputing the knowledge of a potential genocide to P5 Members

As determined by ICJ in the Bosnian Genocide case, when there arises a serious risk of genocide, the due diligence obligations of a state to prevent genocide are triggered the moment the state knows or should have normally known of such a risk[119]. Hence, the knowledge required for triggering the said obligations can be either actual or constructive. While applying the element of knowledge to P5 members, it is important to take into account the "privileged legal position" that P5 members enjoy not only in the UN Security Council but in the whole of the UN system.[120] Apart from their unique power to veto any resolution on any matter other than procedural matters, P5 members, by virtue of their membership in the UN Security Council, are better equipped to access information about the serious risks of a potential genocide in a timely manner as they have access to various early warning mechanisms such as the UN Special Advisor on the Prevention of Genocide.[121] In fact, one of the mandates of the Special Advisor on the Prevention of Genocide is to bring to the attention of the Security Council the situations that may result in genocide.[122] This timely access to information by P5 members about an ongoing or potential genocide coupled with their power to unilaterally defeat any resolution dealing with substantive matters places them in a

[119] See Part 1.3, *above,* for more on this topic.
[120] See M. Milanovic, "State Responsibility for Genocide: A Follow Up" (2007) 18 EJIL 669 at 686. See also Heieck, *A Duty to Prevent Genocide, supra* note 82 at 51 & 63.
[121] See Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 63-64.
[122] See United Nations Office on Genocide Prevention and the Responsibility to Protect, "Special Advisor on the Prevention of Genocide", online: < https://www.un.org/en/genocideprevention/office-mandate.shtml#sapg>.

privileged position vis-à-vis other members of the United Nations.[123] Therefore, it can be said that P5 members are better situated, second only to the state in whose territory genocide is actually being committed or in whose territory there exists a serious risk of genocide being committed, to acquire knowledge of potential genocide. As a result, P5 members satisfy the criteria for triggering their duty to prevent genocide.

1.4.2 The Capacity of P5 Members to Influence the Potential Génocidaires

Once the criterion of knowledge for triggering a state's obligation to prevent genocide has been fulfilled in respect of a particular state, the due diligence standards require that such a state takes all the measures within its capacity and employs all the means at its disposal to prevent genocide. The scope of a state's duty to prevent genocide varies according to the state's capacity "to influence effectively the actions of persons likely to commit, or already committing genocide"[124]. In order to analyze the capacity of P5 members to effectively influence the potential génocidaires, it is necessary to once again examine the 'privileged position' of P5 members within and without the UN system.

As discussed above, the United Nations, and within it, the UN Security Council are primarily responsible for the 'maintenance of international peace and security'.[125] The UN Security Council is empowered by the UN Charter to pass binding resolutions incorporating various measures, including measures involving authorization of the use of military force, for the maintenance of 'international peace and order'.[126] P5 members of the UN Security Council have been entrusted with the unique power to unilaterally veto any such resolution of the Security Council.[127] By virtue

[123] See Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 51.
[124] *Bosnia v. Serbia, supra* note 81 at para 430.
[125] See 9, *above,* for more on this topic.
[126] *UN Charter, supra* note 41, arts 39-42.
[127] *Ibid*, art 27.

of their veto power, P5 members exercise considerable control over the UN Security Council.[128] Hence, in cases of potential genocide, P5 members can either render the Security Council powerless to prevent genocide by vetoing resolutions containing measures to address the risks of genocide or they can play a proactive role in preventing genocide by voting for such resolutions and not defeating them unilaterally.

Outside the Security Council and UN, P5 members wield substantial power when compared to other states. This powerful position of P5 members vis-a-vis other states is attributable to several factors including their formidable military capabilities, highly sophisticated intelligence gathering, great diplomatic influence, and strong economics. These factors enable P5 members to exert greater influence on other nations and on génocidaires. This influence can be employed by P5 members to either coerce or persuade actual or potential génocidaires to cease their actions, thereby contributing to the prevention of genocide.

Therefore, owing to their "privileged legal position" within the UN Security Council and being 'great powers' of the world, outside the UN Security Council, P5 members clearly have the capacity, "unlike that of any other state parties to the Genocide Convention", to effectively influence potential génocidaires and thereby, prevent genocide.[129] From the foregoing, it can be concluded that P5 members satisfy the criteria for the application of the duty to prevent genocide and the due diligence standards entailed by it.

1.5 Implications of the Due Diligence Standards for P5 Members: Duty Not to Veto R2P Resolutions Aimed at Preventing Genocide

[128] See Kishore Mahbubani, "The Permanent and Elected Council Members" in David M. Malone, ed, *The UN Security Council: From the Cold War to the 21st Century* (Boulder: Lynne Rienner Publishers, 2022) 253 ("[t]here is recognition among the P-5 that both their veto power as well as their permanency in the Council give them a privilege of significant control over a powerful global institution" at 255).
[129] See Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 39.

The due diligence standards, as explicated by ICJ[130], obligate states, including P5 members, to do everything within their capacity to prevent or halt a genocide. The due diligence standards provide that the scope of a state's duty to prevent genocide depends on its capacity to effectively influence the potential génocidaires. As said in the preceding section, P5 members have timely access to information on potential genocides and are also equipped with a vast array of tools and resources to prevent such genocides. Owing to their "privileged legal position" and by reason of their having access to ample means, P5 members are more capable than most of the other state parties to the Genocide Convention to influence génocidaires. Accordingly, it can be concluded that the extensive capacity of P5 members to effectively influence the génocidaires directly affects their duty to prevent genocide and considerably widens its scope. Therefore, P5 members have a heightened duty to prevent genocide.[131]

When a state is unable or unwilling to protect its population from an ongoing or potential genocide, the situation qualifies as one falling under the third pillar of R2P, requiring intervention by the international community to take necessary action to prevent or halt genocide in the said state. As discussed above, the UN Security Council is the most suitable forum to legally authorize such international intervention.[132] In such situations, the heightened duty of P5 members to prevent genocide and their obligation to do everything within their capacity to prevent genocide compels them to, among other things, cooperate among themselves and with other members of the Security Council in negotiating and passing resolutions for effectively dealing with situations of potential genocide. If the effective prevention of a potential genocide under the third pillar requires the implementation of particular measures, including international intervention, the due diligence

[130] See Part 1.3, *above,* for more on this topic.
[131] See Trahan, *supra* note 83 at 213. See also Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 51.
[132] See 9, *above,* for more on this topic.

standards require P5 members not to veto a resolution containing such measures and authorizing such intervention. In addition, the due diligence standards, and their concomitant duty to cooperate oblige P5 members to use, while negotiating resolutions aimed at preventing genocide, their influence and their 'privileged legal position' to ensure that the measures most germane to prevent a potential genocide are included in such resolutions. Therefore, in situations of potential or ongoing genocide, the due diligence standards require that the veto exercise by P5 members should be dictated not by their discretion but by the needs of the situation.

Hence, when a situation of genocide falls under the third pillar of R2P requiring international intervention to prevent or halt genocide, which in turn requires authorization by the UN Security Council, the due diligence standards oblige P5 members not to veto resolutions authorizing such intervention. The due diligence standards, therefore, curtail the veto power of P5 members in cases of actual or potential genocide calling for international intervention under the third pillar of R2P and, thereby, promote the implementation of the third pillar. From the foregoing, it can be concluded that the duty of P5 members under the Genocide Convention and customary international law to prevent genocide, incorporates, by virtue of the application of due diligence standards as explicated by ICJ in the Bosnian Genocide case, their duty not to veto resolutions aimed at preventing genocide.

Having considered the implications of the due diligence standards for P5 members, it is important to address a common concern developing among a group of international scholars that R2P is not a law but only a political doctrine[133] and that by placing the crime of genocide along

[133] For a detailed discussion of the view that the R2P principle is just a political doctrine devoid of legal value, see Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm" (2007) 101:99 AJIL 99. See also BC Nirmal, "Responsibility to Protect: A Political Doctrine or An Emerging Norm (With Special Reference to The Libyan and Syrian Crises)" (2015) 57:3 JILI 333 at 338 to 336. Mario Kresic, "Is the R2P Norm a Legal Norm" in *New Legal Reality: Challenges and Perspectives. II* (Riga: University of Latvia Press, 2022) 355. Amrita Kapur, '"Humanity as the A

with other international crimes of different types and varying severity such as war crimes and crimes against humanity, R2P weakens the duty of states to prevent the crime of genocide.[134] While negotiating the 2005 World Summit Outcome document and the R2P principle included in it, most states supported the view that R2P does not create any legally binding obligations for states and the UN Security Council.[135] And because R2P does not create any binding obligations for states and other international organizations, international scholars have argued that R2P has no legal value.[136] Accordingly, R2P has been disregarded by some scholars as insignificant and irrelevant to states' due diligence obligation to prevent genocide.[137] In disregarding R2P, they have altogether ignored the potential of R2P to strengthen the due diligence obligations entailed by the duty of states to prevent genocide.

Though, indeed, R2P does not impose any binding obligations on states, it is erroneous to reject R2P as a concept having no legal value. As H.L.A Hart demonstrates in his seminal work, "*The Concept of Law"*, various categories of law can be found in a modern legal system.[138] Two broad categories of law that Hart describes in his work are: "laws that impose duties" and "laws that confer powers".[139] While laws falling under the farmer category are of a binding nature creating legal obligations for those subjected to them, laws falling under the latter category are not. However, it does not imply that they are not laws. The same holds true for R2P. R2P falls into the

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and Ω of Sovereignty: Four Replies to Anne Peters" (2009) 20 EJIL 560, online: https://academic.oup.com/ejil/Article/20/3/560/402507.

[134] See Heieck, *A Duty to Prevent Genocide*, *supra* note 82 ("by incorporating four legal norms of varying development – i.e. genocide, war crimes, crimes against humanity, and ethnic cleansing – in the same political doctrine, R2P in effect waters down the established obligations associated with genocide prevention" at 57).

[135] See Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge, UK; New York: Cambridge University Press, 2011) at 23-25. See also Edward C. Luck, "Sovereignty, Choice, and the Responsibility to Protect" (2008) 1:1 GR2P 10 at 19.

[136] See *supra* note 133.

[137] See generally Heieck, *A Duty to Prevent Genocide*, *supra* note 82.

[138] See HLA Hart, *The Concept of Law,* 3rd ed (Oxford, United Kingdom: Oxford University Press, 2012) at 26-49.

[139] *Ibid* at 32.

latter category of laws, "laws that confer powers".[140] R2P is not a law that creates binding obligations for states and international organizations. It is a law that authorizes, in certain circumstances, certain kinds of actions by UN and state parties to the Genocide Convention.[141]

R2P, when understood in this way, can have significant implications for the obligations of states flowing from the due diligence standards entailed by the duty to prevent genocide. This chapter explained how the due diligence standards strengthen the third pillar of R2P by constraining the veto power of P5 members when acting within the UN Security Council and dealing with the potential genocidal situation under the said pillar. In addition, it also explained how the due diligence standards compel P5 members to cooperate with other states while negotiating resolutions aimed at preventing genocide and thereby to ensure that measures best suited to address a genocide situation at hand are included in such resolutions. Similarly, as will be explicated below, R2P can also be employed to supplement and strengthen the obligations of states flowing from the due diligence standards entailed by the duty to prevent genocide.

Though discussions in this master's thesis have been confined mainly to the implications of the due diligence standards for the duty of P5 members to prevent genocide when acting within the UN Security Council, the due diligence standards also have repercussions for P5 members when acting without the UN Security Council. This is especially the case when, despite its due diligence obligation, a P5 member vetoes a resolution incorporating measures to address a situation of genocide and the UN Security Council becomes deadlocked as a result of such veto. In such circumstances, the remaining P5 members and other states are not discharged from their obligation to prevent genocide.[142] Contrarily, the due diligence standards, obligating them to do everything

[140] See Orford, *supra* note 135 at 25.
[141] *Ibid.*
[142] See Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 62-63.

within their capacity, require them to cooperate with other willing states outside the UN Security Council and take necessary measures to prevent genocide.[143] Such measures may range from diplomatic isolation and economic sanctions to military intervention in accordance with "the principles of right intention, last resort, proportional means and reasonable prospects".[144] Since such measures would be taken outside the deadlocked Security Council, they would have to face the challenge of legality. It is in such scenarios that R2P, when understood as a law that confers power, becomes specifically relevant and can be employed to dispel challenges regarding the legality of 'bona fide' actions taken outside the deadlocked UN Security Council to prevent genocide. Therefore, R2P, when understood as a law that confers power and authorizes certain actions to prevent or halt genocide and other mass atrocities, can be employed to provide a legal foundation for 'bona fide' measures taken outside the deadlocked UN Security Council by the non-vetoing P5 members in cooperation with other willing states while acting in accordance with the due diligence standards entailed by the duty to prevent genocide. By so doing, R2P, far from being insignificant, can play an important role in strengthening obligations that the states including P5 members are required to discharge in order to satisfy the due diligence standards entailed by the duty to prevent genocide. Therefore, R2P, when understood as a power-conferring law, becomes specifically relevant for the obligations of P5 members and other state parties to the Genocide Convention especially when they act outside the deadlocked Security Council. Accordingly, just as the diligence standards are employed to operationalize the third pillar of R2P by constraining the veto power of P5 members in cases of genocide requiring international intervention, R2P can also be harnessed to strengthen the due diligence obligations of the state parties to the Genocide Convention. Therefore, both the due diligence standards entailed by the duty to prevent genocide

[143] *Ibid.*
[144] See *ICISS Report, supra* note 23 at 86-87.

and R2P can be utilized to complement each other and thereby, to strengthen the duty to prevent genocide.

1.6 The P5's Duty Not to Veto Resolutions Aimed at Preventing Genocide vis-à-vis The P5's Charter Right to Veto

The preceding section argued that the due diligence standards entailed by the duty to prevent genocide constrain the veto power of P5 members in situations of impending or ongoing genocide falling under the third pillar of R2P. Resultantly, the duty of P5 members to prevent genocide imposes on them the duty not to veto resolutions aimed at preventing genocide. That said, as has been elaborated in the following chapter[145], P5 members have been entrusted with a unique right, under Article 27 of the UN Charter, to veto any UN Security Council resolution dealing with a substantive matter. The said Charter right of P5 members may, when exercised in situations of genocide, come in direct conflict with their duty to prevent genocide under the Genocide Convention and the customary international law as such an exercise of veto right may halt an action aimed at preventing genocide.[146] The mechanism for resolution of such conflicts is provided by Article 103 of the UN Charter. By virtue of Article 103, a conflict between the obligations of P5 members under international conventional law and international customary law, on the one hand, and their rights and obligations under the UN Charter, on the other hand, is resolved in favour of the latter. [147] Therefore, in case of a conflict between the duty of P5 members , under the Genocide Convention and international customary law, to prevent genocide, on the one hand, and the right of P5 members, under Article 27 of the UN Charter, to veto any resolution dealing with substantive

[145] See part 2.4.2, *below,* for further discussions on Article 104 of the UN Charter.
[146] *Ibid.*
[147] *Ibid*.

matters, on the other hand, is to be resolved, by virtue of Article 103 of the Charter, in favour of their right to veto under Article 27 of the Charter.

In summary, based on the preceding discussions, it can be concluded that the obligation of P5 members to prevent genocide under the Genocide Convention and customary international law is subservient, by virtue of Article 103 of the UN Charter, to the Charter right of P5 members to exercise veto power over resolutions addressing genocide situations. Resultantly, since the duty of P5 members not to veto resolutions aimed at preventing genocide is part of their duty to prevent genocide under the Genocide Convention and customary international law (which is subservient to the rights of P5 under the UN Charter), it can be defeated by the Charter right of P5 members to veto any resolutions dealing with substantive matters.

1.7 Conclusion

This chapter argued that when a situation of genocide falls under the third pillar of R2P requiring international intervention to prevent or halt genocide which in turn requires authorization from the UN Security Council, the due diligence standards elucidated by ICJ as being entailed by the duty to prevent genocide obligate P5 members not to veto resolutions authorizing such intervention. The due diligence standards, therefore, curtail the veto power of P5 members in cases of actual or potential genocide falling under the third pillar of R2P and, thereby, promote its implementation. Accordingly, it can be concluded that the conventional and customary international law duty of P5 members to prevent genocide incorporates, by virtue of the application of due diligence standards as explicated by ICJ in the Bosnian Genocide case,[148] their duty not to veto resolutions aimed at preventing genocide under the third pillar of R2P.

[148] See Part 1.3, *above*.

Subsequently, this chapter took note of the conflict that may arise between the conventional and customary law duty of the P5 members to prevent genocide, on the one hand, and the Charter right of the P5 members to veto any resolution dealing with substantive issues, on the other hand, and acknowledged that such a conflict would be resolved, by virtue of Article 103 of the UN Charter, in favour of the veto right of P5 members under the Charter. Therefore, since the duty of P5 members not to veto resolutions aimed at preventing genocide is a part of their duty to prevent genocide under the Genocide Convention and customary international law, it can also be defeated by their Charter right to veto any resolutions dealing with substantive matters.

Hence, while this chapter established the duty of P5 members not to veto resolutions addressing situations of genocide under the third pillar of R2P as being part of their duty to prevent genocide under the Genocide Convention and customary international law, it remains susceptible, by virtue of Article 103 of the UN Charter, to be defeated by the veto right of P5 members under the UN Charter. In order to save the duty of P5 members to prevent genocide and its concomitant duty not to veto R2P third pillar resolutions aimed at preventing genocide from being defeated by their Charter right to veto any resolution dealing with a substantive matter, the following chapter will argue that the duty to prevent genocide is also a jus cogens norm and, as such, supersedes Article 103 of the UN Charter, rendering the veto right of P5 members under the UN Charter subservient to their due diligence duty not to veto R2P third pillar resolutions aimed at preventing or halting genocide.

CHAPTER II

PREVENTION OF GENOCIDE AS A JUS COGENS NORM AND ITS IMPLICATIONS FOR THE VETO POWER OF P5 MEMBERS

2.1 Introduction

The first chapter asserted that the due diligence standards outlined in the Bosnian Genocide case require that P5 members, to effectively carry out their duty to prevent genocide under the Genocide Convention and customary international law, refrain from vetoing R2P third pillar resolutions aimed at preventing or halting a genocide. The first chapter also noted that the obligations of P5 members under conventional and customary international law could be superseded, by virtue of Article 103 of the UN Chapter, by their obligations and rights under the Charter. Hence, the obligation of P5 members not to veto R2P third pillar resolutions aimed at preventing genocide, which has been argued to be a corollary of the duty of P5 members to prevent genocide under conventional and customary international law, could be defeated, by virtue of Article 103, by their power under Article 27 of the UN Charter to veto any resolution dealing with substantive issues. That said, this chapter argues that the duty to prevent genocide, in addition to being a conventional and customary law duty, is also a jus cogens norm of international law and that the obligation of P5 members not to veto R2P third pillar resolutions aimed at preventing genocide being a part of the jus cogens duty to prevent genocide, cannot be defeated by Article 103 of the UN Charter.

The jus cogens status of the prohibition of genocide has been recognized in a rich body of legal literature as well as in rulings of international judicial institutions.[149] In the case of the Armed

[149] See e.g. Jan Wouters & Sten Verhoeven, "The Prohibition of Genocide as a Norm of Jus Cogens and Its Implications for the Enforcement of the Law of Genocide" (2005) 5:3 Int'l Crim L Rev 401. Ian Brownlie, *Principles of Public International Law* (Oxford: New York: Oxford University Press, 2008) at 510-11. Malcolm N Shaw, International Law, 6th ed (Cambridge: Cambridge University Press, 2021) at 126. Orna Ben-Naftali, "The

Activities on the Territory of Congo, ICJ, while deciding on the question of its jurisdiction to entertain the dispute revolving around the allegations by The Democratic Republic of the Congo (DRC) against Rwanda of "flagrant violations of human rights and international humanitarian law" as resulting from the acts of armed aggression by Rwanda within the territory of the DRC, took note of the jus cogens status of the prohibition of genocide.[150] While there exists no doubt regarding the jus cogens status of the prohibition of genocide, the question of the jus cogens status of the duty to prevent genocide has been a subject of intense debate among legal scholars.[151] By applying the International Law Commission's (ILC) criteria[152] for the identification of jus cogens norms, Chapter II argues that the prevention of genocide can be identified as a jus cogens norm and that, in its capacity as a jus cogens norm, the prevention of genocide constrains the veto power of P5 members in situations of genocide.

To this end, the second part of Chapter II briefly elucidates the nature and salient features of jus cogens norms and then analyzes the intricacies associated with their identification, primarily those arising from the absence of a universally applicable criterion for such identification. It then explains the ILC's criteria for the identification of jus cogens norms. Applying the ILC's criteria to the duty to prevent genocide, the third part of this chapter argues that the prevention of genocide has indeed attained the status of a jus cogens norm. The fourth part examines the implications of attributing jus cogens status to the duty to prevent genocide for the veto power of P5 members in

Obligations to Prevent and to Punish Genocide" in Paola Gaeta, ed, *The UN Genocide Convention: A Commentary* (Oxford: New York: Oxford University Press, 2009) at 36.

[150] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda),* Judgment [2006] ICJ at para 64 [*Congo. v. Rwanda]*

[151] See e.g. Ventura, *supra* note 79. See also Manuel Ventura and Dapo Akande, "Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Intervention" (6 September 2013), online (blog): < https://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/ >.

[152] See Part 2.2.3, *below.*

situations of imminent or ongoing genocide and argues that since the duty to prevent genocide is a jus cogens norm, the duty of P5 members not to veto resolutions aimed at preventing genocide, which P5 members are to oblige by to satisfy due diligence standards entailed by the duty to prevent genocide, cannot be superseded by Article 103 (establishing the supremacy of obligations and rights of states under the UN Charter over their obligations under the conventional and customary international law) of the UN Charter. The fourth part of Chapter II analyzes and resolves the conflict that may arise between the jus cogens norms of the duty to prevent genocide and the prohibition of the use of force.

2.2 Identifying Jus Cogens Norms

2.2.1 Introduction

Jus cogens norms, also referred to as peremptory norms of international law, "are hierarchically superior" to other norms of international law.[153] In describing the nature of jus cogens norms, ILC states that "[p]eremptory norms of general international law (jus cogens) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable"[154]. Given the elevated status of jus cogens norms in international law, their application cannot be circumvented by states through bilateral or multilateral agreements between them.[155] Additionally, jus cogens norms are not subject to the persistent objector rule applicable in customary international law.[156]

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[153] See *Second Report on Jus Cogens by Dire Tladi, Special Rapporteur*, ILC 69th Sess, UN Doc A/CN.4/706 at para 23 [*ILC Report II*].

[154] See *Report of the International Law Commission*, ILC 71st Sess, UN Doc A/74/10 (2019) at para 56., online: < https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/243/93/PDF/G1924393.pdf?OpenElement>.

[155] See Kamrul Hossain, "The Concept of Jus Cogens and the Obligation Under the U.N. Charter" (2005) 3:1 Santa Clara J Intl 72 at 73. See also Ulf Linderfalk, "The Creation of Jus Cogens – Making Sense of Article 53 of the Vienna Convention" (2011) 71 Heidelberg J Intl 359 at 361. Rain Liivoja, "The Scope of the Supremacy Clause of the United Nations Charter" (2008) 57:3 Int Comp Law Q 583 at 610.

[156] See *Report of the International Law Commission*, ILC 73rd Sess, UN Doc A/77/10 (2022) at 14.

International legal scholars have discussed at length the salient features of jus cogens norms.[157] Commenting on jus cogens, Paust states that "[i]t is subject to birth, growth, other change, and death, depending upon patterns of expectation and behaviour that are recognizable generally conjoined in the ongoing social process".[158] Orakhelashvili describes characteristics of jus cogens norms as;

> [N]orms which safeguard the public interest…Since jus cogens protects the community interest, respective absolute obligations are imposed on States towards the international community as a whole and not to individual States. Peremptory rules, as rules serving superior interests, operate in an imperative manner in virtually all circumstances. Reciprocity is not admitted.[159]

Summing up his analysis of jus cogens, Kadelbach states that the foundation of jus cogens lies in the interests of the international community, marked by the prohibition of relinquishing certain rights, whether it is to one's own detriment or to the harm of others who lack the capacity to protect themselves effectively, such as peoples, groups, or individuals.[160] Verdross similarly explains that jus cogens norms exist to protect the "higher interest of the whole international community" and not of any individual state.[161]

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[157] See e.g. Georg Schwarzenberger, "International Jus Cogens" (1965) 43:4 Tex L Rev 455. Alfred Verdross, "Jus Dispositivum and Jus Cogens in International Law" (1966) 60 Am. J. Int'l L. 55 at 58. Gennady M. Danilenko, "International Jus Cogens: Issues of Law-Making" (1991) 2:1 Eur J Int'l L 42.

[158] See Jordan Paust, "The Reality of jus cogens" (1991) 7 Conn. J Int'l L 81 at 83.

[159] See Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008) at 47 [Orakhelashvili, *Peremptory Norms*].

[160] See Stefan Kadelbach, "Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms" in Christian Tomuschat & Jean Marc Thouvenin, eds, *The fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden; Boston: Martinus Nijhoff Publishers, 2006) 21.

[161] See Verdross, *supra* note 157 at 58.

As is clear from the above analysis, jus cogens norms have gained wide recognition in international legal literature as well as in judicial practice.[162] However, as will be discussed below, no universally accepted criteria exist for the identification of jus cogens norms, leading legal scholars to debate on the suitable methods for their identification.

2.2.2 (Methodological) Complexities Associated with the Identification of Jus Cogens Norms

Though the existence of jus cogens norms is no longer an issue of debate, there exists a lot of uncertainty regarding the appropriate methods for their identification. As ILC aptly points out, the process of identifying jus cogens norms is convoluted.[163] Arguing that the predominant focus of international legal scholars has been on exploring the "legal consequences of jus cogens status" rather than on the development of methods for identifying jus cogens norms, Saul notes that "[w]hat is striking in relation to the body of literature as a whole is the general absence of detailed exploration of the methodological process that should be undertaken to determine whether or not a norm has jus cogens status."[164]

Similarly, international judicial bodies have not been of much help in establishing specific criteria for the identification of jus cogens norms.[165] Most commonly, judges simply tend to accord jus cogens status to a norm without providing any explanation.[166] Saul explains that though judicial bodies have in some instances moved beyond this "just posit approach", explanations provided by them lack specificity and detail which render them susceptible to disparate interpretations.[167]

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[162] See Erika De Wet, "Jus Cogens and Obligations Erga Omnes" in Dinah Shelton, ed, *The Oxford Handbook on Human Rights* (Oxford, United Kingdom: Oxford University Press, 2018) 541 at 543, online: <https://ssrn.com/abstract=2279563>.
[163] *ILC Report II, supra* note 153 at para 32.
[164] See Matthew Saul, "Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges" (2015) 5:1 Asian JIL 26 at 41.
[165] *Ibid* at 43.
[166] *Ibid.*
[167] *Ibid* at 44.

The Vienna Convention on the Law of Treaties (the Vienna Convention) is the first international convention to define jus cogens norms and is, therefore, of particular importance in this regard. Article 53 of the Vienna Convention provides a comprehensive definition of jus cogens norms and posits them above treaty law in the hierarchy norms of international law. Article 53 of the Vienna Convention provides that;

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[168]

Though the Vienna Convention is binding only on states that are parties to it, Article 53 of the Convention has been generally employed in international legal literature and jurisprudence to define and identify jus cogens norms.[169] That said, some international scholars have questioned the use of Article 53 in identifying jus cogens norms.

Disputing the utility of Article 53 in the identification of jus cogens norms, Linderfalk argues that Article 53 acknowledges only the existence of jus cogens norms and does not provide a criterion for their identification.[170] Green states that the definition of jus cogens norms provided under Article 53 is not satisfactory as Article 53 is concerned only with resolving conflict between jus cogens norms and treaties and is not relevant for resolving conflict between jus cogens norms

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[168] *Vienna Convention on the Law of Treaties,* 27 January 1980, 1155 UNTS 331 art 53 [*Vienna Convention*].
[169] See *ILC Report II, supra* note 153 at para 32. See also Johnston, *supra* note 86 at 31-32. Thirlway, *supra* note 86 ("[a]s a provision of the Vienna Convention, this is binding only on the parties to that Convention, but it has become generally recognized that a comparable rule exists for all States, as a matter of customary law or of 'general international law" at 163) [emphasis added].
[170] See Linderfalk, *supra* note 155 at 362-63, 370.

and other sources of international law.[171] In a similar vein, Saul comments, "[a]rticle 53 is far from specific on the explanation for jus cogens norms or on the method to be adopted in determining whether or not a norm has this status"[172]. While emphasizing non-derogability as one of the key elements of jus cogens norms, Johnston points out that the term 'derogation' under Article 53 has been subject to disparate interpretations by different scholars and has, therefore, resulted in "terminological confusion".[173] However, notwithstanding arguments against the utility of Article 53 of the Vienna Convention in the definition and identification of jus cogens norms, it has been extensively utilized by international scholars as well as by judicial institutions for these very purposes.[174] Additionally, as mentioned above, the definition of jus cogens norms provided under Article 53, although binding only on state parties to the Vienna Convention, has been generally applied to all states including those that are not parties to the said convention, "as a matter of customary law or of 'general international law'"[175]. Such a general application of the definition of jus cogens given in Article 53 to all states has also been recognized by ICL in its 2nd report on jus cogens norms.[176] In this report, ILC uses the provisions of Article 53 of the Vienna Convention as the foundation for the criterion for the identification of jus cogens norms.[177]

2.2.3 ILC's Criterion for the Identification of Jus Cogens norms

[171] See James A Green, "Questioning the Jus Cogens Status of the Prohibition of the Use of Force" (2011) 32:2 Mich J Intl L 215 at 219. [Green, "Questioning the Jus Cogens Status"]
[172] See Saul, *supra* note 164 at 29.
[173] See Johnston, *supra* note 86 at 43.
[174] See e.g. Erika De Wet, "The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law" (2004) 15:1 EJIL 97 at 99. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Yugoslavia (Serbia and Montenegro))* Order of 13 September 1993, Separate Opinion Judge Lauterpacht [1993] ICJ Rep 407 at 440 [*Separate Opinion Judge Lauterpacht*].
[175] See Thirlway, *supra* note 86 at 162.
[176] See *ILC Report II, supra* note 153 at paras 33, 36.
[177] *Ibid* at para 32.

Established in 1947 by the United Nations with the object of promoting "the progressive development of international law and its codification"[178], ILC is an international organization and an august authority on matters of international law. Its work is highly cited in the academic literature and relied upon by judicial institutions in rendering their decisions on matters of international law.[179] Commenting on the influence of the ILC's work in developing international law, Wood states that "the influence of the Commission's work is felt in many ways, and often well before the final outcome of its work has emerged."[180]

In 2015, ILC appointed Dire Tladi as a Special Rapporteur to study the topic of "jus cogens", which ILC had recently included in its "programme of work".[181] The second report of the Special Rapporteur on jus cogens dealt specifically with the issue of the identification of jus cogens norms. Draft conclusions from the second report were then included by ILC in its 2017 annual report.

ILC employed the definition of jus cogens provided under Article 53 as a foundation for establishing criteria to identify jus cogens norms. Elucidating its rationale for doing so, ILC asserted that this approach is consistent with the practice of "international courts and tribunals" as these judicial bodies have consistently referenced Article 53 while dealing with jus cogens norms.[182] It further stated that employing Article 53 for identifying jus cogens norms is also

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[178] *Statute of the International Law Commission*, UNGA, 6th Sess art 1, UN Doc A/RES/600 (1952), art 1. See also International Law Commission, "About the Commission" (last updated on 19 June 2023), online:< https://legal.un.org/ilc/ilcintro.shtml>.

[179] For a detailed analysis of the working of the Commission, see United Nations, *The Work of the International Law Commission*, 8th ed, vol 1 (New York: United Nations, 2012), online: <https://legal.un.org/avl/ILC/8th_E/Vol_I.pdf>. See also Sotirios-Ioannis Lekkas, "The Uses of the Outputs of the International Law Commission in International Adjudication: Subsidiary Means or Artefacts of Rules?" (2022) 69 Neth Int Law Rev 327, online: <https://link.springer.com/Article /10.1007/s40802-022-00221-1**>.**

[180]See Michael Wood, "The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why? in Gerhard Hafner & Sabelle Buffard, eds, *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Leiden, Boston: Martinus Nijhoff Publishers, 200) 373 at 383.

[181] See *Report of the International Law*, ILC 69th Sess, UN Doc A/72/10 (2017) 132 at 132, online: <https://legal.un.org/ilc/reports/2017/english/chp8.pdf>.

[182] See *ILC Report II, supra* note 153 at para 33.

consistent with scholarly writings and is in accordance with "views expressed by States during debates in the General Assembly".[183]

Article 53 consists of two sentences: while the first sentence merely stipulates the consequences for a norm of international law that conflicts with a jus cogens norm, the second sentence sets out the definition of jus cogens. As per Article 53, there are two criteria which are to be satisfied before a norm can be characterized as a jus cogens norm of international law. These criteria are:

- The norm in question must be a "norm of general international law"; and,
- It must be "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".[184]

The above-mentioned criteria are two sequential stages in the formation as well as the identification of jus cogens norms, meaning that; the question of 'acceptance and recognition' comes after the norm in question has been established to be a "norm of general international law".[185] Some international scholars argue that in addition to the above-mentioned stages, the norm in question must satisfy another condition to be characterized as a jus cogens norm, that is, it can be modified only by a subsequent jus cogens norm.[186] Arguing to the contrary, ILC states that this so-called third condition is not a condition for the identification of jus cogens norms "but only describes how an existing norm can be modified."[187] The following section will elaborate the two criteria elucidated by ILC for identifying of jus cogens norms.

2.2.3.1 A Norm of General International Law

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[183] *Ibid.*
[184] *Ibid* at para 37.
[185] *Ibid* at paras 61-62.
[186] See e.g. Sévrine Knuchel, *Jus Cogens: Identification and Enforcement of Peremptory Norms* (Zurich: Schulthess, 2015) at 49-136.
[187] See *ILC Report II, supra* note 153 at para 37.

Article 53 explicitly sets out the first condition for the identification of jus cogens norms, that is, jus cogens norms are to be norms of general international law. General international law refers to "international law that is binding on most if not all, States. It is the law which governs the international community in general..."[188]. It is different from 'regional international law' which is binding only "upon States from an identified geographical region" and 'particular international law' which is binding only on a small number of states.[189]

ILC notes that the view that a jus cogens norm is "a norm of general international law" has been frequently stated in the commentary to the "Commission's Articles on the law of treaties".[190] The same approach (jus cogens norms being norms of general international law) has also been adopted by international as well as domestic courts.[191] While acknowledging that "there is no accepted definition of general international law", ILC states that elements of 'general international law' can be inferred "from the practice and literature".[192] ILC explains, on the basis of the practice and literature, that the term general in 'general international law' has been used to refer, for the purpose of Article 53, "to the scope of applicability". It, therefore, refers to rules that are universally applicable but can be derogated from by an agreement between states.[193] It is the possibility of derogation by states from the 'norms of general international law' that distinguishes them from jus cogens norms of international law.

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[188] See Rafael Nieto-Navia, "International Peremptory Norms (Jus Cogens) And International Humanitarian Law" in Lal Chand Vohrah et al, eds, *Man's Inhumanity to Man:* Essays on International Law in Honour of Antonio Cassese, vol 5 (The Hague; New York: Kluwer Law International, 2003) 595 at 611.
[189] *Ibid.*
[190] *ILC Report II, supra* note 153 at para 40.
[191] See e.g. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment [2012] ICJ Rep 422 at para. 99 [*Belgium v. Senegal*] ("the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens"). *Buell v. Mitchell*, 274 F.3d 337 ("[s]ome customary norms of international law reach a 'higher status', in which they 'are recognized by the international community of States as peremptory …" at 373).
[192] *ILC Report II, supra* note 153 at para 41.
[193] *Ibid* at para 42.

ILC further notes that customary international law is the clearest "manifestation of general international law".[194] In fact, there exists a close connection between rules of customary international law and jus cogens norms and the same is illustrated in the case law of international courts, in relevant academic literature as well as in statements made by states at the UN General Assembly sessions.[195] As Heieck notes "the predominant view among international legal scholars is that jus cogens norms are generated through the customary international law process – i.e. through state practice and 'double acceptance'"[196]. Relying on the case law of international and domestic courts, ILC concludes that "customary international law rules qualify as norms of general international law for the purposes of the criteria for the identification of jus cogens derived from Article 53 of the Vienna Convention."

In addition to the rules of customary international law, "norms of general international law" under Article 53 also encompass "the general principles of law recognized by civilized nations" (hereinafter referred to as "general principles of law") which are also one of the sources of international law under Article 38(1)(c) of the Statute of the International Court of Justice.[197] General principles of law possess characteristics similar to those of customary international law, such as; they are generally applicable to all states unless their applicability has been excluded by an agreement between states.

While there exists a dearth of authority in support of the argument "that general principles of law also constitute a basis for jus cogens norms", it does not justify the exclusion of 'general

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[194] *Ibid* at para 43.

[195] See e.g. Paust, *supra* note 158 at 82 (notes that "[j]us cogens is a form of customary international law"). See also *Belgium v. Senegal*, *supra* note 191 at para 99.

[196] Heieck explains that 'double acceptance' refers to the dual belief held by states that a particular "practice is legally required" of them and that this "practice is non-derogable" (See Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 190).

[197] *Statute of the International Court of Justice,* UN, 26 June 1945 (entered into force on 14 October 1945), 1155 UNTS 331 art 53 [*ICJ Statute*].

principles of law' as one of the bases of jus cogens norms.[198] ILC argues that the inclusion in Article 53 of the phrase "general international law" was intended to indicate that general principles of law could serve as a foundation for jus cogens norms"[199]. ILC, therefore, concludes that "the phrase "general international law" … encompasses, in addition to customary international law, general principles of law."[200]

On the question of whether treaty law forms a basis for jus cogens norms, different views have been expressed in international legal literature. While some scholars argue that treaty law does form a basis for jus cogens norms[201], others argue to the contrary.[202] The latter view that treaty law does not constitute a "norm of general international law", is more prevalent and has also been adopted by ILC in its second report on jus cogens norms.[203] While a "norm of general international law" applies generally to all the states unless contracted out by one or more states by an agreement between them, treaty law applies "only to the parties to the treaty".[204] Relying on international and domestic judicial decisions, ILC notes that when a norm exists both under customary international law and treaty law and a court determines it to be a jus cogens norm, such a determination is based not on its conventional status but on its customary status under international law.[205] It does not, however, follow that treaty law is immaterial to "general international law and the identification of jus cogens norms." Treaties are relevant to customary

[198] *ILC Report II, supra* note 153 at paras 41, 49, 51.
[199] *Ibid* at para 51.
[200] *Ibid* at para 52.
[201] See e.g. Grigory Tunki, "Is General International Law Customary Law Only?" (1993) 4:4 EJIL 534 ("as a result of the codification and progressive development of international law, a number of general multilateral treaties have become or are becoming part of general international law" at 538). See also Heieck*, A Duty to Prevent Genocide, supra* note 82 at 190-91.
[202] See, for e.eg, Michael Byers, "Conceptualizing the Relationship between Jus Cogens and Erga Omnes Rules" (1997) 66:2-3 Nordic J Int'l L 211. at 220-21.
[203] *ILC Report II, supra* note 153 at paras 53-57.
[204] *Ibid* at para 55.
[205] *Ibid* at paras 57-59.

international law in three ways: (1) confirming a pre-existing custom, (2) crystallizing a nascent custom, and (3) establishing a new custom.[206] Based on its analysis of judicial practice and state practice, ILC concluded that while treaty law does not constitute "norms of general international law" and, therefore, does not form a basis for the identification of jus cogens norms, it may sometimes reflect general international law that could potentially be elevated to the status of a jus cogens norm.[207]

2.2.3.2 Recognition and Acceptance

Once the first criterion for the identification of jus cogens norms has been satisfied, the analysis of the norm in question proceeds to the second stage, that is, whether the norm has been "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." The main criterion here is 'acceptance' and 'recognition' of the fact of non-derogation. The remaining elements of the definition of jus cogens norm under Article 53 (no derogation permitted and can be "modified only by a norm of general international law having the same character") are consequences of a norm being accorded the status of a jus cogens norm and, therefore, need not be proven for a norm to be identified as a jus cogens norm.[208]

Legal scholars have proffered different interpretations of the phrase "accepted and recognized". Danilenko argues that the phrase "accepted and recognized" has been included in Article 53 of the Vienna Convention to bring the definition of jus cogens norms in line with Article 38(I) of the Statute of ICJ[209] and the phrase, therefore, provides a consensual basis for the

[206] See *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* [1969] ICJ 3 at paras 60-74. See also Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 79-84. *ILC Report II, supra* note 153 at paras 56.
[207] *ILC Report II, supra* note 153 at para 59.
[208] *Ibid* at para 73.
[209] See Danilenko, *supra* note 157 at 53.

formation and identification of jus cogens norms.[210] Saul draws an analogy between 'acceptance' and 'recognition' of jus cogens norms on the one hand and 'opinio juris' for customary international law on the other hand and emphasizes the relevance of opinio juris in determining the 'acceptance' and 'recognition' of a norm as a jus cogens norm.[211]

ILC notes that "[i]t is the acceptance and recognition that is at the heart of the elevation of a norm to jus cogens status."[212] ILC further explains what it is that is to be "accepted and recognized by the international community of states" for a "norm of general international law" to be identified as a jus cogens norm. It asserts that 'recognition' and 'acceptance' for the purpose of Article 53 of the Vienna Convention refer to 'recognition' and 'acceptance' by the "international community of states as a whole" of the fact that the "norm of general international law" possesses the quality of non-derogability, that is, the said norm cannot be derogated from by states.[213] As stated above, non-derogation per se is not one of the criteria for the identification of jus cogens norms but is merely a consequence of such identification. It is, however, the acceptance and recognition by states of the quality of non-derogability of a norm that is relevant for its identification as a jus cogens norm.[214] Acceptance and recognition of the quality of non-derogability of a norm by states also implies that "the norm in question will remain universally applicable and not subject to fragmentation."[215]

ILC also dealt with the question of "how the acceptance and recognition of non-derogability — opinio juris cogentis — is to be shown." It is primarily the perspective of states regarding the

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[210] *Ibid* at 53-54. See also, Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 191.
[211] See Saul, *supra* note 164 at 40-41.
[212] *Ibid* at para 76.
[213] *ILC Report II, supra* note 153 at para 73.
[214] *Ibid* at para 74.
[215] Alexander Orakhelashvili, "Audience and authority — the merit of the doctrine of jus cogens" in Maarten den Heijer & Harmen Van Der Wilt, eds, *Netherlands yearbook of international law 2015. Jus cogens: Quo Vadis?* (The Hague: Asser Press; Berlin: Springer, 2016) 115 at 118.

status of a norm that is to be taken into consideration to determine whether the said norm has attained the status of a jus cogens norm.[216] ILC asserts that the instruments and materials "developed, adopted and /or endorsed" by states that are "capable of expressing the views of states" are the most relevant and non-controversial materials to determine whether or not the non-derogability of the norm in question has been accepted and recognized by states[217]. Such materials include treaties and resolutions adopted by the UN General Assembly, legislation, legal opinions of governments, diplomatic communications, and municipal court rulings. In addition, rulings of international judicial institutions can also be utilized to support the argument that a particular norm has been accepted and recognized by states as a jus cogens norm.[218] That said, materials developed by non-state bodies, such as reports of the UN Human Rights Council and the International Law Commission, are not completely irrelevant and can be used as subsidiary sources to assess and analyze "materials reflecting the views of states".[219]

The phrase "as a whole" in Article 53 of the Vienna Convention has been interpreted by international legal scholars to refer to acceptance and recognition by a vast majority of states. Commenting on the phrase "accepted and recognized by the international community of States as a whole", M.K. Yasseen, former Chairman of the drafting committee on the Law of Treaties, states that the phrase "as a whole" does not mean that a rule must be accepted by all the states of the world. According to him, what the phrase "as a whole" means is 'recognition' and 'acceptance' of the rule in question by "a very large majority of states".[220] Similarly, Hannikainen argues that the phrase "international community of States as a whole" means that the states accepting and

[216] *ILC Report II, supra* note 153 at paras 69, 70.
[217] *Ibid* at para 78-89
[218] *Ibid* at para 85.
[219] *Ibid* at paras 79-82.
[220] *United Nations Conference on the Law of Treaties*, 1st Sess, UN Doc A/CONF.39/C.1/SR.80 (1968) 80th Mtg. at 294.

recognizing a norm as a jus cogens norm comprise the "overwhelming majority of states, but again not necessarily all states".[221] Hossain notes that "[a]s for the binding character of jus cogens, acceptance by a large majority of states of such norm would amount to universal legal obligation for the international community as a whole."[222]

2.3 Duty to Prevent Genocide: A Jus Cogens Norm?

The two criteria for the identification of jus cogens norms elucidated above will be applied to the duty to prevent genocide to examine if it can be characterized as a jus cogens norm.

2.3.1 Duty to Prevent Genocide: A Norm of General International Law?

The first criterion for the identification of a jus cogens norm, as set out by ILC and elucidated above, is that the norm in question should be a "norm of general international law" (rules that are universally applicable). Customary international law and "the general principles of law recognized by civilized nations" are referred to by ILC as the clearest manifestations of norms of general international law.

Legal scholars have frequently proffered the argument that the duty to punish and prevent genocide under Article I of the Genocide Convention is a norm of customary international law. Mettraux states that the duty to prevent and punish genocide, being a norm of customary international law, is "binding even without any conventional obligation".[223] Arguing along the same lines, Heieck states that the duty to prevent genocide is a "rule of customary international

[221] See Stanislaw E Nahlik, "Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status. By Lauri Hannikainen. Helsinki: Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company, 1988. Pp. xxxii, 781. Index. $118" (1990) 84:3 Am J Int Law 779 at 780.
[222] See Hossain, *supra* note 155 at 78.
[223] See Guénaël Mettraux, *International Crimes: Law and Practice: Volume I: Genocide* (Oxford: Oxford University Press, 2019) at 78. See also Lori Lyman Bruun, "Beyond the 1948 Convention - Emerging Principles of Genocide in Customary International Law" (1993) 17 MD. J. Int'l L. & TRADE 193 ([g]enocide Convention "does not represent the entirety of international law on the subject" at 211).

law" and, therefore, applies to all states, including those not parties to the Genocide Convention.[224] Commenting on the Genocide Convention, Arbour states that "[m]ost countries in the world are party to this treaty which, by broad agreement, reflects customary international law binding on all States"[225] Likewise, the "UN Office on Genocide Prevention and the Responsibility to Protect" acknowledges that the prevention of genocide is a norm of customary international law and accordingly, affirms the duty of all states, whether or not parties to the Genocide Convention, to prevent genocide

Judicial bodies have also alluded to the notion that the duty to prevent genocide is a norm of customary international law. ICJ, in the seminal case of 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)' stated that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"[226]. In his dissenting opinion in the case of Bosnia v. Serbia (1996), Judge Kreca elucidated "the principles underlying the Convention".[227] He stated that "the principles underlying the Convention" find their clearest expression "only in the substantive provisions of the convention", specifically in the provisions that delineate its object and purpose.[228] Article I of the Genocide Convention, obligating states to prevent and punish genocide, is a substantive provision of the Convention. As elucidated below[229],

[224] See Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 72-118.
[225] See Arbour, *supra* note 9 at 450. See also Peter Stockburger, "The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking" (2010) 5 Intercultural Hum Rts L Rev 365 at 401 ("it has become universally accepted that the responsibility to prevent genocide is reflective within customary international law"). United Nations Office on Genocide Prevention and the Responsibility to Protect, "The Genocide Convention", online: https://www.un.org/en/genocideprevention/genocide-convention.shtml (obligations to prevent and punish genocide "have been considered as norms of international customary law and therefore, binding on all States, whether or not they have ratified the Genocide Convention").
[226] *Advisory Opinion on Reservation to the Genocide Convention Case*, *supra* note 112 at 23.
[227] *Dissenting Opinion of Judge Kreca, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia,* [1996] ICJ Rep 658.
[228] *Ibid* at 783-84
[229] See Part 3.3.2.1, *below.*

it also represents the object and purpose of the Convention to protect mankind from the scourge of genocide. Resultantly, Article I of the Convention represents "principles underlying the convention", meaning that it is "recognized by civilized nations as binding on States, even without any conventional obligation". Hence, the duty of states to prevent genocide stipulated under Article I of the Convention is binding on all states whether or not they are parties to the Convention and, therefore, constitutes a norm of customary international law. The same has been reiterated in subsequent ICJ judgments as well as in judgments of other judicial institutions.[230] From the foregoing analysis, it is safe to conclude that the duty to prevent genocide constitutes a norm of customary international law. As explained above,[231] customary international law is the clearest manifestation of the norms of general international law. Since the duty to prevent genocide is a customary international law, it qualifies as a norm of general international law. Therefore, the first criterion for identifying a jus cogens norm has been satisfied regarding the duty to prevent genocide.

2.3.2 Acceptance and Recognition by a Vast Majority of States of the Non-derogability of the Duty to Prevent Genocide.

The second criterion for the identification of jus cogens norms, set forth by ICL and discussed above, is that the norm in question has to be "accepted and recognized by the international community of states as a whole" as a non-derogable norm. It is this very criterion that distinguishes jus cogens norms from other norms of general international law. From the above-mentioned analysis of academic literature and ILC's elucidation of the second criterion for the identification of jus cogens norms, the following three main elements of the second criterion can be deduced: (1)

[230] See e.g. *Bosnia v. Serbia, supra* note 81 at para 161. See also *Congo. v. Rwanda, supra* note 150 at 64. *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 SCR 100 at para 82.
[231] See Part 2.2.3.1, *above.*

acceptance and recognition that the norm in question cannot be derogated from by states, (2) such acceptance and recognition must be by a 'vast majority of states', and (3) acceptance and recognition that the norm in question is universally applicable.

2.3.2.1 Acceptance and Recognition of the Non-derogability of the Duty to Prevent Genocide

Article I of the Genocide Convention stipulates the duty of states to prevent genocide. Under international law, states may make reservations to a treaty while signing or ratifying the said treaty, provided that, such reservations are not expressly prohibited by a treaty and that they do not run contrary to its object and purpose.[232] Reservations "allow states to adjust particular obligations" and "to relax obligations that might otherwise make a given treaty too costly to ratify."[233] Basically, reservations provide some latitude to states to mould an obligation contained in the provisions reserved to by them and, thereby, allow them to derogate from the exact obligation contained in such provisions. Regarding the duty to prevent genocide, it is noteworthy that the Genocide Convention contains no provision that prohibits reservations to Article I, or for that matter, any other Article of the convention. However, it is equally noteworthy that despite no express prohibition on states to make reservations, no reservation has been made to Article I of the Genocide Convention incorporating the duty of states to prevent genocide. The fact that no reservation has been made to the duty to prevent genocide since the very inception of the Genocide Convention even when there exists no provision in the Convention prohibiting such reservations reflects the attitude of states toward the duty to prevent genocide, i.e., states perceive the duty to

[232] *Vienna Convention*, *supra* note 168, art 19 ("[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless… the reservation is incompatible with the object and purpose of the treaty.").

[233] See Kelebogile Zvobgo, Wayne Sandholtz & Suzie Mulesky, "Reserving Rights: Explaining Human Rights Treaty Reservations" (2020) 64:4 Int Stud Q 785 at 785, online(pdf): <https://academic.oup.com/isq/Article/64/4/785/5908076>.

prevent genocide as non-derogable. That said, some arguments may potentially be advanced to counter the aforementioned proposition.

In the *Advisory Opinion on Reservations to the Genocide Convention* Case, ICJ noted that reservations incompatible with a treaty's object and purpose are not permitted and that a state making such reservations "cannot be regarded as being a party to the Convention."[234] Provisions to a similar effect can also be found in Article 19 of the Vienna Convention.[235] Regarding the Genocide Convention, one of the most obvious objectives and purposes of the Convention is to liberate mankind from the odious scourge of genocide.[236] Accordingly, Article I of the Genocide Convention, which imposes on states the duty to prevent and punish genocide, is the most clear manifestation of the object and purpose of the Genocide Convention. And since Article I of the Genocide Convention reflects the object and purpose of the Convention, it could be argued that states have abstained from making reservations to Article I of the Genocide Convention not because they accept the non-derogability of the duty to prevent genocide but because their freedom to make reservations to Article I has been curtailed by virtue of the aforementioned finding of ICJ and Article 19 of the Vienna Convention.

However, while this may be true, it is important to note that the duty of states to prevent genocide is also a norm of customary international law[237]. Therefore the 'persistent objector rule'[238] applies to the duty to prevent genocide. On that account, if a state had intended to derogate

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[234] *Advisory Opinion on Reservations to the Genocide Convention Case, supra note* 112 at 18.
[235] *Vienna Convention, supra* note 168, art 19.
[236] See the preamble, *Genocide Convention*, *supra* note 7. See also Dan Eshet, *Totally Unofficial: Raphael Lemkin and the Genocide Convention,* ed by Adam Strom& the Facing History and Ourselves Staff (Facing History and Ourselves, 2007) at 1. Mark Gibney, "State Responsibility and the Object and Purpose of the Genocide Convention" (2007) 4: Issues 2-3 Int'l Stud J 141 at 144. United Nations, "The Convention on the Prevention and Punishment of the Crime of Genocide, 1948-2018, Appeal: Universal Ratification 2018" at 2, online (pdf): https://www.un.org/en/genocideprevention/documents/Appeal-Ratification-Genocide-FactSheet_final.pdf.
[237] See Part 2.3.1, *above.*
[238] For elucidation off the 'persistent objector rule', see James A Green, *The Persistent Objector Rule in International Law,* 1st ed (Oxford, United Kingdom: Oxford University Press, 2016) ("[a] core aspect of mainstream

from its duty to prevent genocide, it could have also done so by persistently objecting to such a duty, and by doing so, it could have exempted itself from the application of the customary international law duty to prevent genocide. However, to date, no state is known to have objected to its customary intranational duty to prevent genocide. Further, the travaux préparatoires to the Genocide Convention reveal that throughout the process that led to the adoption of the Genocide Convention, there existed a clear consensus among states that contracting parties should prevent genocide.[239] In fact, the preamble[240] and Article II[241] of the Genocide Convention's very first draught proposal contained explicit provisions on the subject of the prevention of genocide. Therefore, while the fact that no reservations to Article I of the Genocide Convention have been made by states may not, in itself, be sufficient to conclude that states have accepted and recognized the non-derogable character of the duty to prevent genocide, when it is considered in conjunction with the facts that there exists no persistent objector to the duty to prevent genocide under customary international law and that the states unanimously supported, during negotiations on draft proposals of the Genocide Convention, the notion that states should prevent genocide, signal the acceptance and recognition of the non-derogable character of their duty to prevent genocide under the Genocide Convention as well as under customary international law. Hence, the first element of the second criterion for the identification of a jus cogens norm is satisfied.

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international law doctrine, the rule ostensibly holds that if a state persistently and consistently objects to a newly emerging norm of customary international law during the period of the 'formation' of that norm (i.e. prior to its crystallization as a binding rule of customary international law), then the objecting state is exempt from the customary norm in question once it has crystallized and for so long as the objection is maintained" at 1).

[239] See generally Hirad Abtahi & Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Leiden, Boston: Martinus Nijhoff Publishers, 2008). See also Ventura, *supra* note 79 at 292-306.

[240] *Delegation of Saudi Arabia: Draft Protocol for The Prevention and Punishment of Genocide,* UNGA, 1946, UN Doc A/*C.*6/86*,* online*:* https://digitallibrary.un.org/record/752077?ln=en *("*[w]hereas the atrocities committed against humanity which violated the rules of international law and shocked public conscience make it imperative for the nations of the world to take concerted action to prevent and penalize the commission of such acts in the future").

[241] *Ibid* ("The parties to this protocol agree to make effective use of every means at their disposal, acting separately or in co-operation to prevent and penalize genocide.")

2.3.2.2 Acceptance and recognition by a Vast Majority of States

The second element is that the acceptance and recognition of a jus cogens norm should be by a 'vast majority of states' and not necessarily by all states. It has generally been accepted that non-acceptance or opposition by a few states is not an impediment to the creation of jus cogens norms and that a jus cogens norm is binding on all states, including those who opposed its creation.[242] This line of argument has also been endorsed by ICL.[243] Regarding the duty of states to prevent genocide, it is noteworthy that many countries have adopted and ratified the Genocide Convention. As of April 2022, 153 UN member states have ratified or acceded to the Genocide Convention.[244] By doing so, 153 states have expressly taken upon themselves the duty to prevent genocide, which, as elucidated above, cannot be ousted by a state by a reservation to Article I of the Genocide Convention. In addition, as discussed above, the duty to prevent genocide is also a norm of customary international law, and no state has objected to its duty to prevent genocide under customary international law. Moreover, a significant number of countries have either incorporated provisions criminalizing genocide in their penal codes or have enacted separate legislation containing provisions to prevent and punish genocide.[245] From the foregoing discussions, it can be concluded that a vast majority of states have accepted and recognized the duty to prevent genocide.

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[242] See e.g. Giorgio Gaja, "Jus Cogens beyond the Vienna Convention (Volume 172)" in *Collected Courses of the Hague Academy of International Law*, vol 172 (Hague Academy of International Law, 1981) 279 at 283, online: https://styluscuriarum.files.wordpress.com/2019/08/gaja-jus-cogens-beyond-the-vienna-convention-2.pdf. See also R ST J MacDonald, "Fundamental Norms in Contemporary International Law" (1988) 25 Can Y.B.Int. L 115 ("it is the essence of the concept that a peremptory norm is applicable against states that have not accepted the rule" at 131) [emphasis added].

[243] *ILC Report II, supra* note 153 at para 67.

[244] UN Office on Genocide Prevention and the Responsibility to Protect, "Ratification of The Genocide Convention", online: https://www.un.org/en/genocideprevention/genocide-convention.shtml#:~:text=The%20Genocide%20Convention%20has%20been,Asia%20and%206%20from%20America.

[245] United States Holocaust Memorial Museum, "The Legal Framework", online: <https://www.ushmm.org/genocide-prevention/simon-skjodt-center/work/ferencz-international-justice-initiative/transitional-justice/the-legal-framework>.

That said, it has been argued that acceptance and recognition by a vast majority of states are not sufficient for the formation of a jus cogens norm and that it also requires concurrence by "all the essential components of the international community".[246] However, this line of argument lacks support in the academic literature. Furthermore, even if this line of argument was to be accepted, it would not have impacted the examination of the jus cogens nature of the prevention of genocide as no state is known to have opposed the duty to prevent genocide under the Genocide Convention and customary international law. Hence, the second element of the second criterion for the identification of the jus cogens norm is satisfied.

2.3.2.3 Universal Application of the Duty to Prevent Genocide

The third element of the 2nd criterion for the identification of a jus cogens norm is that the norm in question should be universally applicable. The ICJ, in the *Advisory Opinion on Reservations to the Genocide Convention Case*, recognized the universal character of the Genocide Convention and ruled that, unlike other treaties, the Genocide Convention represents a communal interest ("to liberate mankind from such an odious scourge") and not personal interests of state parties to the Convention and that it was "intended by the…contracting parties to be definitely universal in scope"[247]. Furthermore, ICJ, in the Bosnia v Serbia case, ruled that the duty to prevent and punish genocide under Article 1 of the Genocide Convention is not territorially limited and obliges all state parties to the Convention to do everything in their capacity to prevent or halt genocide.[248] This precedent has also been reiterated by ICJ in several of its other judgments.[249] Also, as

[246] For an overview of this line of argument, see Danilenko, *supra* note 157 at 53-57.
[247] *Advisory Opinion on Reservation to the Genocide Convention Case, supra* note 112 at 7-8.
[248] *Bosnia v. Serbia, supra* note 81 at para 183.
[249] See e.g. *Case Concerning the Barcelona Traction and The Power Company, Limited (Belgium v. Spain),* judgment, [1970] ICJ Rep 3 (erga omnes obligations "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide" at para 34). See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia,*

discussed above, Article I of the Genocide Convention reflects the object and purpose of the Convention and, therefore, no reservations to Article I can be made by states. Given the universal application of the Genocide Convention and the restriction on the right of states to make reservations to Article I of the Convention, it can be concluded that the duty to prevent genocide is universally applicable. Hence the final element of the second criterion for the identification of jus cogens norms has been satisfied in respect of the duty of states to prevent genocide.

From the foregoing, it is evident that the duty to prevent genocide satisfies both the criteria for the identification and formation of jus cogens norms. As a result, the duty to prevent genocide can be aptly characterized as a jus cogens norm of international law.

2.4 Legal Implications of The Jus Cogens Status of The Duty to Prevent Genocide for The Veto Power of P5 Members.

2.4.1 Introduction

As elucidated above,[250] the UN Security Council enjoys extensive powers under the UN Charter and has been empowered by the UN Charter to pass binding resolutions incorporating various measures, including measures involving authorization for the use of military force, for upholding 'international peace and order'. Under Article 27 (3) of the Charter, P5 members of the UN Security Council have been entrusted with a unique power to unilaterally veto any resolution of the Security Council except for resolutions dealing with procedural matters. In addition, if a preliminary question is raised regarding the nature (procedural or substantive) of a matter before the UN Security Council, it is treated as a substantive issue entitling P5 members to exercise their

[1996] ICJ Rep 595("the rights and obligations enshrined by the Convention are rights and obligations erga omnes" at para 31).

[250] See Part 1.4, *above.*

veto power.[251] Therefore, P5 members can exercise an indirect veto even in matters that are apparently procedural in nature by disputing the nature of such matters and then voting against the determination of such matters as procedural. This extensive power of P5 members to exercise a veto on the question of the nature of a matter (procedural or substantive) before the Security Council coupled with its power to veto any resolution dealing with substantive matters is referred to as a "system of double veto".[252]

2.4.2 Veto Power of P5 Members under the UN Charter vis-à-vis the Jus Cogens Duty of P5 members to Prevent Genocide.

As elucidated above, all P5 members are parties to the Genocide Convention and hence, are under the obligation to prevent genocide under Article 1 of the Convention.[253] Furthermore, the obligation of P5 members to prevent genocide also exists under customary international law.[254] The due diligence standards to be satisfied by P5 members to effectively discharge their duty to prevent genocide require them to do everything within their power to prevent genocide, including to restrain from vetoing R2P third pillar resolutions aimed at preventing genocide.[255] When P5 members, acting within the UN Security Council, are faced with a situation of potential genocide, their obligation to prevent genocide under conventional law as well as under customary international law may come in conflict with their veto power under Article 27 of the UN Charter. Such a conflict occurs when a P5 member, exercising its veto power under Article 27, vetoes a

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[251] See Andreas Zimmermann, "The Security Council, Voting, Article 27" in Bruno Simma et al, eds, 3rd ed, *The Charter of United Nations: A Commentary* (Oxford: Oxford University Press, 2012) vol 1 at 903-12. See also Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 72-118.

[252] See Thomas Schindlmayr, "Obstructing the Security Council: The Use of the Veto in the Twentieth Century" (2001) 3:2 J Hist Int'l L 218 at 224. See also Zimmermann, *supra* note 251 at 904. Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 152. See generally Leo Gross, "Double Veto and the Four-Power Statement on Voting in the Security Council" (1953) 67:2 Harv L Rev 251. Aderito Vicente, "United Nations Security Council Reform: The Question of the Veto Power" (2013) Multilateral Diplomacy Summer School–Student Papers 19 at 22.

[253] See Part I.4, *above.*

[254] *Ibid.*

[255] *Ibid.*

resolution that is aimed at preventing a potential genocide or halting an ongoing genocide and, thereby fails to satisfy due diligence standards entailed by the duty to prevent genocide. By so doing, the vetoing P5 member violates its obligation to prevent genocide under conventional and customary international law. Such a conflict between the obligations and rights of a UN member state under the UN Charter and its obligations under other international agreements as well as customary international law is resolved by resorting to Article 103 of the UN Charter.

Article 103, which is also referred to as the 'supremacy clause', provides that "[i]n the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".[256] The term 'obligations' under Article 103 has been interpreted to include the duty of member states under Article 25 of the Charter to "accept and carry out the decisions of the Security Council in accordance with the present Charter"[257]. Article 103 applies also to permissions (authorizations) granted by the UN Security Council to states by its resolutions.[258] Therefore, in case of a conflict between the permissive rights of states under the UN Security Council resolutions and their obligations under any other rule of international law, the former will prevail over the latter. It has also been suggested that Article 103 also applies to the rights of states that "correspond to treaty obligations to which Article 103 applies expressly so that this provision

[256] *UN Charter, supra* note 41, art 103.

[257] See Johann Ruben Leiss & Andreas Paulus, "Miscellaneous Provisions, Article 103" in Bruno Simma et al, eds, 3rd ed, *The Charter of United Nations: A Commentary* (Oxford: Oxford University Press, 2012) vol 2 ("[b]y Art. 103, the obligation under Art. 25 in turn prevails over any other rights and commitments under international law" at 2124). See also Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of International Law Commission, UN Doc A/C.4.L.682 (2006) at para 34. [*Fragmentation of International Law*]. Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 167-68.

[258] See Leiss & Paulus, *supra* note 257 at 2122-24. See also Sophocles Kitharidis, "The Power of Article 103 of the UN Charter on Treaty Obligations: Can the Security Council Authorize Non-Compliance of Human Rights Treaty Obligations in United Nations Peacekeeping Operations?" (2006) 20:1 J. Int. Peacekeeping 111 at 116-18.

is fully effective with regard to the obligations which are covered by its scope".[259] Article 103, therefore, also applies to the rights of P5 members. In addition, it has been generally accepted that a "contextual and purposive" interpretation of Article 103 shows that it establishes the supremacy of obligations and rights under the UN Charter not only over obligations under "international agreements" but also over obligations under international customary law.[260]

From the foregoing analysis of Article 103, it is clear that Article 103 establishes the superiority of the Charter law over other international agreements as well as over customary international law. Resultantly, the rights and obligations of the UN Security Council under the UN Charter, including the right of P5 members to veto any resolution dealing with substantive matters, are given precedence over their obligations under other international agreements and customary international law. It follows that the veto power of P5 members under Article 27 of the UN Charter takes precedence over their obligation to prevent genocide under the Genocide Convention and customary international law. It can, therefore, be concluded that P5 members can, by virtue of Article 103 of the UN Charter, veto an R2P third pillar resolution that is aimed at preventing or halting a genocide even if doing so is contrary to their duty to prevent genocide under the Genocide Convention as well as under customary international law.

However, as argued above, the duty to prevent genocide also qualifies, by applying the ILC's criteria for identifying jus cogens norms, as a jus cogens norm of international law. The question, therefore, arises whether the supremacy clause of the UN Charter can also defeat the jus cogens norm of the duty of states to prevent genocide.

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[259] See Orakhelashvili, *Peremptory Norms*, *supra* note 159 at 435. See also Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 171, citing Leiss & Paulus, *supra* note 257 at 2121-28. Koskenniemi, *supra* note 257 at para 345.
[260] See Leiss & Paulus, *supra* note 257 at 2132-33. See also Heieck, *A Duty to Prevent Genocide*, *supra* note 82 at 167-71. Nico Krisch, "Introduction to Chapter VII: The General Framework" in Simma et al, *supra* note 251 at 1262. Koskenniemi, *supra* note 257 at paras 344-45.

2.5 Article 103 of the UN Charter and Jus Cogens Obligation of P5 Members to Prevent Genocide.

A few counterarguments aside [261], the prevailing view in international legal literature acknowledges the existence and supremacy of jus cogens norms over other norms of international law. As elucidated above, jus cogens norms lie at the zenith of the hierarchy of norms of international law, and any norm of international law that conflicts with jus cogens norms is void.[262] Jus cogens norms are universally applicable, non-derogable and cannot be contracted out by states by entering into agreements with one another.[263]

As has been argued above, the duty to prevent genocide, in addition to being a part of conventional law and customary international law, also qualifies by applying the ILC's criteria for the identification of jus cogens norms as a jus cogens norm of international law. It has also been noted above that P5 members may, by virtue of Article 103 of the UN Charter, supersede their duty to prevent genocide under the Genocide Convention and customary international law by vetoing an R2P resolution aimed at preventing a potential genocide. However, since the duty to prevent genocide also qualifies as a jus cogens norm, the question arises whether P5 members can, by virtue of Article 103, exercise their veto power under Article 27 of the UN Charter in contravention of jus cogens norms of international law. While this question has been subject to some debate in legal literature, it has generally been answered negatively.

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[261] See e.g. Jure Vidmar, "Rethinking Jus Cogens After Germany V. Italy: Back to Article 53?" (2013) 60:1 Neth. Int. Law Rev. 1 ("Jus cogens is a legal manifestation of norms that have a particularly strong ethical underpinning. But it is not a trump card and its direct legal effects are limited" at 25). See also A. Mark Weisburd, "The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina" (1995) 17 Mich. J. Int'l L. 1. Markus Petsche, "Jus Cogens as a Vision of the International Legal Order" (2010) 29:2 Penn St Int'l L Rev 233 at 235-36.
[262] See Part 2.2.1, *above.*
[263] *Ibid*.

Some international legal scholars have argued that the powers of the UN Security Council under international law are unbridled and that the Security Council can, by its resolutions, override any jus cogens norm.[264] However, proponents of such arguments find themselves in the minority. It has been widely accepted that Article 103 of the UN Charter only establishes the supremacy of obligations and rights under the UN Charter over obligations under conventional and customary international law and does not defeat the supremacy of jus cogens norms.[265] The view that Article 103 of the UN Charter supersedes jus cogens norms has been rejected in legal literature and international jurisprudence.[266] Therefore, the actions of the UN Security Council are equally subject to jus cogens norms as the actions of any other entity within the framework of international law.[267]

Based on the foregoing analysis, it can be concluded that the jus cogens duty to prevent genocide cannot be defeated by the UN Security Council resolutions by relying on Article 103 of the UN Charter. Resultantly, in situations of genocide falling under the third pillar of R2P and requiring international intervention, P5 members are under an obligation, to satisfy due diligence

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[264] See e.g. Bernd Martenczuk, "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?" (1999) 10 Eur. J. Int. Law 545 ("it is doubtful whether *jus cogens* can constitute a binding imitation on the Council's discretion under Chapter VII...As a result the Council's discretion to overrule the rights of parties to a dispute that constitutes a situation under Article 39 is essentially unlimited" at 546). See also Kjetil Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers*, Cambridge Studies in International and Comparative Law, ed (Cambridge: Cambridge University Press, 2012) at 323-25.

[265] See e.g. Leiss & Paulus, *supra* note 257 at 2119-20. See also *Separate Opinion Judge Lauterpacht, supra* note 174 at 440 para 100 ("The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot - as a matter of simple hierarchy of norms - extend to a conflict between a Security Council resolution and jus cogens" at para 100), online: <https://www.icj-cij.org/public/files/case-related/91/091-19930913-ORD-01-05-EN.pdf>. Liivoja, *supra* note 155 at 610 ("jus cogens is a limitation on the powers of the Security Council, as Article 103 cannot establish the primacy of a Charter obligation over jus cogens" at 610). Matthias J. Herdegen, "The Constitutionalization of the UN Security System" (1994) 27:1 Vand J Transnat'l L 135 ("the peremptory norms of international law provide insurmountable limitations upon both the conferment and the exercise of competence flowing from the charter" at 156). Najiba Mustafayena, "The "Supremacy Clause" of Article 103 of the UN Charter and European Ordre Public" (2023/1) İbn Haldun Üniversitesi Hukuk Fakültesi Dergisi 115 at 122-23. Koskenniemi, *supra* note 256 at para 331.

[266] *Ibid*.

[267] See Orakhelashvili, *Peremptory Norms, supra* note 159 at 437.

standards entailed by their duty to prevent genocide, not to veto resolutions authorizing such intervention. If a P5 member vetoes such a resolution and thereby fails to satisfy due diligence standards entailed by the duty to prevent genocide, it will be violating its jus cogens duty to prevent genocide and cannot employ Article 103 to justify the exercise of its veto in contravention of its jus cogens duty. As a result, the veto power of P5 members is restrained in situations of genocide and they are obligated not to veto resolutions aimed at preventing or halting genocide.

2.6 Resolving the Conflict Between Jus Cogens Norms of the Duty to Prevent Genocide and the Prohibition of the Use of Force

As has been argued above, the duty of the UN member states, including P5 members, to prevent genocide is a jus cogens norm requiring P5 members not to veto the UN Security Council resolutions aimed at preventing or halting a genocide falling under the third pillar of R2P. On occasion, the prevention of genocide might necessitate the incorporation of coercive measures in the UN Security Council resolutions, including authorization for military intervention under Article 42 of the UN Charter (hereinafter referred to as Article 42 measures). This will especially be the case when a situation of potential genocide falls under the third pillar of R2P, that is, when a state is unwilling or unable to prevent genocide and peaceful alternatives, if available, have been exhausted or would not be sufficient to prevent it.[268] In such circumstances, the Security Council members, owing to their jus cogens duty to prevent genocide, are under an obligation to incorporate Article 42 measures including military intervention in R2P resolutions being negotiated by them to address the situation of potential genocide. Additionally, as explained in the proceeding section, P5 members are under an obligation not to veto R2P third pillar resolutions, including resolutions incorporating coercive measures, aimed at preventing or halting genocide.

[268]See Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All (*Washington, D.C.: Brookings Institution Press, 2008) at 57, 141 [Evans, *The Responsibility to Protect*].

That said, the prohibition of the use of force is also a jus cogens norm of international law[269]. Consequently, R2P third pillar resolutions authorizing the use of force for the prevention of genocide and the resultant use of actual force will contravene the jus cogens norm of the prohibition of the use of force. Hence, the jus cogens norm of the duty to prevent genocide will come in direct conflict with the jus cogens prohibition of the use of force. As a result, the question of how to reconcile this conflict becomes pertinent.

Jus cogens norms are not immutable and can be modified over time to keep pace with developments in international law.[270] The prevailing approach to altering an existing jus cogens norm is through the formation and the identification of a fresh jus cogens norm that conflicts with the existing one.[271] This approach has also been incorporated into the Vienna Convention.[272] Article 53 of the Vienna Convention provides that a jus cogens norm "can be modified only by a subsequent norm of general international law having the same character."[273] Such modification of the existing jus cogens norm usually takes place by recognizing the conflicting new norm as an exception to the existing one, thereby removing it from the scope of the existing jus cogens

[269] Some arguments have been made disputing the jus cogens nature of the prohibition of the use of force. See e.g. Green, "Questioning the Jus Cogens Status", *supra* note 171 ("it is impossible to conclude that the prohibition is, in itself, peremptory" at 255).
[270] See Ole Spiermann, "Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens" (2002) 71 Nordic JIL 523 ("In principle, rules may be changed although they possess a peremptory character; they may also lose this character" at 538). "Reports of the International Law Commission on the Second Part of its Seven-Tenth Session and on its Eighteenth Session" (UN Doc A/6309/Rev.1) in *Yearbook of the International Law Commission 1996*, Vol 2 (New York: UN, 1966) (A/CN.4/SER.A/1966/Add.l) ("it would clearly be wrong to regard even rules of jus cogens as immutable and incapable of modification in the light of future developments" at 248).
[271] See Johnston, *supra* note 86 at 51.
[272] *Ibid.*
[273] *UN Charter, supra* note 41, art 53.

norm.[274] And since the conflicting norm will be outside the scope of the existing one, its apparent derogation from the existing norm will technically not be a derogation but an exception.[275]

Applying the aforementioned conflict resolution mechanism for jus cogens norms to the conflicting jus cogens norms of the duty to prevent genocide and the prohibition of the use of use, the latter, having been in existence before the former one, will be modified so as to allow, for the purpose of prevention of genocide, the use of force when its use is necessitated by the jus cogens norm of the duty to prevent. Therefore, the conflict between the two jus cogens norms is resolved by recognizing the use of force under the jus cogens norm of the duty to prevent genocide not as a derogation from the jus cogens norm of the prohibition of the use of force but as an exception to the said norm and, thereby falling outside its scope.

2.7 Conclusion

As shown in the previous chapter, P5 members, in order to satisfy the due diligence standards entailed by the duty to prevent genocide under the Genocide Convention and customary international law, are under an obligation not to veto R2P third pillar resolutions aimed at preventing or halting genocide. Nevertheless, the said obligation of P5 members is subordinated, by virtue of Article 103 of the UN Charter, to the veto power granted to them under Article 27 of the Charter. Therefore, P5 members could lawfully veto resolutions aimed at preventing genocide falling under the third pillar of R2P by relying on Article 103 of the UN Charter and thereby

[274] See Andre de Hoogh, "The Compelling Law of Jus Cogens and Exceptions to Peremptory Norms: To Derogate or Not to Derogate, That Is the Question!" in Lorand Bartels & Federica Paddeu, eds, *Exceptions in International Law* (Oxford: Oxford University Press, 2020) 127 at 131, 147. See generally Sondre Torp Helmersen, "The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations" (2014) 61:2 Neth. Int. Law 167.

[275] *Ibid*. The terms 'exceptions' and 'derogations' have distinct connotations in the international legal literature. In the present context, "[e]xceptions can be distinguished from derogations by their level of generality. An exception is at the same level of generality as the rules that it modifies … The application of a derogation, on the other hand, will be limited to some of the parties that are bound by the rule in question; a 'derogation' between all parties should rather be considered an exception." See Helmersen, *supra* note 274 at 175-76. For further discussion on the distinction between the terms 'exception' and 'derogation', see Hoogh, *supra* note 274 at 128-34.

contravene their duties to prevent genocide and not to veto R2P third pillar resolutions aimed at preventing genocide.

In order to overcome the obstacle posed by Article 103 of the UN Charter in restraining the veto power of P5 members in genocide situations and to further strengthen the duty of states to prevent genocide, this chapter argued by drawing upon the ILC's criterion for the identification of jus cogens norms, that the duty to prevent genocide, in addition to its existence under the Genocide Convention and customary international law, is also a jus cogens norm of international law. Being a jus cogens norm, the duty of P5 members to prevent genocide ultimately trumps Article 103 of the UN Charter and, therefore, overrides the veto power of P5 members under Article 27 of the Charter to unilaterally veto any UN Security Council dealing with substantive matters. Therefore, the duty of P5 members not to veto R2P third pillar resolutions aimed at preventing genocide, being a corollary of their jus cogens duty to prevent genocide, restrains the veto power of P5 members in genocide situations and paves the way for the passage of R2P third pillar resolutions aimed at preventing genocide.

Against the backdrop of arguments proffered in the second and the third chapters, the upcoming chapter will introduce a novel proposal for an informal restraint on the veto power of P5 members in genocide situations falling under the third pillar of R2P. While numerous such proposals have been suggested in the past, this new proposal seeks to address their shortcomings and offer substantial improvements. Furthermore, because it is rooted in the arguments outlined in the second and third chapters, which establish the duty of P5 members not to veto R2P third pillar resolutions aimed at preventing genocide as an integral part of their jus cogens duty to prevent genocide, the forthcoming recommendation of a veto reform proposal will carry a heightened degree of persuasiveness and credibility compared to previous suggestions.

CHAPTER III

INFORMAL VETO RESTRAINT: DELINEATING A WORKABLE VETO REFORM PROPOSAL

3.1 Introduction

Considering the near impossibility of any formal amendment to the UN Chapter being adopted any time soon, various proposals have been put forth to informally[276] restrain the veto power of P5 members of the UN Security Council in R2P situations of mass atrocities including genocide, particularly in situations requiring 'international intervention' under the third pillar of R2P. 'Informal veto restraint', as the nomenclature suggests, is a restraint on the veto power of P5 members in certain circumstances, particularly in situations of mass atrocities, voluntarily adopted by them to facilitate actions that address such situations.[277] Proposals for informal veto restrain urge P5 members to adopt such a restraint on their veto power in mass atrocity situations. These proposals outline frameworks for implementing such restraint and specify the conditions under which it should be employed. Chapter III concerns itself with such proposals for informal veto restraint. Particularly, Chapter III analyzes some of the significant past proposals for informal veto restraint including the ICISS proposal[278], the High-Level panel proposal[279], the S5 proposal, the France-Mexico proposal on veto reform[280], and the Accountability, Coherency and Transparency

[276] The language of "informal reforms" has been extensively used in legal literature dealing with the UN Security Council reforms, but its meaning and use have not been clearly explained. Broadly speaking, it has been employed to denote changes or reforms to the UN Security Council that transpire external to the framework delineated in the UN Charter. These modifications are instituted through informal practices voluntarily embraced by the UN Security Council members. Such informal practices may encompass self-imposed adjustments facilitated using voluntary arrangements.

[277] See A.J. Bellamy, "The UN Security Council and the Problem of Mass Atrocities" in Anthony Burke & Rita Parker, eds, *Global Insecurity: Futures of Global Chaos and Governance* (London: Palgrave MacMillan, 2017) 311.

[278] See *ICISS Report, supra* note 23.

[279] See *Report of the High-level Panel on Threats, Challenges and Change*, UNGA, 59th Sess, UN Doc A/59/565 (2004), online: https://www2.ohchr.org/english/bodies/hrcouncil/docs/gaA.59.565_En.pdf [*High-Level Panel Proposal*].

[280] *Political Statement on the Suspension of the Veto in Case of Mass Atrocities Presented by France and Mexico,* UNGA, 70th Sess (2015), online: https://onu.delegfrance.org/IMG/pdf/2015_08_07_veto_political_declaration_en.pdf [*France-Mexico Proposal*].

(ACT) Group's code of conduct for P5 members[281]. Alongside these notable proposals for veto restraint, Chapter III elucidates Illingworth's proposal for responsible veto restraint. In his argument, Illingworth advocates the adoption of a 'transitional cosmopolitan approach' and offers a viable and pragmatic suggestion for veto restraint. The 'transitional cosmopolitan approach' recommended by Illingworth is adopted in the proposal recommended in this chapter. Building on past proposals, Chapter III recommends an improved and more feasible proposal for restraining the veto power of P5 members in genocide situations falling under the third pillar of R2P. Chapter III then demonstrates how the proposal recommended in this chapter counters criticism directed against past proposals for veto restrain. This is achieved by adopting a democratic approach to restraining the veto power, incorporating a stringent trigger mechanism from Illingworth's proposal, excluding ambiguous escape clauses for P5 members, and narrowing down the scope of veto restraint to genocide situations by adopting the 'transitional cosmopolitan approach' adopted by Illingworth in his proposal for veto restraint. Additionally, the proposal in this chapter is put forth in light of the arguments presented in the preceding chapters (the duty of P5 members not to veto resolutions aimed at preventing genocide as an integral part of their jus cogens obligation to prevent genocide) and is, therefore, backed by the legal duty of P5 members not to veto resolutions aimed at preventing genocide. This legal foundation lends it a more authoritative and compelling character compared to earlier proposals. Chapter III also shows how narrowing down the proposal for veto reform to genocide situations only will make it more susceptible to being adopted by P5 members.

3.2 Past Proposals for Veto Reform

[281] *Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes*, UNGA, 2015, A/70/621–S/2015/978, online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/433/57/PDF/N1543357.pdf?OpenElement [*ACT Group CoC*].

Though numerous proposals have been put forth for informally reforming the veto power of P5 members[282], this chapter will analyze some of the prominent proposals recommended to date.

3.2.1 ICISS Proposal, High-Level Panel Proposal and the S5 proposal

Although the debate surrounding the veto power of P5 members has been ongoing since the birth of the United Nations[283], it was reinvigorated in 2001 when ICISS in its report on the 'Responsibility to Protect' proposed the 'responsibility not to veto' initiative in mass atrocity situations.[284] The ICISS suggested that the permanent members of the UN Security Council should "agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support"[285].

Following the ICISS suggestions on veto restraint in mass atrocity situations including genocide, the "High-Level Panel on Threats, Challenges and Change" made a similar recommendation in its 2004 report titled 'A More Secure World: Our Shared Responsibility'.[286] Stating that the "veto has an anachronistic character" that is not suitable to today's age when democratic values are increasingly being adopted all over the globe, the High-Level Panel recommended the use of veto only in situations where vital interests of P5 members are implicated.[287] It further stressed the need for P5 members to "pledge themselves to refrain from

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[282] For a detailed discussion of proposals for veto reform, see Alexandru Volacu, "A priori voting power distribution under contemporary Security Council reform proposals" (2015) 21:3 J. Int. Relat. Dev. 247. See also Trahan, *supra* note 83 at 102. Jan Wouters & Tom Ruys, "Security Council Reform: A New Veto for A New Century?" (2005) IRRI-KIIB at 19, online: https://aei.pitt.edu/8980/1/ep9.pdf. For a timeline of proposals for veto reform, see The United Nations Associations-UK, "UN Security Council and the Responsibility to Protect: Voluntary Restraint of the Veto in Situations of Mass Atrocity", online: https://una.org.uk/sites/default/files/Briefing%20-%20Veto%20code%20of%20conduct.pdf.

[283] See Cox, *supra* note 72 at 98.

[284] See Adediran, *supra* note 64 at 468.

[285] See *ICISS Report, supra* note 23 at 9.

[286] *High-Level Panel Proposal*, *supra* note 279.

[287] *Ibid* at para 256.

the use of the veto in cases of genocide and large-scale human rights abuses".[288] As was expected, these recommendations to limit the veto power of P5 members in mass atrocity situations faced stiff opposition from P5 members and were, therefore, dropped from the 2005 World Summit Outcome.[289]

After the High-Level panel recommendations on veto restraint, the debate surrounding restrains on the veto power of P5 members in mass atrocity situations was reenergized in 2012 by a small group of five states consisting of Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland (the S5 group). The S5 group made various recommendations in a draft resolution aimed at institutionalizing the practices of the Security Council[290]. The most significant one was its recommendation urging P5 members to refrain "from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity".[291] The S5 group urged P5 members to adopt a practice whereby they would indicate that their negative vote would not amount to a veto in mass atrocity cases.[292] Much like the previous proposals, the S5 group's proposal on veto restraint met with solid opposition from P5 members. P5 members sought advice from the UN Legal Advisor on the threshold of votes required by the UN General Assembly for passing the draft resolution containing recommendations for veto restraint. The UN Legal Advisor concluded that "the draft resolution was to be considered under the aspect of a comprehensive reform of the council and should, therefore, be submitted to a qualified two-thirds

[288] *Ibid.*
[289] See John Heieck, "The Responsibility Not to Veto Revisited. How the Duty to Prevent Genocide as a Jus Cogens Norm Imposes a Legal Duty Not to Veto on the Five Permanent Members of the Security Council" in Barnes Richard & Tzevelekos Vassilis, eds, *Beyond Responsibility to Protect: Generating Change in International Law*, International Law, ed (Cambridge, UK: Intersentia, 2016) 103.
[290] See *Improving the working methods of the Security Council: Draft Resolution/Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland,* UNGA, 66th Sess, UN Doc A/66/L.42 (2012).
[291] *Ibid* at para 20.
[292] *Ibid* at para 21.

majority of all member states".[293] The draft resolution was ultimately withdrawn by the S5 group.[294]

Owing to the fierce opposition by the majority of P5 members, with France being an exception, the ICISS proposal, the High-Level panel proposal and the S5 proposal could not succeed in restraining the veto power of P5 members. The ICISS and the High-Level Panel proposals, even if they were adopted, suffered from a major deficiency which would have rendered them ineffective. The ICISS's 'responsibility not to veto' initiative contained an ambiguous saving clause for the veto power of P5 members. It provided that a P5 member could veto a resolution aimed at preventing mass atrocities if its 'vital interests' were at stake. The ICISS neither provided any definition of the phrase 'vital interests' nor stipulated any criteria for determining when the 'vital interests' of a state could be said to be at stake. Consequently, had this proposal been accepted, it would have been easy for P5 members to veto any resolution by claiming that their vital interests were implicated. The High-Level Panel adopted the same ambiguous language as that of the ICISS proposal by including a saving clause for the veto power of P5 members (enabling them to veto a resolution if their interests were involved) in recommending veto restraint and thus suffered from the same deficiencies as those of the ICISS proposal.

On the other hand, the S5's proposal to restrain the veto power of P5 members, though not as ambiguous as the previous proposals, was contained in a comprehensive draft resolution comprising numerous recommendations aimed at improving the overall working of the UN Security Council and was not confined to veto reforms. Due to the broad scope of the draft

[293] Rita Emch, "Swiss withdraw UN draft resolution" (18 May 2012), online: https://www.swissinfo.ch/eng/security-council-reform_swiss-withdraw-un-draft-resolution/32719648.
[294] *Ibid.*

resolution, the chances of its adoption were very slim.[295] Consequently, it was met with even more fierce resistance by P5 members, ultimately resulting in its withdrawal by the S5 group.

3.2.2 ACT Group Proposal

'The Accountability, Coherence and Transparency Group' (ACT Group) is a "cross-regional" group of countries formed to improve the functioning of the UN Security Council.[296] Its membership, initially consisting of 21 countries, has expanded to 27 countries.[297] According to the fact sheet of the ACT group, "ACT focuses on the Security Council in its present composition. It seeks to improve working methods here and now through concrete and pragmatic measures. ACT is committed to working constructively with members of the Security Council, as well as with the larger membership."[298]

In 2015, the ACT group proposed a Code of Conduct (ACT CoC) for members of the UN Security Council, which they were to adhere to when dealing with resolutions aimed "to prevent or end genocide, crimes against humanity and war crimes".[299] The ACT CoC requires all the members (permanent and non-permanent) of the Security Council to "pledge to support Security Council action against genocide, crimes against humanity and war crimes". [300] It further requires them to pledge that they will not vote against "credible draft Security Council resolutions that are aimed at preventing or ending those crimes".[301] The ACT CoC does not provide any specific and codified trigger mechanism for its application. The explanatory note to the ACT CoC merely states

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[295] See Adediran, *supra* note 64 at 463.
[296] See Centre for Development of international law, "UN Security Council Code of Conduct", online: http://cdilaw.org/unsc-code-of-conduct.
[297] *Ibid.*
[298] See "Factsheet - The Accountability, Coherence and Transparency (ACT) Group – Better Working Methods for today's UN Security Council", online: https://centerforunreform.org/wp-content/uploads/2015/06/FACT-SHEET-ACT-June-2015.pdf.
[299] See explanatory note, *ACT Group CoC, supra* note 281.
[300] *Ibid.*
[301] *Ibid.*

that the CoC will apply "when the facts on the ground lead to Security Council action". The "facts on the ground" are to be assessed by a state signatory to the CoC.[302] The ACT CoC has garnered significant support from all over the globe. As of 8 June 2022, it has been signed by 121 states and two observers.[303]

Despite garnering significant support, the ACT CoC suffers from various deficiencies. Like the previous proposals, it includes a somewhat ambiguous get-out clause. As stated above, it requires the members of the UN Security Council not to vote against '*credible*' draft resolutions aimed at preventing mass atrocities. The ACT CoC does not provide any explanation as to which resolutions can be categorized as 'credible resolutions'. Without such explanation, it remains open to P5 members to declare any resolution as not credible and defeat it by casting a veto.[304]

Secondly, the ACT CoC appears to be undemocratic. As stated above, if adopted, it will apply to both permanent and non-permanent members of the Security Council and will require them not to vote against resolutions aimed at preventing genocide and other mass atrocities. Resultantly, once a situation has been assessed to be a mass atrocity situation and the ACT CoC is triggered, members of the UN Security Council opposed to resolutions aimed at addressing the mass atrocity situations will lose their voting privilege regarding such resolutions even if they constitute the majority. Therefore, rather than restraining the veto power of P5 members, it effectively renders the voting rights of all the UN Security Council members ineffective once the situation is assessed as one involving mass atrocity crimes. It does so by committing them to either vote in favour of resolutions addressing mass atrocity situations or not vote at all. Given these

[302] *Ibid.*
[303] See Global Centre for the Responsibility to Protect, "List of Signatories to the Act Code of Conduct" (8 June 2022), https://www.globalr2p.org/resources/list-of-signatories-to-the-act-code-of-conduct/#:~:text=As%20of%208%20June%202022,member%20states%20and%202%20observers.
[304] See Adediran, *supra* note 64 at 395-97.

significant limitations on the voting rights of all the Security Council members, the chances of the adoption of ACT CoC are highly improbable. It is also likely that powerful and influential states may abuse the ACT CoC procedure as they may be able to use their power and influence to sway the outcome of an assessment of the situation (undertaken to determine whether it is a mass atrocity situation) to get the results that are best suited to their vested interests.

3.2.3 France-Mexico Proposal on Veto Reform

Like the ACT group's Code of Conduct for veto restraint, France-Mexico's proposal on veto reform in mass atrocity situations, including genocide, has also amassed considerable support. France has long campaigned for reforms to the UN Security Council. It has been advocating an expansion of the membership (both permanent and non-permanent) of the Security Council.[305] More recently, during the 77th UN General Assembly session (2022), France restated its strong support for the UN Security Council reforms as the representative of France advocated permanent membership of the Security Council for "Brazil, Germany, India and Japan"[306]. France is the only P5 member to have not utilized its veto powers in the last three decades.[307]

In August 2015, France, with the support of Mexico, presented to the UN General Assembly the "Political Statement on Suspension of Veto Powers in Cases of Mass Atrocity" (France-Mexico Code of Conduct).[308] As of April 2022, it has been signed by 103 states and 2 UN

[305] See Ministère de l'Europe et des Affaires étrangères, "France and the United Nations Security Council", online: <https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/france-and-the-united-nations/france-and-the-united-nations-security-council/#:~:text=France%20has%20long%20been%20in,%3A%20permanent%20and%20non%2Dpermanent>.

[306] See United Nations, "Concluding Debate on the Security Council Reform, Speakers in General Assembly Urge More Representation for Developing Countries, Ending of Permanent Members' Veto Power" (18 November 2022), online: https://press.un.org/en/2022/ga12473.doc.htm.

[307] See Adediran, *supra* note 64 at page 470.

[308] See United Nations Office on Genocide Prevention and the Responsibility to Protect, "Security Council", online: https://www.un.org/en/genocideprevention/security-council.shtml.

observers.[309] Stressing the need to restrain veto use in situations involving mass atrocity crimes, the France-Mexico proposal states that "the Security Council should not be prevented by the use of veto from taking action with the aim of preventing or bringing an end to situations involving the commission of mass atrocities. We underscore that the veto is not a privilege, but an international responsibility."[310] The France-Mexico proposal requires P5 members to voluntarily enter into an agreement whereby they would agree to "refrain from using the veto in case of mass atrocities"[311]. However, the France-Mexico proposal allows the use of the veto in cases where the "'vital interests' of P5 members are at stake".[312] Unlike the ACT group's Code of Conduct, the France-Mexico proposal provides a codified trigger system. For the application of the France-Mexico proposal to a particular situation, not less than 50 members of the UN are required to refer that situation to the UN Secretary-General who is to determine whether mass atrocities are being committed. If the Secretary-General determines that mass atrocity crimes are being committed, the France-Mexico Code of Conduct will be activated and the veto power of P5 members will be suspended.[313]

Like the previous proposals for veto reform, the France-Mexico Code of Conduct also suffers from some flaws. Firstly, it provides an ambiguous saving clause for the veto power of P5 members similar to that of the ICISS initiative on veto reform.[314] As stated above, it allows a P5 member to veto a draft resolution if its "vital interests are at stake". It, however, does not provide any criteria for determining when the vital interests of a state can be said to be at stake. In the

[309] See Security Council Report: Independent, Impartial, Informative, "In Hindsight: Challenging the Power of the Veto" (29 April 2022), online: https://www.securitycouncilreport.org/monthly-forecast/2022-05/in-hindsight-challenging-the-power-of-the-veto.php.
[310] *France-Mexico Proposal, supra* note 280.
[311] *Ibid.*
[312] See Illingworth, supra note 33 at 396.
[313] See *France-Mexico Proposal*, *supra* note 280.
[314] See Webb, *supra* note 75 at 484.

absence of any such criteria, P5 members will be at liberty to veto any draft resolution by simply claiming that their "vital interests are at stake".[315] In addition, once the application of the proposal has been triggered, it effectively allows only those P5 members to cast a vote that are in favour of a draft R2P resolution aimed at addressing mass atrocities. P5 members against such a draft resolution will have no option but to not participate in the voting of such a resolution. As a result, it commits P5 members opposed to a draft R2P resolution to a particular course of action: either vote in favour of such draft resolutions or not vote at all.[316] Therefore, like the ACT CoC, the France-Mexico initiative for veto reform lacks democratic procedure.

3.2.4 Responsible Veto Restraint: A Transitional Approach to Veto Reform

Richard Illingworth, in his article titled "Responsible Veto Restraint: A Transitional Cosmopolitan Reform Measure for the Responsibility to Protect" proposes an innovative idea for veto reform in R2P situations involving mass atrocity crimes.[317] Illingworth adopts a 'transitional cosmopolitan approach' to veto reform and argues that some compromise on ideal progress is necessary to make progress towards veto reform. Elucidating the 'transitional cosmopolitan approach' he states that "it is an approach which accepts that promoting some normative progress through tempered actions is better than making no progress at all, and that this is better than calling for overly ambitious and unrealizable goals that are likely to be outrightly rejected".[318] He states that such non-ideal progress may take more time to achieve the desired outcomes but it will still achieve some progress which is better than stagnation caused due to pressing for idealistic and impracticable reforms. He argues that when prevalent political constraints render the prospects of making ideal progress toward achieving the desired goals too bleak, it becomes necessary to make

[315] See Adediran, *supra* note 64 at 470.
[316] *Ibid* at 464.
[317] See Illingworth, *supra* note 33.
[318] *Ibid* at 391.

some compromise on the ideal goals so that some progress, though imperfect, can be made. The idea is not to completely sacrifice the desired goals but to temper them to render them acceptable to the present political conditions and then take small steps towards such goals which may progressively create the possibility for further steps and foster political conditions which are favourable to the desired goals.

Adopting the 'cosmopolitan transitional approach', Illingworth proposes 'Responsible Veto Restraint' (RVR) for veto reform which, according to him, will ensure timely R2P action in mass atrocity situations. This proposal recommends veto restraint by P5 members in R2P situations involving mass atrocities, including genocide, so that resolutions aimed at preventing or halting mass atrocities are not unilaterally defeated by a P5 member. [319] However, it significantly differs from the previous proposals for veto reform as it excludes coercive measures such as the "application of sanctions, ICC referrals, or the authorization of military force" from the scope of the 'Responsible Veto Restraint'.[320] Consequently, P5 members will still be able to exercise a veto against draft resolutions containing such coercive measures. These coercive measures are excluded from the RVR proposal under the hope that excluding such measures will render the proposal more acceptable to P5 members as they will have an assurance that if the proposal is adopted, they will still be able to exercise veto against resolutions containing coercive measures. According to Illingworth, such an assurance will ease the fears of P5 members as well as other states that R2P may be abused as an excuse for unlawful use of force and that the veto restraint in R2P situations may render such abuse of R2P more probable.[321] Illingworth further argues that excluding such measures from the RVR proposal will also make it difficult for a P5 member to

[319] *Ibid* at 400.
[320] *Ibid* at 400-01.
[321] *Ibid* at 401.

veto a resolution on the ground that it contains coercive measures which may have adverse effects on 'international peace and security'.[322] It will, therefore, make it possible to pass binding resolutions containing measures short of coercive measures aimed at addressing a mass atrocity situation under R2P. Such measures include "declaratory statements and condemnations of violence; humanitarian access to provide vital resources to those in need; fact-finding missions to bring greater accountability and knowledge of a crisis; mediation efforts to broker peace; and provide counter-narratives to atrocity violence to promote the norm that atrocity crimes are unacceptable."[323] Illingworth argues that though these measures may not be sufficient to put an end to mass atrocity crimes, they may be able to mitigate the sufferings of victims of these crimes. This approach aligns with the 'cosmopolitan transitional approach' in that while sacrificing the perfect progress (absolute veto restraint in mass atrocity situations), it does render some progress, though not ideal, highly probable.

The trigger system recommended by Illingworth for initiating the 'Responsible Veto Restraint' is a slight modification of the trigger mechanism provided under the France-Mexico proposal, making it more democratic than the said proposal. Illingworth states that to initiate the 'Responsible Veto Restraint', "a majority of UN member states would be required to present a joint declaration that acknowledged a case as one of manifest R2P failure to the UN Secretary-General directly".[324] Once the said declaration has been made, the Secretary-General will be required to determine whether the said case is a case of R2P failure. If the Secretary-General so determines, the 'Responsible Veto Restraint' will be initiated. Additionally, unlike the previous

[322] *Ibid* at 403.
[323] *Ibid* at 401.
[324] *Ibid.*

veto reform proposals, the 'Responsible Veto Restraint' proposal does not include any get-out clause for P5 members.

The 'Responsible Veto Restraint', by providing a more stringent trigger mechanism and removing the saving clause, provides some improvements to the previous proposals for veto reform. These improvements are worthy of consideration when making any future recommendation for veto-reform proposals. That said, it suffers from some major deficiencies. First and foremost is its too great emphasis on veto restraint for non-coercive measures such as humanitarian assistance while outrightly rejecting coercive measures such as ICC referrals and military intervention. This is done to increase the likelihood of its adoption by P5 members. Such a proposal, even if adopted, may not make much difference. Most of the non-coercive measures, which Illingworth argues the international community will be able to take if his proposal is accepted, can be taken outside the Security Council and, therefore, do not necessarily require veto restraint. To elucidate the functionality of the RVR proposals, Illingworth gives an example of Syria to argue that had his proposal been in place during the Syrian Civil War, it would have been possible to provide access to humanitarian aid to Syrians by passing binding resolutions aimed at providing such assistance.[325] However, it is worth noting that impartial cross-border humanitarian assistance is not regarded as an unlawful intervention and can, therefore, be legally delivered without authorization by the UN Security Council.[326] There are numerous instances where, despite the vetoing of Security Council resolutions to provide access to humanitarian assistance, such assistance has been legally delivered and is still being delivered to Syrians. For instance, since

[325] *Ibid* at 410.

[326] See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America)* (1986) ICJ Rep 14 "[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law at para 242." See also Frits Kalshoven, "Impartiality and Naturality in Humanitarian Law and Practice (1989) 29:273 Int. Rev. Red Cross 516.

2011, the European Union has delivered humanitarian assistance worth 30 billion euros to Syrians.[327] In addition, there are several NGOs engaged in delivering humanitarian assistance to vulnerable people in Syria.[328] Similarly, the fact-finding missions (one of the non-coercive measures included by Illingworth in his proposal) can also be legally established outside the Security Council and, therefore, do not necessarily require veto restraint.[329] For instance, the UN 'Human Rights Council' established the 'Independent International Commission of Inquiry on the Syrian Arab Republic' with a mandate to "investigate all alleged violations of the international human rights law since March 2011 in the Syrian Arab Republic and to present public reports on its findings."[330] Therefore, many non-coercive measures covered by the RVR proposals can be taken outside the UN Security Council, meaning that the veto power of P5 members is not as problematic regarding non-coercive measures as it is regarding coercive measures. The veto power of P5 members has proven to be most troublesome when effective redressal of a mass atrocity situation requires coercive measures and a P5 member vetoes a resolution aimed at authorizing such measures. Therefore, RVR, by excluding coercive measures from a veto reform proposal, renders the international community incapable of taking such measures when they are required the most to effectively address a mass atrocity situation, and by doing so, it fails to address this key issue associated with the veto.

[327] See European Commission, "European Civil Protection and Humanitarian Aid Operations", online: https://civil-protection-humanitarian-aid.ec.europa.eu/where/middle-east-and-northern-africa/syria_en.
[328] See Lawyering Peace Class, "NGOS Working in Syria", https://www.lawyeringpeaceclass.com/ngos-working-in-syria.
[329] See European Center for Constitutional and Human Rights, "United Nations Fact Finding Missions" (December 2010), online: <https://www.ecchr.eu/fileadmin/Gutachten/Gutachten_Sri_Lanka_UN_fact-finding_mechanisms.pdf>.
[330] See United Nations Human Rights Council, "Independent International Commission of Inquiry on the Syrian Arab Republic", online: <https://www.ohchr.org/en/hr-bodies/hrc/iici-syria/independent-international-commission>.

Secondly, once the application of the Code has been triggered, it allows only those P5 members to cast a vote that are in favour of a draft resolution aimed at addressing the R2P situation. P5 members against such a draft resolution will have no option other than to not participate in the voting of such a resolution. It, therefore, commits such P5 members to a particular course of action: either vote in favour of draft resolutions aimed at preventing or halting mass atrocity crimes or not vote at all. By suspending the voting rights of P5 members not in favour of a resolution aimed at addressing a mass atrocity situation, RVR suffers from the same flaw as suffered by the France-Mexico initiative; that is, it undermines democratic values.[331]

Based on the foregoing analysis of the past proposals for veto reform, it can be concluded that though these proposals have significantly contributed to efforts aimed at restraining the veto power of P5 members in R2P situations of mass atrocities, they are marred by various shortcomings. These shortcomings underline the need for a new proposal which addresses them and is more feasible, thereby increasing its probability of acceptance by P5 members.

3.3 Delineating a Workable Roadmap for Veto Restraint in Genocide Situations

Building on the past proposals for veto restraint discussed above, this part offers a revised Code of Conduct (proposed CoC) for P5 members. The proposed CoC aims to overcome deficiencies in the past proposals analyzed above and offer a more feasible and practicable proposal for veto restraint. The elements of the proposed CoC and its comparison with past proposals for veto restraint are explained below.

3.3.1 The Mechanism for Triggering Proposed CoC and the Exclusion of Escape Clauses for P5 members.

[331] See Part 3.2.3 *above.*

The mechanism for triggering the proposed CoC is the same as that of RVR. Accordingly, to trigger the recommended CoC, a majority of the UN member states will be required to make a joint declaration to the UN Secretary-General recognizing a case as that of an impending or ongoing genocide. Once such a declaration has been made, the Secretary-General will determine if a genuine threat of genocide exists, and if the Secretary-General so determines, the recommended CoC will be initiated. The reason for adopting this trigger system is that it is more stringent, democratic, and expedient than those provided in the France-Mexico proposal and the ACT Code of Conduct.

In addition, unlike the France-Mexico Proposal and the ACT Code of Code, the proposed CoC does not offer any avenue for P5 members to override the recommended CoC by relying on ambiguous notions of 'credible resolutions' and 'vital interests'. Therefore, in terms of the trigger mechanism and exclusion of the ambiguous get-out clauses, the proposed CoC is comparable to the RVR proposed by Illingworth. However, as explained below, it significantly differs from RVR and other past proposals in other aspects.

3.3.2 Enhanced Feasibility of the Proposed CoC: Legal Foundations and Focused Scope

Firstly, while the past proposals including RVR apply to all the mass atrocity crimes included in R2P, the proposed CoC applies only to genocide. This is because genocide, being the 'crime of all crimes', is the most egregious of all the mass atrocity crimes.[332] Further, genocide is the only mass atrocity crime that has a separate convention that codifies it and imposes on states the duty to prevent it.[333] No such convention exists for war crimes and crimes against humanity and there exists no clear obligation of states under international law to prevent such crimes.[334] The

[332] See *The Jean Kambanda Case*, *supra* note 6 at para 16. See also Akhavan, "Genocide in the ICTR Jurisprudence", *supra* note 6 at 997.
[333] See Ventura, *supra* note 79 at 333.
[334] *Ibid.*

Rome Statute of the International Criminal Court does not contain any operative article that imposes on states a duty to prevent war crimes and crimes against humanity as its purpose is to provide for individual responsibility and not state responsibility.[335] While many scholars argue that the duty to "respect and ensure respect" of the Geneva Conventions under Common Article 1 of the said conventions resembles the obligation to prevent genocide under the Genocide Convention[336], the Geneva Conventions apply specifically to situations of war and armed conflicts. Genocide and other mass atrocities can occur independently of such contexts. Therefore, in instances where these atrocities unfold outside of armed conflict scenarios, the Geneva Conventions do not apply. In such cases, the primary obligation of states lies in preventing genocide as stipulated by the Genocide Convention, as there exists no equivalent obligation regarding other mass atrocities.

Furthermore, there could be scenarios where the conflict facilitating genocide and other mass atrocities fails to meet the criteria for classification as an armed conflict.[337] Consequently, this would render the Geneva Conventions inapplicable, leaving states without a defined obligation to prevent war crimes, crimes against humanity, and ethnic cleansing within the framework of

[335] *Ibid* at 334.

[336] See e.g. Andreas Zimmermann, "The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?" in Ulrich Fastenrath et al, eds, *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma,* (Oxford, United Kingdom: Oxford University Press, 2011) 629. See also Federica D'Alessandra & Shannon Raj Singh,
"Operationalizing Obligations to Prevent Mass Atrocities: Proposing Atrocity Impact Assessments as Due Diligence Best Practice" (2011) 14:3 J. Hum. Rights Pract. 769 at 774.

[337] International Humanitarian Law does not "apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts…" see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 08 June 1977 art 1(2). For a comprehensive discussion of the threshold od applicability of Geneva Conventions and their additional protocols, see Sylvain Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations" (2009) 91:873 Int. Rev. Red Cross. 69.

these conventions. However, the obligation to prevent genocide under the Genocide Convention remains relevant and enforceable in such circumstances. Therefore, aside from the duty to "respect and ensure respect" for the Geneva Conventions, states lack explicit obligations to prevent war crimes and other mass atrocities within the parameters of these conventions.

As for ethnic cleansing, it is not recognized as an autonomous crime under international law, and, therefore, states have no legal duty to prevent it.[338] Additionally, as argued in the preceding chapters, the duty to prevent genocide also qualifies as a jus cogens norm and the due diligence standards to be satisfied by P5 members to effectively discharge their jus cogens duty to prevent genocide require them, inter alia, not to veto resolutions aimed at preventing or halting genocide. However, as noted above, this is not the case with other mass atrocity crimes as the duty of states including P5 members to prevent other mass atrocity crimes, far from being a jus cogens norm, is not even expressly posited in international law. Even if such an obligation existed, it would have been possible for P5 members to override it by virtue of Article 103 of the UN Charter (elucidated in the previous chapter)[339] and exercise their veto power under Article 27 of the Charter.

Hence, while P5 members may refuse to accept a proposal for veto restrain in other mass atrocity situations on the ground that they have no clear express legal obligation under international positive law to prevent them, they will not be able to put forth a similar argument against a proposal for veto restraint in genocide cases. Consequently, a proposal to restrain a veto in genocide cases will be more persuasive and feasible as it will be backed by the legal duty to prevent genocide, which is expressly incorporated in the Genocide Convention, and more importantly, also qualifies as a jus cogens norm of international law. Therefore, the express stipulation of the duty to prevent

[338] *Ibid.* See also United Nations Office on Genocide Prevention and the Responsibility to Protect, "Ethnic Cleansing", online: <https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml>.
[339] See Part 2.3, *above,* for more on this topic.

genocide in the Genocide Convention and its qualification as a jus cogens norm of international law provide a strong legal foundation for a proposal of restraining the veto power of P5 members in genocide situations. The proposed CoC also differs from RVR in another aspect. While it embraces the transitional cosmopolitan approach recommended by Illingworth and confines the application of veto restraint to situations of genocide, it, as elaborated earlier, does not preclude the inclusion of coercive measures.

The narrow scope of the proposed CoC and a greater degree of latitude for P5 members to exercise their veto in situations of other mass atrocities may render it more feasible and more acceptable to P5 members as they will have the assurance that if the proposed CoC is adopted, the veto power of P5 members will be restrained in a very limited number of cases that will qualify as cases of genocide or potential genocide as per the narrow definition of genocide stipulated under article II of the Genocide Convention. Also, genocide does not occur as frequently as other mass atrocity crimes. The narrow scope of the proposed CoC accompanied by the conventional and jus cogens duty of states including P5 members to prevent genocide enhances the probability of its success.

By recommending the application of veto restraint to only genocide cases, the proposed CoC adopts a transitional cosmopolitan approach put forth by Illingworth.[340] Accordingly, the proposed CoC may not represent ideal progress (restraining the veto in all mass atrocity crimes under R2P), but it does increase feasibility of its acceptance and offers avenues for some progress. As the proposed CoC is ingrained in the UN Security Council practice with time and as veto restraint in genocide cases gains a normative value, further efforts can be made to include other mass atrocity crimes in the proposed CoC.

[340] See Illingworth, *supra* note 33.

3.3.3 Upholding Democratic Values Via Informal Voting

Another major difference between the proposed COC and previous proposals for veto restraint is that before a draft resolution aimed at preventing or halting a genocide is put to vote in the UN Security Council, the proposed CoC provides for informal voting on such a draft resolution. During such informal voting, a negative vote of P5 members will not amount to a veto. Therefore, unlike the France-Mexico Code of Conduct, the ACT Code of Conduct and RVR, P5 members against a draft R2P resolution will be able to have their negative votes counted in deciding whether to pass such a resolution by way of putting it to an informal vote. According to the proposed CoC, P5 members opposed to a draft R2P resolution aimed at preventing or halting genocide will be required to abstain from voting against such a draft resolution when it is formally put to vote in the UN Security Council only if not less than nine members of the Security Council, during informal voting, vote in favour of such resolution. Therefore, unlike the France-Mexico proposal, the ACT CoC and RVR, the mere declaration by the Secretary-General that the prevailing situation involves genocide does not lead to an automatic suspension of the voting rights of P5 members opposed to resolutions aimed at addressing such a situation. Such a procedure makes the proposed CoC more democratic than the past proposals for veto restrain. It may also render the proposed CoC more acceptable to P5 members as they will not be committed to a particular course of conduct (to either vote in favor of the draft R2P resolution or abstain from voting) based solely on a declaration of the Secretary-General and will be assured that they will be able to have their negative votes considered by way of holding informal voting.

3.4 Addressing Some Prevalent Concerns Regarding Informal Veto Restraint

Arguments have been raised by various international legal scholars regarding the feasibility and utility of proposals for veto reform. For instance, Adrian argues that the prospects of success

of these proposals are no better than a formal amendment of the UN Charter.[341] According to him, this is because any such proposal, to come into effect, will have to be supported by all the five permanent members of the UN Security Council as is the case for the Charter amendment. He, therefore, argues that accomplishing an informal veto reform is as cumbersome as bringing about a Charter amendment. It is no doubt true that accomplishing an informal veto restrain is no easy task. However, it is equally true that it is more pragmatic than a Charter amendment. This is because, unlike a Charter amendment, a voluntary veto restrain will not be permanently binding on P5 members. Knowing that if their vital interests are being adversely affected by restraint on their veto power, they may be able to revert to the previous position, P5 members are more likely to enter into such an informal arrangement than agree to a Charter amendment.[342] At the same time, as informal veto restraint gets ingrained in the UN Security Council practice with time and gains normative value, it will be difficult and politically costly for a P5 member to back out of an informal arrangement for veto restraint in genocide cases. Hence, implementing informal veto restraint arrangements as a means to curtail the veto power of P5 members is significantly more viable and workable than pursuing a formal amendment of the UN Charter.

Another concern, directed specifically against past proposals for veto reform is that most of these proposals contain ambiguous saving clauses, allowing P5 members to override these proposals and effectively render them useless.[343] However, this concern has been addressed by the CoC proposed in this chapter as it does not contain any such ambiguous saving clause and, therefore, does not provide any avenue for P5 members to override the veto restraint.

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[341] See Adediran, *supra* note 64 at 476.

[342] See Illingworth, supra note 33 at 396-97.

[343] See Adediran, *supra* note 64 at 464. See also Illingworth, *supra* note 33. Justin Morris & Nicholas Wheeler, "The Responsibility Not to Veto: A Responsibility Too Far?" in Alex J. Bellamy & Tim Dunne, eds, *The Oxford Handbook of the Responsibility to Protect* (Oxford, United Kingdom: Oxford University Press, 2016) 227 at 238.

Proposals for informal veto reform have also been criticized on the ground that such proposals, if accepted, will commit P5 members to a particular course of action, that is, to either vote in favour of an R2P resolution or to restrain from voting and will, therefore, undermine "democratic discourse on the nature of atrocity crimes and the appropriate action to be undertaken".[344] As stated above, the proposed CoC does not commit P5 members to a particular course of action merely because a situation has been determined by the Secretary-General as one involving mass atrocity crimes. The informal voting stage stipulated by the proposed CoC enables P5 members opposed to the draft R2P resolution to cast a negative vote. However, since the voting is held informally, the negative vote of a P5 member will not amount to a veto. It is only if at least nine members of the UN Security Council vote in favour of a draft resolution during the informal voting that the veto power of P5 members opposed to such a resolution will be curtailed at the formal voting on such a resolution. The informal voting stage, therefore, enables P5 members opposed to a draft R2P resolution to have their negative vote counted in deciding the action to be taken in a genocide situation rendering the proposed CoC more democratic than the previous proposals for veto reform.

3.5 Conclusion

Building on some of the feasible and prominent past proposals for veto reform, this chapter has put forth a revised Code of Conduct (proposed CoC) for P5 members to restrain their veto power in situations of impending or ongoing genocide. To achieve a greater degree of persuasiveness and feasibility, the proposed CoC has adopted Illingworth's transitional cosmopolitan approach, initially limiting the proposal's applicability to only genocide situations. In keeping with the cosmopolitan approach, as some degree of consensus and normative practice

[344] See Adediran, *supra* note 64 at 464.

on veto restraint in genocide situations develops among P5 members, proponents of veto reform can gradually push for bringing other mass atrocities into the fold of the proposed CoC. A narrow proposal like the one recommended in this chapter, limiting the veto restraint to a very narrow set of circumstances qualifying as situations of genocide, will provide an assurance to P5 members that such a proposal, if adopted, will limit their veto power in a very narrow set of circumstances, enabling them to retain their veto power in majority cases of mass atrocities. Such an assurance will increase the probability of approval by P5 members of the proposed CoC.

Additionally, genocide is the only mass atrocity crime in respect of which there exists an explicit preventive obligation under the Genocide Convention, which, as argued in the first chapter, also incorporates the duty of P5 members not to veto resolutions aimed at preventing or halting a genocide. As argued in the second chapter, the duty to prevent genocide also qualifies as a jus cogens norm by application of the ILC's criteria for identification of jus cogens norms. The duty of P5 members not to veto resolutions aimed at preventing genocide entailed by their duty to prevent genocide, which also qualifies as a jus cogens norm, provides legal underpinnings to the proposed CoC to restrain veto in situations of an impending or ongoing genocide. Such legal foundations of the proposed CoC in situations of an impending or ongoing genocide accompanied by mounting international pressure on P5 members to refrain from exercising veto in mass atrocity cases will make it increasingly difficult and politically costly for them to repel the proposals for veto reform for too long.

CONCLUSION

Genocide is as dreadful a crime as one can imagine. It has been characterized as the most heinous and the gravest of all crimes and rightly so. Yet, failing to honour the pledge of "never again" we have allowed it to happen time after time. The blatant failure of the international community to prevent the Bosnian and Rwandan genocides sparked a significant global outcry, leading, among others, to the establishment of the R2P principle in 2001 and its adoption by the UN General Assembly in 2005. With the emergence of R2P, many hoped that the international community would finally be able to fulfill its "never again" vow by acting on its duty to prevent genocide through the third pillar of R2P which provides for international intervention when a state has either failed or is unwilling to prevent genocide and other mass atrocities. However, even though R2P stands as one of the most noteworthy advancements in the domain of genocide prevention, second only to the adoption of the Genocide Convention, its potential remains unrealized due to several factors that have curtailed its effectiveness in preventing genocide. One of these factors, and probably the most important one, is the repeated veto, by one or more of P5 members, of the R2P third pillar resolutions aimed at preventing or halting genocide.

Acknowledging that the implementation of pillar III relies to a great extent on surmounting the 'problematic' exercise of veto by P5 members, this thesis advocated for strategies by which the veto power of P5 members can be regulated in R2P third pillar situations of an impending or ongoing genocide. It mainly put forth three such strategies, each of which is discussed in individual chapters. Expanding upon the due diligence principle as expounded by ICJ in the Bosnian Genocide Case, the first chapter of this thesis argued that if P5 members are to satisfy the due diligence standards inherent in the duty to prevent genocide under the Genocide Convention and the customary international law, and thereby fully discharge their duty to prevent genocide, they

bear an obligation not to exercise their veto power against R2P third pillar resolutions pertaining to genocide situations. The first chapter then acknowledged that the duty of P5 members not to veto the R2P third pillar resolutions as forming part of their conventional and customary international law duty to prevent genocide, though successfully established, is subordinated by virtue of Article 103 of the UN Charter, to the veto power granted to P5 members under Article 27 of the Charter. Resultantly, P5 members can lawfully contravene their duty not to veto R2P third pillar resolutions pertaining to genocide by relying on Article 103 of the UN Charter.

To overcome the hurdle posed by Article 103 in restraining the veto power of P5 members in the R2P third pillar situations of genocide and to further strengthen the duty of P5 members not to veto R2P third pillar resolutions aimed at preventing or halting genocide, the second chapter of this thesis argued, by application of the ILC's criteria for identifying jus cogens norms, that the duty to prevent genocide qualifies as a jus cogens norm. Subsequently, taking note of the fact that Article 103 of the UN Charter can be defeated by jus cogens norms, it is asserted that the jus cogens duty to prevent genocide, along with its concomitant duty of P5 members not to veto R2P third pillar resolutions aimed at preventing genocide, cannot be negated by P5 Members through the use of Article 103 to assert their article 27 veto powers.

Against the backdrop of arguments proffered in previous chapters, this thesis's last chapter (Chapter III) proposed a CoC for the exercise of veto by P5 members in the R2P third pillar situations of genocide. Chapter III analyzed some significant but unsuccessful past proposals for veto restraint in mass atrocity situations to discern their deficiencies and weaknesses. Building on these past proposals for veto restraint, Chapter III recommended a CoC for restraining the veto power of P5 members in R2P third pillar situations of genocide and elucidated how the proposed CoC addresses and rectifies the shortcomings and deficiencies of past proposals for veto restraint

in mass atrocities. The proposed CoC improves upon the past proposals for veto restraint by providing a stringent trigger mechanism, narrowing the scope of veto restraint to situations of genocide, excluding ambiguous get-out clauses for P5 members, and providing for a more democratic procedure. Additionally, the legal duty of P5 members, outlined in the first two chapters, not to veto resolutions aimed at preventing or halting genocide provides a legal foundation for the proposed CoC, rendering it more authoritative and persuasive.

This master's thesis has centred its arguments on one particular avenue (veto restraint) to advance the implementation of the third pillar of R2P within the context of genocide situations and, consequently, to enhance the prevention of genocide. Although the veto authority wielded by P5 members constitutes the biggest challenge in implementing the third pillar of R2P in situations of genocide and other mass atrocities and, thereby, in preventing genocide, it is essential to acknowledge that this challenge is not isolated. Additional hurdles exist that necessitate attention and resolution to fully harness the potential of R2P in preventing genocide.

The absence of an independent, adequately equipped and readily available standby force that can be swiftly deployed when authorized by the UN Security Council represents one such additional challenge in implementing the third pillar of R2P. Timely deployment of forces to prevent or halt a genocide can be a matter of life and death for the actual or potential victims of genocide. The lack of an independent standby force necessitates reliance on states for their 'merciful contribution' of forces when needed. As demonstrated by the tragic scenario of the Rwandan Genocide, such a procedure may result in an inordinate delay in the deployment of forces. Such a delay allows a genocide situation to deteriorate, and génocidaires may already have carried out massacres by the time forces are deployed to prevent them. While there have been calls for the establishment of a United Nations standby force, there is a need for additional research to construct

a theoretical framework for such a force. This research could delve into its feasibility in terms of its financial implications and the allocation of resources and could address potential logistical challenges in its establishment and maintenance.

Additionally, there is a tendency among critics of R2P to conflate R2P's third pillar exclusively with military intervention, disregarding the diverse array of measures it encompasses, ranging from political mediation to economic sanctions and referrals to the International Criminal Court.[345] Such erroneous conflation of R2P with military intervention results in unfounded fears among scholars that it is a façade for neo-colonist interventions by the Global North in the third-world countries[346]. Such fears were exaggerated by 2011 NATO's military intervention in Libya, which is arguably the first clear case of R2P application. Ironically, it is also a case of R2P's misapplication. Exceeding the mandate of the UN Security Council resolution 1973[347], which was "to protect civilians…under threat of attack in the Libyan Arab Jamahiriya… while excluding a foreign occupation force of any form on any part of Libyan territory", NATO forces attacked Gaddafi and effected regime change. Arguing that NATO's invasion of Libya represents a case of application of R2P, critics of R2P assert that R2P is a means to legitimize otherwise illegitimate military intervention by the West. The events in Libya in 2011 also served as a justification for states like Russia and China to resist any form of international intervention in subsequent R2P cases such as Syria and employ their veto power to block resolutions aimed at R2P implementation in such cases[348]. However, NATO's attack on Gaddafi and its role in toppling the Gaddafi regime was anything but an application of R2P. While actions carried out by NATO within the scope of

[345] See Evans, *The Responsibility to Protect*, *supra* note 268 at 56.
[346] See e.g. Thamil Venthan Ananthavinayagan, "Uniting the Nations or Dividing and Conquering? The United Nations' Multilateralism Questioned—A Third World Scholar's Perspective" (2018) 29 Irish Stud. Int. Aff 35.
[347] UNSC, UN Doc S/Res/1973 (2011) 6498th Mtg.
[348] See Justin Morris, "Libya and Syria" R2P and the Spectre of Swinging Pendulum" (2013) 89:5 Royal Inst Intl Affairs 1265 at 1725.

Resolution 1973 were clearly within the scope of R2P, actions of NATO outside the scope of the said resolution were carried out contrary to the principles of R2P ("right intention, last resort, proportional means and reasonable prospects") and therefore cannot be characterized as R2P actions. As Thakur points out, "[t]o the extent that [Gaddafi] was so targeted, NATO exceeded UN authority in breach of the Charter law," and, therefore, it acted outside the scope of R2P.[349] However, NATO's unauthorized actions in Libya raise an essential question: How can the intervening states be prevented from exceeding the R2P mandate for intervention and, thereby, acting contrary to the R2P principle? Addressing this question is paramount to prevent the misapplication of R2P in future and foster trust among states and scholars regarding R2P.

Furthermore, while this thesis focused on three possible avenues to surmount the 'veto problem' in implementing the third pillar of R2P in situations of genocide and, thereby, to prevent genocide, other avenues are also being researched in this domain and remain open for further exploration. One such avenue is to promote the invocation of 'Uniting for Peace' resolutions to sidestep a deadlocked Security Council and seek recourse through recommendations by the General Assembly for "collective measures", including "the use of armed force when necessary"[350]. 'Uniting for Peace' resolutions can serve as an effective instrument to mitigate the detrimental consequences of veto in the R2P third pillar genocidal situations.[351] However, the 'Uniting for

[349] See Ramesh Thakur, "Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism" (2011) 7:4 Security Challenges 13 at 20.
[350] *Uniting for Peace*, UNGA, 5th Sess, UN Doc A/RES/377 (1950) GA Res 377(V) ("if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security" at para 1)
[351] See Melling & Dennett, *supra* note 68.

Peace' mechanism is rarely invoked (only 12 times since 1950[352]), and its potential remains largely untapped. Consequently, arguments can be articulated, underscoring the untapped potential of the 'Uniting for Peace' mechanism and advocating for its enhanced implementation.

Another avenue that can be explored to deal with the 'veto problem' is the concept of the 'ex-post facto authorization' of intervention carried out in the scenario of a deadlocked UN Security Council to prevent genocide within the scope of the third pillar of R2P. Such authorization can be obtained through a UN Security Council resolution that explicitly conveys its endorsement of the intervention or through a sequence of resolutions focused on reconstruction following such intervention, none of which object to the intervention. Arguably, there have been some instances of ex-post facto authorization of intervention in the past, such as NATO intervention in Kosovo.[353] However, given the potential of such a practice to disrupt the well-established international order (intervention through the UN Security Council), further research needs to be done to comprehend the feasibility of such a practice. Furthermore, such research should endeavour to establish a suitable framework that delineates the conditions and circumstances under which such an authorization can be granted.

While curtailment of the veto power of P5 members in mass atrocity situations through an amendment of the UN Charter is unquestionably the most desirable method, the prospects of such an amendment being adopted soon are exceedingly dim. Consequently, the protection of victims or potential victims cannot hinge upon such an amendment. Therefore, alongside the campaign for such Charter amendment, endeavours to restrict the veto authority of P5 members through alternative methods, like the ones explored in this thesis, should persist and be actively pursued.

[352] See Michael P. Scharf, "Power Shift: The Return of the Uniting for Peace Resolution" (2023) 55:1 Case W. Res. J. Int'l L. 217.
[353] See e.g. Inger Österdahl, "The Exception as The Rule: Lawmaking on Force and Human Rights By The UN Security Council" (2005) 10:1 J.C & S.L 1, online: <http://www.jstor.org/stable/26294347>.

While no one can predict with certainty the duration and the amount of pressure required to persuade P5 members to adopt some restrain in exercising their veto in mass atrocity situations, proponents of veto reform should take heart in the growing consensus for veto restraint and persist in their campaign for veto restraint in mass atrocities, particularly in R2P third pillar situations of genocide where, as explained above, the adverse consequences of veto use are most pronounced.

BIBLIOGRAPHY

International Materials: Treaties and Resolutions

2005 World Summit Outcome Document, UNGA, 60th Sess, 2005, UN Doc A/RES/60/1.

Charter of the United Nations, 26 June 1945, Can TS 1945 No 7.

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

Standing Mandate for a General Assembly Debate When a Veto Is Cast in the Security Council, UNGA, 76th Sess, UN Doc A/L.52/Add.1 (2022) GA Res 76/262.

Statute of the International Court of Justice, UN, 26 June 1945 (entered into force on 14 October 1945), 1155 UNTS 331.

Statute of the International Law Commission, UNGA, 6th Sess art 1, UN Doc A/RES/600 (1952).

Uniting for Peace, UNGA, 5th Sess, UN Doc A/RES/377 (1950) GA Res 377(V).

Vienna Convention on the Law of Treaties, 27 January 1980, 1155 UNTS 331.

International Materials: International Reports

International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, (Ottawa: International Development Research Centre, 2001).

Koskenniemi, Martti, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of International Law Commission, UN Doc A/C.4.L.682 (2006).

Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, 1999, UN Doc S/1999/1257, online(pdf): https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20S19991257.pdf.

Report of the International Law Commission, ILC 71st Sess, UN Doc A/74/10 (2019).

Report of the International Law, ILC 69th Sess, UN Doc A/72/10 (2017) 132.

Report of the Secretary-General pursuant to General Assembly resolution 53/35: The fall of Srebrenica, 44th Sess, UN Doc A/54/549 (1999).

Reports of the International Law Commission on the Second Part of its Seven-Tenth Session and on its Eighteenth Session" (UN Doc A/6309/Rev.1) in *Yearbook of the International Law Commission 1996*, Vol 2 (New York: UN, 1966) (A/CN.4/SER.A/1966/Add.l).

Second Report on Jus Cogens by Dire Tladi, Special Rapporteur, ILC 69th Sess, UN Doc A/CN.4/706.

International Materials: Miscellaneous

Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes, UNGA, 2015, A/70/621–S/2015/978.

Delegation of Saudi Arabia: Draft Protocol for The Prevention and Punishment of Genocide, UNGA, 1946, UN Doc A/*C*.6/86.

Improving the working methods of the Security Council: Draft Resolution/Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, UNGA, 66th Sess, UN Doc A/66/L.42 (2012).

Political Statement on the Suspension of the Veto in Case of Mass Atrocities Presented by France and Mexico, UNGA, 70th Sess (2015).

Report of the High-level Panel on Threats, Challenges and Change, UNGA, 59th Sess, UN Doc A/59/565 (2004).

United Nations Conference on the Law of Treaties, 1st Sess, UN Doc A/CONF.39/C.1/SR.80 (1968) 80th Mtg.

UNSC, UN Doc S/Res/1973 (2011).

Jurisprudence

Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, [1951] ICJ Rep 15.

Alabama claims of the United States of America against Great Britain (1872) RIAA (Reports of International Arbitral Awards) 125 (Arbitrators: Charles Francis Adams et al).

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Yugoslavia (Serbia and Montenegro)) Order of 13 September 1993, Separate Opinion Judge Lauterpacht [1993] ICJ Rep 407.

Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Judgment [2006] ICJ.

Buell v. Mitchell, 274 F.3d 337.

Case Concerning Application of The Convention on The Prevention and Punishment of The Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), [2007] ICJ Rep 191.

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America) (1986) ICJ Rep 14.

Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia, [1996] ICJ Rep 595.

Case Concerning the Barcelona Traction and The Power Company, Limited (Belgium v. Spain), judgment, [1970] ICJ Rep 3.

Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] 2 SCR 100.

North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), [1969] ICJ 3.

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment [2012] ICJ Rep 422.

The Prosecutor v Jean Kambanda, ICTR 97-23-S, Judgment and Sentence (9 September 1998).

Secondary Sources: Articles

Adediran, Bolarinwa, "Reforming the security council through a code of conduct: A Sisyphean task?" (2018) 32:4 Ethics Int. Aff. 463.

Akhavan, Payam, "The Crime of Genocide in the ICTR Jurisprudence" (2005) 3:4 J Int'l Crim Just 989.

Akhavan, Payam, "Preventing Genocide, Measuring Success by What Does Not Happen" (2011) 22:1 Crim. L.F. 1.

Ananthavinayagan, Thamil Venthan, "Uniting the Nations or Dividing and Conquering? The United Nations' Multilateralism Questioned—A Third World Scholar's Perspective" (2018) 29 Irish Stud. Int. Aff 35.

Arbour, Louise, "The responsibility to protect as a duty of care in international law and practice" (2008) 34:3 Review of International Studies 445.

Bellamy, Alex J., "The Responsibility to Protect and the Problem of Military Intervention" (2008) 84:4 RIIA 615.

Bellamy, Alex J., "The Responsibility to Protect—Five Years On" (2010) 24:2 Ethics Int Aff 143.

Bellamy, Alex J., "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", Ethics & International Affairs 20(2): 143–69 (2006).

Bruun, Lori Lyman, "Beyond the 1948 Convention - Emerging Principles of Genocide in Customary International Law" (1993) 17 MD. J. Int'l L. & TRADE 193.

Byers, Michael, "Conceptualizing the Relationship between Jus Cogens and Erga Omnes Rules" (1997) 66:2-3 Nordic J Int'l L 211.

Cox, Brian, "United Nations Security Council Reform: Collected Proposals and Possible Consequences" (2009) 6:1 SC J Int'l L & Bus 89.

Crossley, Noele, “Is R2P Still Controversial? Continuity and Change in the Debate on ‘Humanitarian Intervention’” (2018) 31:5 Camb. Rev. Int. Aff. 415.

Frits Kalshoven, “Impartiality and Naturality in Humanitarian Law and Practice (1989) 29:273 Int. Rev. Red Cross 516.

Garwood-Gowers, Andrew, "R2P Ten Years After the World Summit: Explaining Ongoing Contestation over Pillar III" (2015) 3:4 Glob. Responsib. Prot. 300.

Genser, Jared, "The United Nations Security Council’s Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement" (2018) 18:2 Chi. J. Int’l L 420.

Gibney, Mark, "State Responsibility and the Object and Purpose of the Genocide Convention" (2007) 4: Issues 2-3 Int'l Stud J 141.

Green, James A, “Questioning the Jus Cogens Status of the Prohibition of the Use of Force” (2011) 32:2 Mich J Intl L 215.

Gross, Leo, "Double Veto and the Four-Power Statement on Voting in the Security Council" (1953) 67:2 Harv L Rev 251.

Grover, Sonja, “R2p And the Syrian Crisis: When Semantics Becomes a Matter of Life or Death” (2005) 19:9 Int. J. Hum. Rights 1112 at 1118.

Herdegen, Matthias J., "The Constitutionalization of the UN Security System" (1994) 27:1 Vand J Transnat'l L 135.

Hossain, Kamrul, “The Concept of Jus Cogens and the Obligation Under the U.N. Charter” (2005) 3:1 Santa Clara J Intl 72.

Illingworth, Richard,” Responsible Veto Restraint: A Transitional Cosmopolitan Reform Measure for the Responsibility to Protect” (2020) 12:4 GR2P 385.

Johnston, Katie A, “Identifying the Jus Cogens Norm in The Jus Ad Bellum” (2021) 70:1 ILQ 29 at 32.

Kapur, Amrita, “‘Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters” (2009) 20 EJIL 560.

Kitharidis, Sophocles, “The Power of Article 103 of the UN Charter on Treaty Obligations: Can the Security Council Authorize Non-Compliance of Human Rights Treaty Obligations in United Nations Peacekeeping Operations?” (2006) 20:1 J. Int. Peacekeeping 111.

Kourula, Erkki & Tapio Kanninen. “Reforming the Security Council: The International Negotiation Process Within the Context of Calls to Amend the UN Charter to the New Realities of the Post-Cold War Era” (1995) 8:2 LJIL 337.

Kuperman, Alan J., “Rethinking the Responsibility to Protect” (2009) 10:1 Whitehead J Diplomacy & Intl Relations 33.

Lekkas, Sotirios-Ioannis, “The Uses of the Outputs of the International Law Commission in International Adjudication: Subsidiary Means or Artefacts of Rules?” (2022) 69 Neth Int Law Rev 327.

Lepard, Brian D., “Challenges in Implementing the Responsibility to Protect: The Security Council Veto and the Need for a Common Ethical Approach” (2021) 25 J. Ethics 223.

Liivoja, Rain, “The Scope of the Supremacy Clause of the United Nations Charter” (2008) 57:3 Int Comp Law Q 583.

Linderfalk, Ulf, “The Creation of Jus Cogens – Making Sense of Article 53 of the Vienna Convention” (2011) 71 Heidelberg J Intl 359.

Luck, Edward C., “Sovereignty, Choice, and the Responsibility to Protect” (2008) 1:1 GR2P 10.

M. Danilenko, Gennady, "International Jus Cogens: Issues of Law-Making" (1991) 2:1 Eur J Int'l L 42.

MacDonald, R ST J, “Fundamental Norms in Contemporary International Law” (1988) 25 Can Y.B.Int. L 115.

Mamdani, Mahmood “Responsibility to Protect or Right to Punish?” (2010) 4:1 J. Interv. Statebuilding 53.

Martenczuk, Bernd “The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?” (1999) 10 Eur. J. Int. Law 545.

Melling, Graham & Anne Dennet,” The Security Council Veto and Syria: Responding to Mass Atrocities Through the “Uniting for Peace” Resolution” (2018) 57 Indian J Intl 285 at 290.

Milanovic, M., “State Responsibility for Genocide: A Follow Up” (2007) 18 EJIL 669 at 686.

Molier, Gelijn “Humanitarian Intervention and The Responsibility to Protect After 9/11” (2006) 53:1 Netherlands International Law Review 37.

Moodley, Vadi, Alphonse Gahima & Suveshee Munien, “Environmental Causes and Impacts of the Genocide in Rwanda: Case Studies of the Towns of Butare and Cyangugu” (2010) 10:2 AJCR 103.

Morris, Justin, “Libya and Syria” R2P and the Spectre of Swinging Pendulum” (2013) 89:5 Royal Inst Intl Affairs 1265.

Mustafayena, Najiba, "The “Supremacy Clause” of Article 103 of the UN Charter and European Ordre Public" (2023/1) İbn Haldun Üniversitesi Hukuk Fakültesi Dergisi 115.

Nahlik, Stanislaw E, “Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status. By Lauri Hannikainen. Helsinki: Lakimiesliiton Kustannus, Finnish Lawyers’ Publishing Company, 1988. Pp. xxxii, 781. Index. $118” (1990) 84:3 Am J Int Law 779.

Negrón-Gonzales, Melinda & Michael Contarino, “Local Norms Matter: Understanding National Responses to the Responsibility to Protect” (2014) 20:2 Glob. Gov. 255.

Nirmal, BC, “Responsibility to Protect: A Political Doctrine or An Emerging Norm (With Special Reference to The Libyan and Syrian Crises)” (2015) 57:3 JILI 333.

Österdahl, Inger, “The Exception as The Rule: Lawmaking on Force and Human Rights by The UN Security Council” (2005) 10:1 J.C & S.L 1.

Paust, Jordan, “The Reality of jus cogens” 7 Conn. J Int’l L 81.

Petsche, Markus, "Jus Cogens as a Vision of the International Legal Order" (2010) 29:2 Penn St Int'l L Rev 233.

Quinton-Brown, Patrick, "Mapping Dissent: The Responsibility to Protect and Its State Critics" (2013) 5:3 Glob. Responsib Prot. 260.

Reinold, Theresa, “The ‘Responsibility Not to Veto’ Secondary Rules and the Rules of Law” (2014) 6:3 Glob. Responsib. Prot. 269.

Saul, Matthew, “Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges” (2015) 5:1 Asian JIL 26 at 41

Scharf, Michael P., “Power Shift: The Return of the Uniting for Peace Resolution” (2023) 55:1 Case W. Res. J. Int'l L. 217.

Schindlmayr, Thomas, "Obstructing the Security Council: The Use of the Veto in the Twentieth Century" (2001) 3:2 J Hist Int'l L 218 at 224.

Schwarzenberger, Georg, "International Jus Cogens" (1965) 43:4 Tex L Rev 455.

Spiermann, Ole, “Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens” (2002) 71 Nordic JIL 523.

Stahn, Carsten, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm” (2007) 101:99 AJIL 99.

Stanton, Gregory, “The Rwandan Genocide: Why Early Warning Failed” (2009) 1:2 JACAPS 6.

Stockburger, Peter, "The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking" (2010) 5 Intercultural Hum Rts L Rev 365.

Thakur, Ramesh, “Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism” (2011) 7:4 Security Challenges 13.

Toten, Samuel, “The state and future of genocide studies and prevention: An overview and analysis of some key issues” (2011) 6:3 Genocide Studies and Prevention: An Intl J 211 at 219.

Tunki, Grigory, “Is General International Law Customary Law Only?” (1993) 4:4 EJIL 534.

Verdross, Alfred, “Jus Dispositivum and Jus Cogens in International Law” (1966) 60 Am. J. Int’l L. 55.

Vidmar, Jure, “Rethinking Jus Cogens After Germany V. Italy: Back to Article 53?” (2013) 60:1 Neth. Int. Law Rev. 1.

Volacu, Alexandru, “A priori voting power distribution under contemporary Security Council reform proposals” (2015) 21:3 J. Int. Relat. Dev. 247.

Webb, Philippa, “Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria” (2014) 19:3 J. Confl. Secur. Law 471.

Weisburd, A. Mark, “The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina” (1995) 17 Mich. J. Int'l L. 1.

Welsh, Jennifer M., “Norm Robustness and the Responsibility to Protect” (2019) 4:1 J. Glob. Secur. Stud. 53.

Wet, Erika De, “The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law” (2004) 15:1 EJIL 97.

Wheeler, Nicholas J., “A Victory for Common Humanity: The Responsibility to Protect after the 2005 World Summit” (2005) 2:1 J. Int. Law Int. Relat. 95.

Wouters, Jan & Sten Verhoeven, "The Prohibition of Genocide as a Norm of Jus Cogens and Its Implications for the Enforcement of the Law of Genocide" (2005) 5:3 Int'l Crim L Rev 401.

Wouters, Jan & Tom Ruys, "Security Council Reform: A New Veto for A New Century?" (2005) IRRI-KIIB at 19.

Zheng Chen & Hang Yin, "China and Russia in R2P debates at the UN Security Council" (2020) 96:3 Int. Aff. 787.

Zvobgo, Kelebogile, Wayne Sandholtz & Suzie Mulesky, "Reserving Rights: Explaining Human Rights Treaty Reservations" (2020) 64:4 Int Stud Q 785.

Secondary Sources: Books

Abtahi, Hirad & Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Leiden, Boston: Martinus Nijhoff Publishers, 2008).

Brownlie, Ian, *Principles of Public International Law* (Oxford: New York: Oxford University Press, 2008).

Deng, Francis M. et al, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC: Brookings Institution Press, 1996).

Destexhe, Alain, *Rwanda and Genocide in the Twentieth Century*, translated by Alison Marschner **(**New York: New York University Press, 1995).

Eshet, Dan, *Totally Unofficial: Raphael Lemkin and the Genocide Convention*, ed by Adam Strom& the Facing History and Ourselves Staff (Facing History and Ourselves, 2007).

Evans, Gareth et al, *The Responsibility to Protect* (Ottawa, Canada: International Development Research Centre, 2001).

Evans, Gareth, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All (*Washington, D.C.: Brookings Institution Press, 2008).

Feher, Michel, *Powerless by Design: The Age of International Community* (Durham: Duke University Press, 2000).

Feinstein, Lee, *Darfur and Beyond: What is Needed to Prevent Mass Atrocities* (New York: Council of Foreign Affairs, 2007).

Fiott, Daniel & Joachim Koops, eds, *The Responsibility to Protect and the Third Pillar: Legitimacy and Operationalization* (London, UK: Palgrave Macmillan, 2015).

Green, James A, *The Persistent Objector Rule in International Law*, 1st ed (Oxford, United Kingdom: Oxford University Press, 2016).

Hart, HLA, *The Concept of Law*, 3rd ed (Oxford, United Kingdom: Oxford University Press, 2012).

Heieck, John, *A Duty to Prevent Genocide: Due Diligence Obligations Among P5* (Cheltenham, UK: Edward Elgar Publishing Limited, 2018).

Hofmann, Gregor P., *Ten Years R2P – What Doesn't Kill a Norm Only Makes It Stronger? Contestation, Application and Institutionalization of International Atrocity Prevention and Response* (Peace Research Institute Frankfurt, 2015).

Knuchel, Sévrine, *Jus Cogens: Identification and Enforcement of Peremptory Norms* (Zurich: Schulthess, 2015).

Krasno, Jean E *The Founding of United Nations* (Academic Council on the United Nations System, 2001).

Kulesza, Joanna, *Due Diligence in International Law,* vol 26 ed by Malgosia Fitzmaurice, Phoebe Okowa & Sarah Singer (Boston: BRILL, 2016).

Larsen, Kjetil Mujezinović, *The Human Rights Treaty Obligations of Peacekeepers*, Cambridge Studies in International and Comparative Law, ed (Cambridge: Cambridge University Press, 2012).

Malaihollo, Medes, "Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights" (2021) 68:1 Neth. Int. Law Rev. 121.

Mettraux, Guénaël, *International Crimes: Law and Practice: Volume I: Genocide* (Oxford: Oxford University Press, 2019).

Monnheimer, Maria, *Due Diligence Obligations in International Human Rights Law* (Cambridge, United Kingdom; New York, NY: Cambridge University Press, 2021).

Nahlawi, Yasmine, The *Responsibility to Protect in Libya and Syria: Mass Atrocities, Human Protection and International Law* (Abingdon, Oxon; New York, NY: Routledge, 2020.

Orakhelashvili, Alexander, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008).

Orford, Anne, *International Authority and the Responsibility to Protect* (Cambridge, UK; New York: Cambridge University Press, 2011.

Power, Samantha, *A Problem from Hell: America and The Age of Genocide* (New York: Perennial, 2003).

Shaw, Malcolm N, International Law, 6th ed (Cambridge: Cambridge University Press, 2021).

Stewart Patrick, Stewart "Cutting the Global Knot: The Global Perspectives on UN Security Council Reforms" in Stewart Patrick, ed, *UN Security Council Reform: What the World Thinks*, (Carnage Endowment for International Peace, 2023).

Thirlway, H, *The Sources of International Law,* 2nd ed (Oxford: Oxford University Press 2019).

Trahan, Jennifer, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, ed (Cambridge: Cambridge University Press, 2020).

United Nations, *The Work of the International Law Commission*, 8th ed, vol 1 (New York: United Nations, 2012).

Weiss, Thomas G. & Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background (Supplementary Volume)* (Ottawa: International Development Research Centre, 2001).

Weiss, Thomas G., *Humanitarian intervention: Ideas in Action* (Malden, MA: Polity, 2012).

Wyatt, Samuel James, *The Responsibility to Protect and a Cosmopolitan Approach to Human Protection* (London: Palgrave Macmillan, 2019).

Secondary Sources: Chapters From Collection of Essays

Akhavan, Payam & Rene Provost, "Moving from Repression to Prevention of Genocide" in Rene Provost & Payam Akhavan, eds, *Confronting Genocide* (Springer, 2011) 1.

Alvarez, José E., "The Schizophrenias of R2P" in Philip Alston & Euan MacDonald, eds, *Human Rights, Intervention and the Use of Force* (Oxford: Oxford University Press, 2008) 275.

Arts, Wiebe, "Preventing Genocide Through Military Intervention: Peacekeeping Troops in the "Responsibility to Protect Era" in Rene Provost & Payam Akhavan, eds, *Confronting Genocide* (Springer, 2011) 117.

Bellamy, A.J., "The UN Security Council and the Problem of Mass Atrocities" in Anthony Burke & Rita Parker, eds, *Global Insecurity: Futures of Global Chaos and Governance* (London: Palgrave MacMillan, 2017) 311.

Ben-Naftali, Orna, "The Obligations to Prevent and to Punish Genocide" in Paola Gaeta, ed, *The UN Genocide Convention: A Commentary* (Oxford: New York: Oxford University Press, 2009).

Gaja, Giorgio, "Jus Cogens beyond the Vienna Convention (Volume 172)" in *Collected Courses of the Hague Academy of International Law*, vol 172 (Hague Academy of International Law, 1981) 279.

Heieck, John, "The Responsibility Not to Veto Revisited. How the Duty to Prevent Genocide as a Jus Cogens Norm Imposes a Legal Duty Not to Veto on the Five Permanent Members of the Security Council" in Barnes Richard & Tzevelekos Vassilis, eds, *Beyond Responsibility to*

Protect: Generating Change in International Law, International Law, ed (Cambridge, UK: Intersentia, 2016) 103.

Hoogh, Andre de, "The Compelling Law of Jus Cogens and Exceptions to Peremptory Norms: To Derogate or Not to Derogate, That Is the Question!" in Lorand Bartels & Federica Paddeu, eds, *Exceptions in International Law* (Oxford: Oxford University Press, 2020) 127.

Kadelbach, Stefan, "Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms" in Christian Tomuschat & Jean Marc Thouvenin, eds, *The fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* **(**Leiden; Boston: Martinus Nijhoff Publishers, 2006) 21**.**

Kotarski, Krzysztof & Samuel Walker, Privatizing Humanitarian Intervention? Mercenaries, PMCs and the Business of Peace" in Rene Provost & Payam Akhavan, eds, *Confronting Genocide* (Springer, 2011) 239.

Kotzé, Louis J, "In Search of a Right to a Healthy Environment in International Law: Jus Cogens Norms" in John H Knox & Ramin Pejan, eds, *The Human Right to a Healthy Environment*, ed (Cambridge: Cambridge University Press, 2018) 136.

Kresic, Mario, "Is the R2P Norm a Legal Norm" in *New Legal Reality: Challenges and Perspectives. II* (Riga: University of Latvia Press, 2022) 355.

Mahbubani, Kishore, "The Permanent and Elected Council Members" in David M. Malone, ed, *The UN Security Council: From the Cold War to the 21st Century* (Boulder: Lynne Rienner Publishers, 2022) 253.

Morris, Justin & Nicholas Wheeler, "The Responsibility Not to Veto: A Responsibility Too Far?" in Alex J. Bellamy & Tim Dunne, eds, *The Oxford Handbook of the Responsibility to Protect* (Oxford, United Kingdom: Oxford University Press, 2016) 227.

Nieto-Navia, Rafael, "International Peremptory Norms (Jus Cogens) And International Humanitarian Law" in Lal Chand Vohrah et al, eds, *Man's Inhumanity to Man:* Essays on International Law in Honour of Antonio Cassese, vol 5 (The Hague; New York: Kluwer Law International, 2003) 595.

Orakhelashvili, Alexander, "Audience and authority — the merit of the doctrine of jus cogens" in Maarten den Heijer & Harmen Van Der Wilt, eds**,** *Netherlands yearbook of international law 2015. Jus cogens: Quo Vadis?* (The Hague: Asser Press; Berlin: Springer, 2016) 115.

Patrick, Stewart "Cutting the Global Knot: The Global Perspectives on UN Security Council Reforms" in Stewart Patrick, ed, *UN Security Council Reform: What the World Thinks*, (Carnage Endowment for International Peace, 2023).

Ventura, Manuel J., "The Prevention of Genocide as a Jus Cogens Norm? A Formula for Lawful Humanitarian Intervention" in Charles Chernor Jalloh & Olufemi Elias, eds, *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (Leiden: BRILL, 2015) 289.

Violi, Federica, "The Function of the Triad 'Territory', 'Jurisdiction', and 'Control' in Due Diligence Obligations" in Heike Krieger, Anne Peters, & Leonhard Kreuzer, eds, *Due Diligence in the International Legal Order,* 1st ed (Oxford: Oxford University Press, 2021).

Wet, Erika, "Jus Cogens and Obligations Erga Omnes" in Dinah Shelton, ed, *The Oxford Handbook on Human Rights* (Oxford, United Kingdom: Oxford University Press, 2018).

Wood, Michael, "The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why? in Gerhard Hafner & Sabelle Buffard, eds, *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Leiden, Boston: Martinus Nijhoff Publishers, 200) 373

Secondary Sources: Online Databases and Web Pages

"Factsheet - The Accountability, Coherence and Transparency (ACT) Group – Better Working Methods for today's UN Security Council", online: <https://centerforunreform.org/wp-content/uploads/2015/06/FACT-SHEET-ACT-June-2015.pdf>.

"ICJ Releases Legal Q & A on Crime of Genocide" (27 August 2018), online: *International Commission of Jurists* <https://www.icj.org/icj-releases-legal-q-a-on-crime-of-genocide/>.

Centre for Development of International Law, "UN Security Council Code of Conduct", online: <http://cdilaw.org/unsc-code-of-conduct>.

Crossland, James, "Europe's Rwanda: The Shame of the Srebrenica Massacre" (7 July 2020), online: <https://www.ljmu.ac.uk/about-us/news/blog/2020/7/7/europes-rwanda-the-shame-of-the-srebrenica-massacre/>.

Crush, Jay, "The Responsibility to Protect in International Law" (31 May 2013), online: <https://www.e-ir.info/2013/05/31/the-responsibility-to-protect-in-international-law/>.

Emch, Rita, "Swiss withdraw UN draft resolution" (18 May 2012), online: <https://www.swissinfo.ch/eng/security-council-reform_swiss-withdraw-un-draft-resolution/32719648>.

Engelberg, Stephen, Tim Weiner & Raymond Bonner "Massacres in Bosnia; Srebrenica: The Days of Slaughter" (29 October 1995), online: <https://www.nytimes.com/1995/10/29/world/massacre-in-bosnia-srebrenica-the-days-of-slaughter.html>.

European Center for Constitutional and Human Rights, "United Nations Fact Finding Missions" (December 2010), online:

<https://www.ecchr.eu/fileadmin/Gutachten/Gutachten_Sri_Lanka_UN_fact-finding_mechanisms.pdf>.

European Commission, "European Civil Protection and Humanitarian Aid Operations", online: <https://civil-protection-humanitarian-aid.ec.europa.eu/where/middle-east-and-northern-africa/syria_en>.

Fortify Rights, "U.N. Member States: Acknowledge the Rohingya Genocide, Refer Myanmar to the International Criminal Court" (March 21, 2022), online: <https://www.fortifyrights.org/mya-inv-2022-03-21/>.

French, Duncan, & Tim Stephens, ILA Study Group on Due Diligence in International Law, *First Report* (7 March 2014), online: <https://olympereseauinternational.files.wordpress.com/2015/07/due_diligence_-_first_report_2014.pdf>.

Genocide Watch, "Genocide Alerts: The Syrian Arab Republic", online: <http://genocidewatch.net/page/5/?s=syria>.

Genocide Watch, "Genocide Emergency: Syria" (September 2020), online: <https://www.genocidewatch.com/_files/ugd/137a5c_d99b7abb2bc84b13a88d1580eb8a88ba.pdf>.

Global Centre for the Responsibility to Protect, "Nine Years of Atrocities, Impunity and Inaction" (14 March 2020), online: < https://www.globalr2p.org/publications/syria-nine-years-of-atrocities-impunity-and-inaction/>.

Hinton, Alex, "A Year On, We Have Clear Evidence of Genocide in Ukraine" (19 February 2023), online: <https://thehill.com/opinion/international/3859439-a-year-on-we-have-clear-evidence-of-genocide-in-ukraine/>.

Karen, Smith, "R2P and the Protection of Civilians: South Africa's Perspective on Conflict Resolution" (March 2015), online: <https://www.jstor.org/stable/pdf/resrep25927.pdf>.

Lawyering Peace Class, "NGOS Working in Syria", https://www.lawyeringpeaceclass.com/ngos-working-in-syria.

Magid, Shelby & Yulia Shalomov, "Russia's Veto Makes a Mockery of the United Nations Security Council" (15 March 2022), online: <https://www.atlanticcouncil.org/blogs/ukrainealert/russias-veto-makes-a-mockery-of-the-united-nations-security-council/>.

Ministère de l'Europe et des Affaires étrangères, "France and the United Nations Security Council", online: <https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/france-and-the-united-nations/france-and-the-united-nations-security-council/#:~:text=France%20has%20long%20been%20in,%3A%20permanent%20and%20non%2Dpermanent>.

New Lines Institute for Strategy and Policy & Raoul Wallenberg Centre for Human Rights, "An Independent Analysis of the Russian Federation's Breaches of The Genocide Convention in Ukraine and the Duty to Prevent" (May 2022), online: <https://newlinesinstitute.org/wp-content/uploads/English-Report-2.pdf>.

Political Declaration on Suspension of the Veto Powers in Cases of Mass Atrocities Presented by France and Mexico at the 70th General Assembly of the United Nations, online: <https://www.globalr2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities/#:~:text=In%20August%202015%2C%20France%2C%20with,when%20faced%20with%20mass%20atrocities.>

Power, Samantha "Never Again: The World's Most Unfulfilled Promise" (18 January 2001), online: <http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/genocide/neveragain.html>.

Security Council Report, "Myanmar: Vote on Draft" (21 December 2022), online <https://www.securitycouncilreport.org/whatsinblue/2022/12/myanmar-vote-on-draft-resolution.php>.

Security Council Report: Independent, Impartial, Informative, "In Hindsight: Challenging the Power of the Veto" (29 April 2022), online: <https://www.securitycouncilreport.org/monthly-forecast/2022-05/in-hindsight-challenging-the-power-of-the-veto.php>.

Special Advisor Council, "UN Security Council Resolution on Myanmar Welcome but Weak" (22 December 2022), online: < https://specialadvisorycouncil.org/2022/12/un-security-council-resolution-myanmar-weak/>.

U.S Committee for Refugees and Immigrants, "Never Again and Never Forget the Rohingya Genocide" (25 August 2023), online: < https://refugees.org/never-again-and-never-forget-the-rohingya-genocide/>.

UN Human Rights Office of the High Commissioner, "UN Expert Demands Accountability for the Rohingya an End to 'Paralysis of Indifference" (24 August 2023), online: < https://www.ohchr.org/en/press-releases/2023/08/un-expert-demands-accountability-rohingya-and-end-paralysis-indifference#:~:text=Those%20nations%20who%20support%20human,in%20their%20hour%20of%20need.>.

UNA-UK, "Britain Backs Initiative to Restrain Security Council Veto" (5 October 2015), online: <https://una.org.uk/news/britain-backs-initiative-restrain-security-council-veto>.

United Nations Human Rights Council, "Independent International Commission of Inquiry on the Syrian Arab Republic", online: <https://www.ohchr.org/en/hr-bodies/hrc/iici-syria/independent-international-commission>.

United Nations, "Concluding Debate on the Security Council Reform, Speakers in General Assembly Urge More Representation for Developing Countries, Ending of Permanent Members' Veto Power" (18 November 2022), online: <https://press.un.org/en/2022/ga12473.doc.htm>.

United States Holocaust Memorial Museum, "The Legal Framework", online: <https://www.ushmm.org/genocide-prevention/simon-skjodt-center/work/ferencz-international-justice-initiative/transitional-justice/the-legal-framework>.

Ventura, Manuel, and Dapo Akande, "Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Intervention" (6 September 2013), online (blog): < https://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/ >.

Secondary Sources: Online Newspapers and Press Releases

Aljazeera, "Russia Vetoes UN Vote to Extend Syria Aid Route" (11 July 2023), online: < https://www.aljazeera.com/news/2023/7/11/russia-vetoes-un-vote-to-extend-key-syria-aid-route>.

United Nations Meeting Coverage and Press Releases, "General Assembly Holds First-Ever Debate on Historic Veto Resolution, Adopts Texts on Infrastructure, National Reviews, Council of Europe Cooperation" (26 April 2023), online: <https://press.un.org/en/2023/ga12500.doc.htm>.

United Nations Office on Genocide Prevention and the Responsibility to Protect, "The Genocide Convention", online: <https://www.un.org/en/genocideprevention/genocide-convention.shtml>.

United Nations Press Release (26 March 2004), online: <https://press.un.org/en/2004/sgsm9223.doc.htm>.

Other Materials

"China, Russia Veto Security Council Resolution on Myanmar Sought by United States" (2007) 101:2 AJIL 484.

Krisch, Nico "Introduction to Chapter VII: The General Framework" in Bruno Simma et al, eds, 3rd ed, *The Charter of United Nations: A Commentary* (Oxford: Oxford University Press, 2012) vol 2.

Leiss, Johann Ruben & Andreas Paulus, "Miscellaneous Provisions, Article 103" in Bruno Simma et al, eds, 3rd ed, *The Charter of United Nations: A Commentary* (Oxford: Oxford University Press, 2012) vol 2.

Schimmer, Russell, Roland A. Geerken & Ben Kiernan, "Tracking the Genocide in Darfur: Population Displacement as Recorded by Remote Sensing" (January 2008).

United Nations Media Coverage and Press Release, "In Meeting Following Russian Federation's Veto of Cross-Border Aid Text, General Assembly Speakers Highlight Humanitarian

Consequences for Millions" (19 July 2023), online: <https://press.un.org/en/2023/ga12517.doc.htm>.

Vicente, Aderito, "United Nations Security Council Reform: The Question of the Veto Power" (2013) Multilateral Diplomacy Summer School–Student Papers 19.

Zimmermann, Andreas, "The Security Council, Voting, Article 27" in Bruno Simma et al, eds, 3rd ed, *The Charter of United Nations: A Commentary* (Oxford: Oxford University Press, 2012) vol 1.