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United Nations Security Council Permanent Membership and the Veto Problem

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UNITED NATIONS SECURITY COUNCIL PERMANENT MEMBERSHIP AND THE VETO PROBLEM

*Michael J. Kelly*¹

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INTRODUCTION

Congratulations to the *Case Western Reserve Journal of International Law* on a remarkable symposium regarding collective security structures and atrocity prevention.² While Ambassador Wenaweser wrestled with practical realities of U.N. Security Council reform and the efforts lead by his delegation to craft and see adopted a new code of conduct for Security Council practice,³ and Professor Trahan discussed legal challenges underway,⁴ this article considers structural impediments to atrocity prevention that are baked into the U.N. Charter and proposes structural reforms designed to alleviate such.

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1. Professor of Law and Senator Allen A. Sekt Endowed Chair in Law at Creighton University. This essay is an update and revision of his prior article, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 320 (2000). Professor Kelly serves on the Board of Directors of L'Association Internationale de Droit Pénal, a Paris-based society of international criminal law scholars and jurists founded in 1924 that enjoys consultative status with the United Nations. Special thanks to Matthew Little for superb research assistance on this paper.
 2. Todd Buchwald & Jody Aremband, *Foreward: Atrocity Prevention: The role of International Law and Justice*, 52 CASE W. RES. J. OF INT'L L. (2020).
 3. Christian Wenaweser & Sina Alavi, *Innovating to Restrain the Use of Veto in the United Nations Security Council*, 52 CASE W. RES. J. OF INT'L L. (2020).
 4. Jennifer Trahan, *Questioning Unlimited Veto Use in the Face of Atrocity Crimes*, 52 CASE W. RES. J. OF INT'L L. (2020).

The question presented at this forum is whether reforms can be undertaken to prevent Russia, China, Great Britain, the United States, and France—the five permanent members of the Security Council (P5)⁵—from wielding (1) their veto power,⁶ or (2) more commonly, the threat of a veto,⁷ to shield bad actors from collective security consequences when those actors commit atrocities. Ready examples might include Russia shielding both Serbia for atrocities committed during the Balkan civil wars⁸ and Syria for atrocities committed during

5. U.N. Charter art. 23, ¶ 1.

6. U.N. Charter art. 23, ¶ 3.

7. Céline Nahory, *The Hidden Veto*, GLOBAL POLICY FORUM (May 2004) <https://www.globalpolicy.org/security-council/42656-the-hidden-veto.html> [<https://perma.cc/P5KF-A2C6>] (“Permanent members use the hidden veto mainly in closed-door informal consultations, rather than in official open meetings. Since the late 1980s, the Council largely conducts its business in such private sessions. Away from the public and without any record of what has been said, the P5 have more freedom to pressure, threaten, and even bully other members of the Council. By giving private veto warnings before a vote takes place, the P5 can “convince” Council members to shift their position and still persuade the international public of their good intentions.”).

8. Reid Standish, *Why Did Russia Veto Recognizing Srebrenica as a Genocide?*, FOREIGN POL’Y (July 9, 2015, 5:39 PM) <https://foreignpolicy.com/2015/07/09/why-did-russia-veto-recognizing-srebrenica-as-a-genocide-putin-bosnia/> [<https://perma.cc/X4JX-US94>].

the Syrian civil war,⁹ and China shielding Sudan during the Darfur genocide.¹⁰

Indeed, many in the international community believe that reform of the permanent membership is needed so badly that it has risen to the level being a near-existential matter.¹¹ Jordanian prince and former U.N. High Commissioner for Human Rights Zeid Ra'ad al-Hussein's view is emblematic of that widely-shared perspective:

al-Hussein decried the sense among some at the United Nations that the “pentarchy” of Britain, China, France, Russia and the United States “is running too much of the business.” He was alluding to the countries’ ability to veto resolutions in cases like alleged injustices in Syria’s war or by Israeli forces against Palestinians. “When they cooperate things can move; when they don’t everything becomes stuck and the organization in general becomes so marginal to the resolution of these sorts of horrific conflicts that we see,” Zeid said. “That has to change: In the end the organization can collapse at great cost to the international community. There is a sense that the permanent five have created a logjam by dint of their proclivity to use the veto, and the

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9. Louisa Loveluck, *Russia Vetoes U.N. Resolution to Continue Syria Chemical Weapons Investigation*, WASH. POST. (Oct. 24, 2017) https://www.washingtonpost.com/world/middle_east/russia-vetoes-un-resolution-to-continue-syria-chemical-weapons-investigation/2017/10/24/63e52470-b8c6-11e7-9b93-b97043e57a22_story.html?noredirect=on [https://perma.cc/H9H6-JANY] (“Russia used its veto power on the . . . Security Council . . . to block an extension of efforts by international inspectors to determine who was behind chemical weapons attacks that have killed scores of Syrian civilians. Moscow’s veto decision was condemned by the United States, Britain and others as an attempt to shield the perpetrators from answering for the most controversial human rights abuses of Syria’s six-year-old war. Western intelligence officials and U.N. investigators have blamed the government of Syrian President Bashar al-Assad for the attacks. It was the ninth time Russia has used its veto to hinder international action on Syria. Moscow is a key ally of the Syrian government, supporting it militarily, politically and financially.”). In several instances Russia was joined by China in protecting Syria. Graham Mellings & Anne Dennett, *The Security Council Veto and Syria: Responding to Mass Atrocities Through the “Uniting for Peace” Resolution*, 57 INDIAN J. INT’L L. 285, 286 (2017).
 10. See generally Michael J. Kelly, *Ending Corporate Impunity for Genocide: The Case Against China’s State-Owned Petroleum Company in Sudan*, 90 OR. L. REV. 413 (2011).
 11. See, e.g., Jamey Keaten, *UN Rights Chief Warns UN Could ‘Collapse’ Without Change*, ASSOCIATED PRESS (Aug. 20, 2018) <https://www.apnews.com/ea.1ea4fa7eb44284b5eca85dec42c43d> [https://perma.cc/EL5P-42AN].

paralysis — less so the U.K. and France — but of course, the U.S., Russia and China quite frequently”. . . .¹²

Of course, any discussion of Security Council reform immediately runs into two vexing issues, either of which are potentially negatively dispositive. First is the problem of politics. None of the P5 wish to meaningfully discuss alteration in their status or power in the first instance and, in the second instance, are wary of discussing reforms that would tend to diffuse or diminish said power — such as expanding the U.N. Security Council (UNSC) in general or permanent membership in particular.¹³ Consequently, any reform would have to dampen perceived threats to the P5 while simultaneously reassuring them of their influence.¹⁴ Antagonistic jockeying among candidates for permanent seats only complicates matters further: “[B]eyond the idea of expansion, any consensus falls apart, with fierce regional rivalries over who might gain new permanent seats making any change problematic, if not impossible.”¹⁵

Second is the problem of amendment. No structural reform can be implemented without opening the Charter to amendment¹⁶ — a prospect

12. *Id.*

13. “Meaningfully” is used purposefully here. Several P5 members have endorsed individual candidates to join the council when it has been politically expedient for them to do so, knowing full well that actual movement in this direction is unlikely, or for other reasons such as irking another member of the P5. See Sheryl Gay Storberg & Jim Yardley, *Countering China, Obama Backs India for U.N. Council*, N.Y. TIMES (Nov. 8, 2010) <https://www.nytimes.com/2010/11/09/world/asia/09prexy.html>, [https://perma.cc/G572-ZB59]; see also Bardo Fassbender, *On the Boulevard of Broken Dreams: The Project of a Reform of the UN Security Council after the 2005 World Summit*, 2 INT’L ORG. L. REV. 391 (2005) (discussing the intractability of reform efforts).

14. Jan Wouters & Tom Ruys, *Security Council Reform: A New Veto for a New Century?*, Egmont Paper no. 9, at 1, 20 (Aug. 2005), available at <http://aei.pitt.edu/8980/1/ep9.pdf> [https://perma.cc/SD3Y-379N] (“[E]xpansion of the P-5 is unlikely to go smoothly. Indeed, proposals of this kind meet with fierce opposition from the main rivals of the four allied applicants: i.e. Italy (regarding Germany), Mexico and Argentina (regarding Brazil) and Pakistan (regarding India). Moreover, opinion on which or how many countries should get permanent seats remains divided.”).

15. Neil MacFarquhar, *Change Will Not Come Easily to the Security Council*, N.Y. TIMES (Nov. 8, 2010), <https://www.nytimes.com/2010/11/09/world/09nations.html>, [https://perma.cc/ZK5D-2Y6X].

16. See Luisa Blanchfield, CONG. RESEARCH SERV., Rep. No. RL33848, *United Nations Reform: Background and Issues for Congress 13* (2015).

fraught with dangers, not the least of which includes a very long line of proposed amendments¹⁷ to almost every aspect of the United Nations in addition to potentially contentious legislative battles in the parliamentary assemblies of member states.

Amending the UN Charter is an onerous process, requiring not only approval of two-thirds of the UNGA, but also ratification of the relevant domestic legislation by two-thirds of UN member states (including all of the P5). . . . Amending the charter faces a multitude of obstacles, not least within the U.S. Congress. Any UN Charter amendment would require bipartisan backing on Capitol Hill. At present, support in Congress for the United Nations is irresolute¹⁸

Consequently, any resolution to amend would need to be crafted narrowly to encompass only those articles of the Charter implicated in achieving the envisioned structural adjustment, much as was the case with the 1965 UNSC expansion.¹⁹ That was the last time Security Council expansion was undertaken; that instance was an effort to reflect the new world order forming in the wake of the global decolonization process by adding more geographic diversity to the council through more non-permanent seats.²⁰

While not insurmountable, the realities of both problems must be addressed if any forward momentum can be achieved. That said, this discussion does not wholly encompass strategies for tackling those issues. Rather it focuses on presenting the best options for restructuring that, taken together, provide the most effective outcome for a re-energized and more transparent Security Council. This reformed Security Council might be less inclined to forego appropriate security responses to the commission of atrocities around the globe no matter which permanent member's client state committed them.

I. REGIONAL RECONFIGURATION OF PERMANENT MEMBERSHIP

No reform of the United Nations will be complete without reform of the Security Council. And, indeed, so long as the Council

17. *See id.* at 15.

18. Kara C. McDonald & Stewart M. Patrick, *U.N. Security Council Enlargement and U.S. Interests*, Council on Foreign Relations, Special Rep. No. 59, at 11 (Dec. 2010).

19. *See id.* at 34–36.

20. Bruce Russett, *Security Council Expansion: Can't, and Shouldn't*, in *REFORMING THE UNITED NATIONS FOR PEACE AND SECURITY* 153, 153 (Mar. 2005).

remains unreformed, the whole process of transforming governance in other parts of the system is handicapped by the perception of an inequitable distribution of power The world has changed dramatically since 1945, and the Security Council must change, too. . . .

Secretary General Kofi Annan (2006)²¹

Permanent membership on the Security Council comes with certain perks: no elections, immense influence, the ability to single-handedly defeat any resolution, and, until recently, a guaranteed seat on the International Court of Justice.²² Unlike resolutions of other U.N. bodies, UNSC resolutions carry the force of international law as binding obligations that members agree through the charter to comply with,²³ even to the detriment of other international obligations they may have.²⁴ Consequently, the P5's power to positively or negatively affect not only the creation of international law but also its implementation is enormous.

At the Charter's inception in 1945,²⁵ this made some sense. As the institutional replacement to the League of Nations, which failed as a collective security paradigm to prevent the Second World War,²⁶ the Allies designed the United Nations to be a body imbued with the ability to collectively assess threats to international peace and deploy military force to protect or restore it.²⁷ They lodged this war-making power in

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21. *Need for Security Council Reform is Greater Than Ever, Says Annan as He Urges Action*, UN NEWS (Sept. 21, 2006), <https://news.un.org/en/story/2006/09/193132-need-security-council-reform-greater-ever-says-annan-he-urges-action> [<https://perma.cc/SC8T-MZT2>].
 22. Until 2017, there was an informal understanding that the P5 would always fill one of the 15 seats on the ICJ, when the British judge, Christopher Greenwood, was not re-elected to the ICJ. *See International Court of Justice: UK Abandons Bid for Seat on U.N. Bench*, BBC NEWS (Nov. 21, 2017), <https://www.bbc.com/news/uk-42061028> [<https://perma.cc/CV7C-MYMR>].
 23. U.N. Charter art. 25.
 24. U.N. Charter art. 103 (“In the event of a conflict between the obligations of the 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.”).
 25. *Charter of the United Nations*, U.N., <https://www.un.org/en/charter-united-nations/>, [<https://perma.cc/Q9QY-UAGY>].
 26. Schott Michael Rank, *Why Did the League of Nations Fail?*, HISTORY ON THE NET (Nov. 25, 2019), <https://www.historyonthenet.com/why-did-the-league-of-nations-fail> [<https://perma.cc/Z9JU-JQNN>].
 27. U.N. Charter arts. 39–51.

the Security Council and put themselves in charge of it.²⁸ This was a reflection of the old colonial paternalistic mindset of “who knows best,” still quite prevalent in that period, but it also reflected the near monopoly on military and economic power by the great powers of the day.²⁹

Much has changed in the 73 years since that bargain was struck. Two of the P5 seats of the original members are now filled by successor states: The Soviet Union’s seat to Russia and the Republic of China’s seat to the People’s Republic of China.³⁰ In 1946 there were 51 states in the world; today there are 194.³¹ At that time, France and Britain controlled much of the territory in Africa and Asia through colonial subjugation.³² During the Cold War, the P5 had a monopoly on nuclear weapons;³³ today other states have them (India, Pakistan, North Korea, Israel),³⁴ had them and gave them up (South Africa),³⁵ or are developing them (Iran).³⁶ The P5 also embodied the largest economies of the world.³⁷ While the United States and China remain the top two

28. *See id.*

29. *See* Ashley Purcell Goad, *Mind the Gap: Navigating the Pitfalls of Cross-Cultural Partnership* (Feb. 2016) (unpublished Dissertation, George Fox Evangelical Seminary) *available at* <https://digitalcommons.georgefox.edu/cgi/viewcontent.cgi?article=1128&context=dmin> [<https://perma.cc/LQ3T-YRKH>] (exemplifying the paternalistic mindset’s continued existence).

30. *United Nations Security Council*, ENCYCLOPAEDIA BRITANNICA (Jul. 20, 1998), <https://www.britannica.com/topic/United-Nations-Security-Council> [<https://perma.cc/8ADN-DG8M>].

31. *Growth in United Nations Membership, 1945-Present*, U.N., <https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> [<https://perma.cc/49CL-P88U>].

32. *See* Jeannette L. Nolen, *Decolonization*, ENCYCLOPAEDIA BRITANNICA (Feb. 20, 2009), <https://www.britannica.com/topic/decolonization> [<https://perma.cc/5DTH-9X4G>].

33. Andre Munro, *Nuclear Proliferation*, ENCYCLOPAEDIA BRITANNICA (Sep. 14, 2016), <https://www.britannica.com/topic/nuclear-proliferation> [<https://perma.cc/LYE3-9NYH>].

34. *Id.*

35. *Id.*

36. *See* Lara Seligman, *How Close Is Iran to a Nuclear Bomb, Really?*, FOREIGN POL’Y (July 1, 2019), <https://foreignpolicy.com/2019/07/01/how-close-is-iran-to-a-nuclear-bomb-really/> [<https://perma.cc/GGD3-NA8A>].

37. *See* AMIT K. BANERJEE & MURARI R. SHARMA. *REINVENTING THE UNITED NATIONS* 24 (2007),

economies, Japan and Germany are next, followed by Britain.³⁸ France is no longer in the top 5, falling into the sixth spot, and Russia isn't even in the top 10, lagging behind India, Italy, Brazil, and Canada.³⁹ "When the Berlin Wall fell in 1989, the seven largest Western economies—three of which have permanent seats on the council—accounted for 51 percent of global economic output. Today they account for only 30 percent."⁴⁰

Thus, any political, military, and economic rationales of P5 membership that may have made sense in 1946, have all but evaporated. Indeed, what the world is left with is an increasingly anachronistic power structure that is not diverse (geographically, ethnically, or religiously), and therefore not representative of the world today. Together with the potential for arbitrary use of power through the veto, this reality harms the Security Council's legitimacy. If analogized to a constitution of global order, and there is much reason to believe that not only the framers of the Charter regarded it as such but also that many currently view it as such,⁴¹ then restructuring a key feature of the United Nations organic operational system is a new constitutional moment – albeit not as a big a moment at the organizations creation, but an important one nonetheless.⁴² In this case, a constitution is a social compact among states that agree to a set of rules for conducting themselves and reflects the shared values and aspirations of those states.⁴³ When a constitution ceases to adequately do so, then it should be flexible enough to evolve (e.g. in the U.S. via amendment or judicial or statutory interpretation), otherwise, its legitimacy continues to erode.

38. See Caleb Silver, *Top 20 Economies in the World*, INVESTOPEDIA, <https://www.investopedia.com/insights/worlds-top-economies/> [https://perma.cc/WPT3-JPCC].

39. *GDP*, The World Bank (2018), https://data.worldbank.org/indicator/ny.gdp.mktp.cd?most_recent_value_desc=true [https://perma.cc/5U6N-FNPN] (containing the World Bank ranking of states by GDP as of 2018).

40. Stewart M. Patrick, *Why is No One Talking About UNSC Reform Anymore?*, WORLD POL. REV. (June 3, 2019), <https://www.worldpoliticsreview.com/articles/27906/why-is-no-one-talking-about-unscc-reform-anymore> [https://perma.cc/QT3Y-QB4R].

41. See Bardo Fassbender, *The United Nations Charter as Constitution of International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 568–84 (1998).

42. *Id.* at 577–81.

43. Paul Lermack, *The Constitution Is the Social Contract So It Must Be a Contract... Right? A Critique of Originalism as Interpretive Method*, 33 WILLIAM MITCHELL L. REV. 1403, 1427 (2007).

Calls for expansion of the Security Council's permanent membership have increased since the end of the Cold War.⁴⁴ However, nothing has changed, due in large part to a general lack of agreement among the P5 on what such reform should look like.⁴⁵ Many of those proposals urged doubling or tripling the size of the permanent members, some of which included equal veto powers, and all of which would have resulted in an unwieldy and even more ineffective and inefficient Security Council, thereby further undermining the goal of actual collective security.⁴⁶ More reform proposals have been logged since the turn of the century, also displaying a wide variety of formulae.⁴⁷

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44. See *United Nations Security Council*, *supra* note 30.
45. Patrick, *supra* note 40; See also Melling & Dennett, *supra* note 9, at 287.
46. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 573–74 (1993).
47. See e.g., Ian Hurd, *Myths of Membership: The Politics of Legitimation in UN Security Council Reform*, 14 GLOBAL GOVERNANCE 199 (2008) (acknowledging the value of increased deliberation on UNSC, but remaining skeptical that increasing diversity of the Security Council will increase its legitimacy); Anna Spain, *The U.N. Security Council's Duty to Decide*, 4 HARV. NAT'L SEC. J. 320 (2013) (acknowledging impossibility of substantive reform, calling for procedural reform to UNSC to recognize three duties: (1) A duty to decide whether it will take action in response to a crisis (2) A duty to disclose the reasons why it is not taking action (3) A duty to consult those nations and people most affected by its decisions); Kamrul Hossain, *The Challenge and Prospect of Security Council Reform*, 7 REGENT J. INT'L L. 299 (2010) (advocating for two plans for UNSC expansion: one with new permanent seats and one with 4-year repeatable seats; further recommending no expansion of veto power); Igor C. Bailen, *In Search of a Southern Agenda*, 77 PHIL. L. J. 158 (2002–03) (noting that the global South is sorely underrepresented on the UNSC; recognizing that this problem is exacerbated by reform proposals that only add Germany and Japan as permanent members); Bart. M. J. Szewczyk, *Variable Multipolarity and U.N. Security Council Reform*, 53 HARV. INT'L L. J. 449 (2012) (Recognizing that legitimacy is a separate question from legality and advising against UNSC expansion, though noting that if expansion occurs, it should be limited to India and Japan absent vetoes; further proposing that *de facto* situational expansion should instead be achieved via dramatically increased communication with states prior to and during a crisis thereby increasing legitimacy without expansion); Sebastian Jodoin, *Enhancing the Procedural Legitimacy of the U.N. Security Council: A Normative and Empirical Assessment*, 17 SRI LANKA J. INT'L L. 1 (2005) (recommending a wide array of reforms for UNSC: (1) including Japan and Germany ,perhaps by replacing current permanent members; (2) creating intermediate level of membership; (3) eliminating or reducing the power of the veto (4) increasing importance of the contribution criterion in Council selection; (5) allowing for immediate reelection of council members; (6) eliminating permanent membership; (7) implementing judicial review of Security Council resolutions by the ICJ; (8) limiting closed door meetings of UNSC; (9) allowing UNGA questions to UNSC that require answers; (10)

A moderated approach would place the most obvious, and perpetually regarded, candidates (Germany, Japan, India, and Brazil) as permanent members of the UNSC alongside others that would yield greater diversity without undue expansion. That can be achieved through the creation of rotating permanent seats that are anchored geographically. Due to the existence of large-scale ethno-religious differences in each region, such a solution is needed to accommodate those interests. If only the four perpetual candidates above were elevated, the council's permanent membership would result in elevating the mostly Hindu state from a region that is mostly Muslim⁴⁸ and elevating the mostly Portuguese state from a region that is mostly Spanish.⁴⁹ The Arab/Black split in Africa wouldn't even be addressed.

To accomplish this restructuring, Russia, China, and the United States would need to be left intact on the P5. However, there is room for accommodation with respect to Britain and France – both of which are more forward-looking states, less able to project military power than the other three, and are invested in notions of advancement for multilateral institutions.⁵⁰ In fact, France appears particularly willing

enforcing the UNSC's reporting obligation to UNGA; (11) institutionalizing the practice of consulting with states not on the Council); Craig Hammer, *Reforming the Security Council: Open Letter to U.N. Secretary General Kofi Annan*, 15 FLA. J. INT'L L. 261 (2002) (proposing a short-term course of action: leave P5 in place, create 5 new seats with vetoes for rotating 2-year terms for "middle powers," leave non-permanent seats in place; proposing a long-term course of action: remove veto power and end permanent seats altogether); Jessica Elbaz, *International Stalemate: The Need for a Structural Revamp of the U.N. Security Council*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 211 (2016) (recommending to replace the veto with a composite majority vote or institute a veto override by majority vote of the UNSC for one or two vetoes; further recommending that membership be altered to 8 permanent seats and 19 nonpermanent seats allocated regionally).

48. *See Religion by Country 2019*, WORLD POPULATION REVIEW (Oct. 24, 2019), <http://worldpopulationreview.com/countries/religion-by-country/> [<https://perma.cc/6V5R-ZSZA>] (showing that Afghanistan, Pakistan, and Bangladesh all consist of heavily Muslim population as well as the 176 million Muslims in India).
49. Will Brown, *Why is Brazil the Only Portuguese-Speaking Country in South America?*, JBI STUDIOS (Aug. 8, 2016), <https://www.jbistudios.com/blog/why-is-brazil-the-only-portuguese-speaking-country-south-america> [<https://perma.cc/A9VL-TXLU>] (citing UN Dept. of Econ. & Soc. Aff. 2015 statistics).
50. *See* Select Committee on Int'l Relations, UK Foreign Policy in a Shifting World Order, 2017–19, HL 250, at summary (UK); *see also* Press Release from France Diplomatie, *United Nations Day* (Oct. 24 2018), <https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/news/events-2018/article/united-nations-day-24-10-18> [<https://perma.cc/WF5X-VMR9>].

to embrace reform overall and limit veto use in the case of atrocities.⁵¹ In a *démarche* released by the French Foreign Ministry on United Nations Day 2018, the French government stated, “France is in favor of reforming the Security Council to make it more representative and to limit the use of the veto when mass crimes are committed.”⁵² Bringing the French and British into a shared seat with Germany to represent Europe would achieve the dual task of maintaining them on the council while also getting Germany onto the Security Council.

This allows a new structure to emerge: Permanent membership would consist of Russia, China, the U.S. and one seat each for Europe, Asia, Latin America, and Africa that rotates every two years among three permanent members from that region. This arrangement would expand permanent membership at any single sitting of the Security Council from 5 to 7, thereby avoiding the problem of too many permanent members all sitting at once and creating a further drag on efficiency.

The Asian seat would be shared among Japan, India, and either Indonesia or Pakistan. This arrangement achieves the goals of getting both Japan and India onto the council while also providing for periodic Muslim representation. The Latin American seat would be shared among Brazil, Mexico, and either Argentina or Chile – simultaneously achieving the goal of elevating Brazil while also ensuring periodic representation from Spanish Latin America. The African seat would be shared among South Africa, Egypt, and Kenya or Nigeria. This accommodation places both the leaders of Saharan and Sub-Saharan Africa on the council while also recognizing the economic importance of regional influencers.

In all four cases, the geographic rotating permanent seats bring new voices to the table with increased authority, reward the longstanding economic and military contributions regularly made by these candidates to the United Nations budget and peacekeeping operations, and recognize the historical leadership each state has undertaken in its respective region.

II. A PROCEDURAL SOLUTION TO THE VETO PROBLEM

Equity issues inevitably arise when discussion of permanent membership restructuring touches on the veto. There is very little appetite for expanding the potential for veto usage on the council by adding new permanent members with this power intact. Yet, to be fair, elevation of new members without *any* veto power creates a second

51. Press Release from France Diplomatie, *supra* note 50.

52. *Id.*

tier of less powerful permanent members. The proposal herein manages a moderate accommodation of both views.

Currently, the veto power held by the P5 is *substantive* in nature – it can be used anytime for any reason without explanation.⁵³ If assent to a resolution is withheld, the matter is over.⁵⁴ Any restraint in the use of the veto would have to be voluntary on the part of the P5 member wielding it as the Charter imposes no such breaking mechanism.⁵⁵

The Charter makes no constraints on how often or for what reason the veto power may be used; nor does it create a framework of checks and balances or require accountability. Hans Kelsen identifies the drafters' missed opportunity to restrict the negative effect of the veto: under Article 27 the voting procedure fails to distinguish between the "quasi-obligatory and discretionary functions" of the Security Council in the Charter, and Kelsen argues that the functions which the body "shall" perform could have required a simple majority and only those which it "may" perform could have required a qualified majority, so that the veto would only apply to the latter. In contrast, the Charter clearly affords all decision making by the Security Council the greatest discretion and the permanent members near complete control as a central plank of maintaining international security, with the notorious downside that, as Brierly notes, it 'has resulted in a system that can be jammed by the opposition' of a single permanent member.⁵⁶

What is proposed here is creation of a veto power that is *procedural* in nature. In other words, when one of the regional permanent members withholds assent to a measure, that is not the end of the matter. Instead, the issue is referred to a special session of the General Assembly for consideration – a majority vote in the Assembly after brief debate and without the possibility of amendment would determine the resolution's vitality and return it to the Security Council for adoption or withhold it. A procedural veto then may in fact become a substantive veto if a matter is defeated in the Assembly.

53. *UN Security Council Working Methods: The Veto*, SECURITY COUNCIL REPORT (Sept. 30, 2019), <https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php> [<https://perma.cc/V7X8-4ULS>].

54. *See id.*

55. *See id.*

56. Melling & Dennet, *supra* note 9, at 289 (citing Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 HARVARD L. REV. 1087, 1111 (1946); J. L. Brierly, *The Covenant and the Charter*, 23 BRITISH YEARBOOK INT'L L. 83, 91 (1946)).

Due to the different legislative sessions (the Security Council is always in session; the General Assembly is not),⁵⁷ it may be the case that a special standing committee of the General Assembly is formed to consider such procedural vetoes. Such a committee would need to be in session around the clock just as the Security Council and should be constituted in a geographically representative manner. Indeed, permanent regional Security Council members not currently serving in their rotating seats could possibly find a seat in their “off years” on this committee. Alternatively, the full General Assembly could consider procedural veto referrals if they occur while it is in session and the standing committee could do so when the Assembly is not in session.

This structure yields the added benefit of increasing General Assembly involvement in security matters in a much more meaningful way. It also creates more stakeholders in the “collective” prong of collective security by allowing participation in the decision-making process on important global issues. In some respects, this could be a realization of the impetus behind the Uniting for Peace Resolution. Adopted in 1950, General Assembly resolution 377(V) resolves that if the Security Council fails to exercise its responsibility to maintain international peace and security due to a lack of unanimity among the permanent members.⁵⁸ In other words, due to a veto, the General Assembly shall consider the matter immediately and make recommendations to restore international peace and security, and shall be able to do so in emergency session if the matter arises while it is out of session.⁵⁹

With one exception, each new permanent member state filling a regional rotating seat would join the council with a procedural veto power. The one exception would be Germany. There is no possibility

57. Leland Goodrich, *Basic Principles and Purposes of the United Nations*, SCHOLASTIC (May 16, 2016), <https://www.scholastic.com/teachers/articles/teaching-content/six-parts-un/> [https://perma.cc/P95Y-9CJA]; see also Juian Borger, *What is the Point of the UN General Assembly?*, THE GUARDIAN (Sep. 23, 2019), <https://www.theguardian.com/world/2019/sep/23/what-is-the-point-of-the-un-general-assembly> [https://perma.cc/U999-A4KT] (providing that there are gaps between UN General Assembly sessions).

58. See G.A. Res. 377(V), Uniting for Peace (Nov. 3, 1950); see also Christian Tomuschat, *Uniting for Peace General Assembly Resolution 377(V)*, AUDIOVISUAL LIBRARY OF INT'L LAW, <https://legal.un.org/avl/ha/ufp/ufp.html> [https://perma.cc/4GGZ-7HYL].

59. G.A. Res. 377, Uniting for Peace (Nov. 3, 1950). Originally engineered by the U.S. to circumvent a proliferation of Soviet vetoes during the Korean War, Resolution 377 has actually only been implemented ten times – the first of which was to deal with the Suez Crisis in 1956 when France and Britain were wielding vetoes. Tomuschat, *supra* note 58.

of Great Britain or France giving up their substantive veto and there is equally no possibility of Germany joining the council on unequal footing⁶⁰ – especially if it were sharing a seat with the other two. A wide array of views is held among the other candidates on the veto. Japan would not require a substantive veto to accompany its seat;⁶¹ Brazil, Pakistan, and Chile agree that the veto should eventually be eliminated altogether;⁶² Mexico believes the veto should be restricted to Chapter VII issues only.⁶³

Consequently, the realpolitik involved with maneuvering two P5 states into a shared seat with Germany together with Germany's insistence on equality, means that the Europeans emerge as a favored region with more real power than the other regions. While the inequity of this arrangement is unfortunate, it is a necessary accommodation in order to avoid the proliferation of more substantive veto possibilities. In fact, the possibility of a substantive veto being wielded any particular Security Council session is reduced under this plan from five to four, even though three procedural veto possibilities would be added.

III. VETO TRANSPARENCY VIA AN EXPLANATORY REQUIREMENT

If a permanent member of the Security Council wields its veto, whether the substantive or procedural variety, in an attempt to shield those who commit atrocities, an explanation should be forthcoming. Germany first resurrected this quite old notion of veto explanation in the 1990s when, after reunification, Berlin began making its case for permanent membership.⁶⁴ Although it only encompassed the original veto power, not the procedural version proposed here, it applied to all

60. Bardo Fassbender, *UN Security Council Reform and the Right of Veto*, 32. LEGAL ASPECTS OF INT'L. ORG. 1, 261 (Apr. 1, 1998).

61. *Id.* at 261 n.325.

62. Press Release, General Assembly, General Assembly Continues Debate on Security Council Reform with Focus on Changing Veto, Permanent Membership, U.N. Press Release GA/9692 (Dec. 20, 1999); *see also* Press Release, General Assembly, General Assembly Concludes Consideration of Security Council Reform, U.N. Press Release GA/9693 (Dec. 20, 1999); Press Release, General Assembly, Opinion on Security Council Reform Offered by Thirty-Nine More Member States As Assembly Debate Continues, U.N. Press Release GA/9825 (Nov. 16, 2000).

63. Press Release, General Assembly, General Assembly Continues Discussion of Security Council Reform, U.N. Press Release GA/9689 (Dec. 16, 1999); *See also* Fassbender *supra* note 32, at 245.

64. Michael J Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319, 341 (2000).

uses of veto.⁶⁵ I would extend this notion to include procedural vetoes as well. Whenever this unilateral and intensely undemocratic power is used, it should be accompanied by a rationale that explains not only to other members of the Security Council, but also to the entire membership of the United Nations, precisely why that permanent member was disposed to resort to this extreme measure.

Within the framework of the text of the Charter, the underlying logic in this position rests in the nature of the fiduciary duty owed by the Security Council to the rest of the United Nations – a point of some dispute among scholars.⁶⁶ The *quid pro quo* reflected in Articles 24 and 25 of the Charter is that in exchange for the Security Council acting on behalf of the members in carrying out its powers to maintain international peace and security, the members agree to accept and carry out the Security Council's decisions.⁶⁷ If use of the veto by a permanent member is an aspect of a permanent member carrying out its duty and that member is acting on behalf of the members (which in classic veto usage, it has demonstrably not been so acting), then the members are entitled to an explanation of that usage.

External to the Charter's internal logic, some have advanced the idea that permanent members have a duty under international human rights law, specifically due process norms, as well as the Responsibility to Protect,⁶⁸ to provide reasons for their votes. That same argument would hold true for the veto as well. When the Security Council adopts resolutions, these are typically preceded in their published form with a long series of whereas clauses that justify the issuance of the resolution and that cite prior or other resolutions as a basis for action.⁶⁹ A similar form could be used to accompany veto usage.

Whatever the ultimate theoretical underpinning, a requirement to transparently provide the rationale for veto usage would likely dampen its frequency. In fact, the same positive likely outcomes identified by those seeking rationales to accompany all Security Council votes are present with respect to vetoes alone as well:

A duty to give reasons for votes cast in the Security Council will rationalize the Council's decision-making process and, ultimately, improve the quality of the adopted decisions. The reason for this

65. *Id.*

66. See ANDREAS S. KOLB, *THE U.N. SECURITY COUNCIL MEMBERS' RESPONSIBILITY TO PROTECT: A LEGAL ANALYSIS* 176–77 (2017).

67. U.N. Charter arts. 24–25.

68. See generally Daniel Moeckli & Raffael N. Fassel, *A Duty to Give Reasons in the Security Council: Making Voting Transparent*, 14 INT'L ORG. L. REV. 13, 47–57 (2017).

69. See S.C. Res. 2496 (Nov. 5, 2019); see also S.C. Res. 2495 (Oct. 31, 2019).

is threefold. First, if decision-makers have to justify their decisions, they are more likely to exchange information and expertise, to carefully assess the available evidence, to weigh the different positions, and to reflect on their choices before making a decision. This allows them to be more successful at finding the decision that is best suited for the case at hand. Second, under a duty to give reasons, decision-makers are more likely to adopt reasonable decisions because they need to persuade others, including those most affected by the decisions. Since others will be able to examine and assess the justifications provided by the decision-maker, selfish and immoral arguments as well as arguments based on prejudice are likely to be suppressed. Thus, only a limited range of reasons can be invoked in order to justify decisions. In particular, decision-makers have fewer options to adopt decisions that are based on self-interested reasons. . . . Third, decisions based on grounds that can be endorsed by others will in the long run lead to an improvement of decision-making in general. Future decision-makers are more likely to base their decisions on the non-self-interested reasons that antecedent decision-makers have given.⁷⁰

Alternatively, a fallback position would be the requirement of a “situational explanation” related to use of veto concerning a situation characterized by the existence of mass atrocities.⁷¹ In other words, if an explanation for veto usage is not forthcoming in all instances, it should at least be required when the veto is used in response to situations that involve atrocities. A group of former diplomats referred to as “the Elders,” until recently led by former Secretary General Kofi Annan, maintains that in the first instance the veto should not be used or threatened to be used in these situations, but that if it is used, an explanation should be forthcoming.⁷²

Under the Elders’ proposal, where a permanent member does cast a veto in such cases then it is incumbent upon the member to explain, clearly and publicly, what alternative course of action

70. See Moeckli & Fassel, *supra* note 68, at 63.

71. Three groups have advocated some form of this, including the French Foreign Ministry, a group of statesmen known as the Elders, and the Accountability, Coherence and Transparency Group, or ACT. See Press Release from France Diplomatie, *supra* note 50; Melling & Denet, *supra* note 9, at 296; Wenaweser & Alavi, *supra* note 3. See also Security Council Research Report No. 3, *The Veto*, at 1 (Oct. 2015) (explaining that three groups have advocated some form of this, including the French Foreign Ministry, a group of statesmen known as the Elders, and the Accountability, Coherence and Transparency Group, or ACT).

72. See Security Council Research Report No. 3, *supra* note 71, at 5.

they propose as a credible and efficient way to protect the populations in question. This explanation, the Elders assert, ‘must refer to international peace and security, and not to the national interest of the state casting the veto, since any state casting a veto simply to protect its national interests is abusing the privilege of permanent membership.’ Moreover, when one or more permanent members do feel obliged to cast a veto, and do provide such an explanation, the others must undertake not to abandon the search for common ground but to make even greater efforts to agree on an effective course of action.⁷³

The veto’s original conception during the Charter’s negotiation was that it would not be a self-interested tool. “In the U.N. Charter negotiations in 1945, the Security Council’s permanent members, or P5, committed to not use the veto in situations in which they were involved. Over time, however, this has become the constant, if not almost exclusive, reason for the P5 using the veto.”⁷⁴ If that were indeed the case, and the P5 exclusively used the veto for the advancement of the organization’s purposes, then there would be much less consternation about how it has historically been deployed.⁷⁵

Part and parcel of this original justification also rested on the idea that the P5 would be the ones deploying most of the troops needed to maintain international peace and security – yet another instance where reality has departed from the foundational bargain:

The veto was originally agreed as a quid pro quo for these powerful states which had carried the heavy burden in World War II of fighting the Nazis and Japan on behalf of the international community. As they stated in 1945, the P5 could not be expected “to assume the obligation to act” and especially “in consequence of a decision in which they had not concurred.” Yet, out of almost 100,000 soldiers and police deployed today in UN-led peace forces around the world, only 3.7 percent of them are provided by the P5, and a measly 0.24 percent or 239 soldiers and police by the U.S. and Russia. While the P5 pay financially for this common endeavor, their contribution to U.N. forces is much more treasure than blood.⁷⁶

Consequently, both of the 1946-era assumptions underlying (1) the veto’s use (not self-interested) and (2) the nationality make-up of deployed U.N. troops to maintain international peace and security

73. Melling & Dennet, *supra* note 9, at 296.

74. Scott Sheeran, *The UN Security Council Veto is Literally Killing People*, WASH. POST (Aug. 11, 2014, 2:09 PM) <https://www.washingtonpost.com/posteverything/wp/2014/08/11/the-un-security-council-veto-is-literally-killing-people/>. [<https://perma.cc/Z5M2-25EJ>].

75. *See id.*

76. *Id.*

(resting disproportionately on the shoulders of the P5) have evaporated alongside the 1946-era rationales addressed above concerning which states should be permanent members.

CONCLUSION

Every time a permanent member of the U.N. Security Council casts a veto, or threatens to do so, to protect a client state committing atrocities, or perhaps to protect even themselves when they do so, the legitimacy of the UNSC is further eroded. This erosion has been decades in the making as the U.N. has grown but the UNSC has long ceased to reflect the new power structures in the world today; however, this behavior quickens the pace of that erosion exponentially. A weakened Security Council weakens not only our entire global governance project but also the very collective security goal the United Nations was designed to effectuate.

Taken together: reconfiguration of the UNSC's permanent seats to include expansion and realignment with shared regional rotating seats, implementation of a procedural veto for new members, and an explanatory requirement for each instance of veto use by a permanent member, this package of structural reforms yields a Security Council with increased legitimacy through greater representativeness, decreased possibility of substantive veto use in any one session, increased interactivity with the General Assembly, and increased transparency with rationales accompanying all veto usages.

Returning to the central question posed by the editors for this symposium, one would expect to see extending from this suite of reforms a significant diminution in use of the veto power to protect states that commit mass atrocities. Increased accountability through increased communication and transparency and increased representativeness through more regional representatives sitting as actual permanent members while only marginally increasing the size of the council is key to this outcome. It is one thing for a permanent member to cast a veto to shield a reprehensible client state without consequence on a council where the members of the "club" have not changed in 70 years.⁷⁷ It is quite another thing to cast that same veto looking eye-to-eye with another permanent member from the region where those atrocities are unfolding and explain yourself.

77. See *The UN Security Council*, COUNCIL ON FOREIGN RELATIONS (Sept. 24, 2018), <https://www.cfr.org/backgrounder/un-security-council> [<https://perma.cc/Z3EK-5TF5>].