

THE UNITED NATIONS SECURITY COUNCIL IN THE 21ST CENTURY: WHERE ARE WE NOW AND WHERE ARE WE HEADING?

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I. INTRODUCTION

In 2022, the UN will be celebrating its 77th Anniversary.¹ A question on the minds of many is whether the UN Security Council (UNSC) should be reformed in view of the many changes that have occurred in the world since the establishment of the UN. The principal change driving the debate

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1. The Charter was adopted at the San Francisco Conference on June 26, 1945, and came into force on October 24, 1945. *The San Francisco Conference*, U.N., <https://www.un.org/en/about-us/history-of-the-un/san-francisco-conference> (last visited Oct. 8, 2022).

has been the growth in the number of Member States in the UN over the years, from fifty-one at its inception to its current membership of 193. It also involves the persistent question of whether the original rationale for the institution of “permanent members” and their veto power continues to justify those unique aspects of the UNSC in its present form.

That said, the question of reforming the UNSC is not a new question. It has been present since the establishment of the UN.² Indeed, almost every time it comes up, the resounding answer from most of the Member States of the UN³ is that it can and should be reformed to reflect the changes in the world and in UN Membership over the years. However, reforming the UNSC, apart from procedural reforms that only marginally affect the performance of its fundamental functions under the Charter, is not easily accomplished. Such more fundamental changes require an amendment to the Charter, which requires the consent of all five of the Permanent Members of the UNSC.⁴

Articles 108 and 109 of the Charter govern the amendment of the Charter. Article 108 provides that any amendment must be adopted by two thirds of the Member States and ratified by two-thirds “including all of the permanent members.”⁵ Article 109 provides an alternative method for amending the Charter, through a General Conference of Member States. However, that also requires ratification by “all permanent members.”⁶

In the seventy-seven years of its existence, despite the many changes that the world and the UN have experienced, the Charter has only been amended three times: in 1963;⁷ in 1965;⁸ and in 1971.⁹ Only one of those three amendments, the amendment of 1963, dealt with reforming the UNSC. That amendment enlarged the membership of the UNSC from its original size of eleven to fifteen Member States, and also amended the manner of voting in the UNSC.

The 1963 enlargement of the UNSC was in response to the growth of the UN from fifty-one Member States at its inception in 1945 to over 112 in 1963, due principally to the decolonization of Africa following World War

2. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 434-36 (Bruno Simma ed., Oxford Univ. Press, 1995).

3. *Id.*

4. U.N. Charter art. 108, ¶ 1.

5. *Id.*

6. U.N. Charter art. 109, ¶ 2.

7. Amendments to art. 23, 27 and 61, adopted on Dec. 17, 1963. U.N. Charter Amend. art. 23, 27, 61, 109, ¶ 1.

8. *Id.* (Amendment to art. 109, adopted on Dec. 20, 1965).

9. *Id.* (Further amendment to art. 61, adopted Dec. 20, 1971).

II, which was encouraged and supported by the UN.¹⁰ The 1963 amendment dealing with voting in the UNSC provides that such decisions on procedural matters are to be made by an affirmative vote of nine members and on all other matters by an affirmative vote of nine “including the concurring votes of the five permanent members.”¹¹

There have been a number of proposals to reform the UNSC over the years, almost all of them on further enlarging the number of Member States on the UNSC and addressing in some manner the institution of permanent members and their veto power.¹² In addition, many of the more recent proposals addressed the working methods of the UNSC and the transparency of its work. This paper will address those reform proposals for enlarging the number of Member States and the institution of permanent members and the veto power. The paper will also note a fundamental new procedural reform recently adopted by the U.N. General Assembly (hereinafter UNGA) in response to the Russian invasion of Ukraine and its use of the veto to frustrate any significant action in the Security Council to resolve that conflict.

To put these issues in perspective, the paper will start with a bit of history regarding the institution of permanent members of the UNSC and the veto.

II. THE ESTABLISHMENT OF THE INSTITUTION OF “PERMANENT MEMBERS” AND THE VETO.

The institution of permanent members of the UNSC with unrestricted veto power was opposed at the San Francisco conference and has remained an issue throughout the seventy-seven years that the UN has existed.¹³ In response to such opposition at the San Francisco Conference, the US, the UK, Russia and China—in a joint Statement to the other delegations (designated in the joint statement as “the four sponsoring Governments”)—insisted on what was termed the “Yalta Formula” for voting in the Security Council.¹⁴ The formula gives the Permanent Members the veto in regard to “decisions which involve ... taking direct measures in connection with the settlement of disputes, adjustments of situations likely to lead to disputes, determination of threats to the peace, and suppression of breaches of the

10. See, e.g., Simma, *supra* note 2, at 14.

11. U.N. Charter, art. 27, ¶ 3.

12. See e.g., Simma, *supra* note 2, at 396-97.

13. See generally Simma, *supra* note 2.

14. U.N. Conference on International Organization San Francisco, 1945, *Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council*, 710-714, U.N. Doc. UNIO Vol. 11-E-F, (June 8, 1945).

peace” which are “to be governed by a qualified vote—that is, the vote of seven¹⁵ members.”¹⁶ France, which became the fifth Permanent Member shortly following the issuance of the joint statement, separately concurred with the joint Statement.¹⁷ In the Statement, the four sponsoring governments reminded other delegates to the conference, that under the Yalta formula, the Permanent Members could not act by themselves to make such decisions alone since a majority of seven—now nine—votes would be required for any such decisions. As the four sponsoring Governments further explained in their joint statement, they could not be expected in its then present condition of the world to assume the obligation to act in such serious matters as the maintenance of international peace and security in consequence of any decision in which they did not concur.¹⁸

Nonetheless, other states continued to oppose the veto at the conference. However, in the face of the determined position of the four sponsoring governments that they were not prepared to consent to the proposed UN Charter in the absence of the veto, Article 27(3) reflecting the Yalta Formula, was adopted.¹⁹

There have been proposals for reforming the UNSC in regard to the unrestricted use of the veto throughout the decades, almost from the inception of the UN.²⁰ Thus, for example, in a number of resolutions, the UNGA called upon the Permanent Members, among other measures, to “exercise the veto only when they consider the question of vital importance, taking into account the United Nations as a whole, and to state upon what ground they consider this condition present” when there is not unanimity among members of the Security Council.²¹

After the 1963 amendment to the Charter expanding the size of the UNSC from eleven to fifteen, the calls for reforming the Security Council with the further large growth of new Member States continued in the 1960s and 1970s. The proposals focused largely on the enlargement of the

15. A majority of the original eleven members of the Security Council.

16. See U.N. Conference on International Organization San Francisco, *supra* note 14.

17. *Id.* at 710.

18. *Id.* at 711.

19. See Simma, *supra* note 2, at 435 -36; see also EDWARD C. LUCK, UN SECURITY COUNCIL: PRACTICE AND PROMISE 14, 135 n.24 (2006).

20. See, e.g., G.A. Res. 40(1), at 64 (Dec. 13, 1946); G.A. Res. 117(II), at 23 (Nov. 21, 1947); G.A. Res 290 (IV), (Dec. 1, 1949).

21. G.A. Res. 267 (III), at 7 (April 14, 1949); see also, Manuel Tello, Ambassador, U.N. Statement at the Working Group on the Reform of the Security Council, in *passim* (Apr. 21, 1998) [hereinafter *Mexico Statement, 1998*]; see Plenary Press Release, G.A. General Assembly Opens Debate on Security Council Reform, Including Increase in Membership and Equitable Representation, U.N. Press Release G.A. 9508, (Nov. 19, 1998) (Summarizing statements of Mexico and Singapore) [hereinafter *1998 GA Press release*].

Security Council to reflect that development. Member states continued to propose the expansion of the UNSC generally, including calls to expand the number of permanent members while at the same time revisiting the issue of the unrestricted veto.²²

III. WHERE IS THE UN IN REFORMING THE UNSC?

The current initiatives to reform the UNSC began in 1979, with a decision by the UNGA to include a specific item on the subject on its provisional agenda. However, the UNGA did not actually consider that item until 1992.²³

The end of the Cold War in the early 1990s saw renewed efforts to reform the Security Council, both in terms of its membership and the use of the veto. In 1993, the General Assembly established the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council (hereinafter the Open-ended WG).²⁴ Very early in this process, the UNGA, recognizing the legal difficulties of achieving any progress on these issues under the Charter, decided that any such reform would require two-thirds of the Members of the General Assembly.²⁵

Over the following fifteen years or so, the Open-ended WG made considerable progress on issues relating to the working methods of the UNSC and transparency. However, this was not the case in regard to the issues relating to proposed reforms involving the enlargement of the UNSC or the veto.²⁶ In respect to these issues, the Open-ended WG in 2004 identified six topics that were individually considered: 1) size of an enlarged UNSC; 2) question of regional representation; 3) criteria for membership; 4) relationship between the UNGA and the UNSC; 5) accountability; and 6) the use of the veto.²⁷

22. Simma, *supra* note 2, at 395-97.

23. *See*, Rep. of the Open-ended Working Group on Question of Equitable Representation on and Increase in Membership of the Security Council and Other Matters related to the Security Council, Annex 1, ¶ 1 G.A. Rep. U.N. Doc. A/58/47 (July 21, 2004) [hereinafter *2004 Open-ended WG Report*].

24. *Id.* ¶ 2; G.A. Res. A/RES/48/26 ¶ 10 (Dec. 3, 1993); *see also*, *Mexico Statement, 1998*, *supra* note 21.

25. G.A. Res. A/RES/53/30, ¶ 1 (Dec. 1, 1998).

26. *2004 Open-ended WG Report supra* note 23, at Annex 1 ¶¶ 13, 15; *see* Reference paper, *Five Points Proposed for Consideration by The Informal Meeting of The Working Group*, at Annex II; *see also* Chairman's summary of discussions, at Annex IV.

27. *2004 Open-ended WG Report, supra* note 23, at ¶¶ 17-24.

In 2004, the UN's High Level Panel on Threats, Challenges and Change, originally established to prepare for the 2005 World Summit, called on the Permanent Members of the UNSC to commit voluntarily to refrain from invoking the veto in cases of genocide and large scale human rights abuses.²⁸ The High Level Panel also addressed the issue of criteria for new permanent members of any expanded UNSC, recommending that any such new permanent members should be among those states that have contributed "most to the United Nations financially, militarily, and diplomatically," particularly through contributions to the UN budget and through participation in UN peacekeeping operations.²⁹ The High Level Panel also recommended that in regard to any expansion of the UNSC, new permanent members should "represent the broader UN membership" and should not impair the "effectiveness" of the UNSC.³⁰

In 2008, the UNGA agreed to move the long deadlocked discussions on Security Council reform from the Open-ended Working Group to the Intergovernmental Negotiations in an informal Plenary of the UNGA.³¹ In February of 2009, the President of the UNGA presented a working paper which identified five key issues to be discussed: 1) categories of membership, 2) the question of the veto, 3) regional representation, 4) size of an enlarged Council and 5) working methods of the Council and the relationship between the Council and the UNGA.³²

The discussions within the UNGA on reforming the UNSC have focused on the following major initiatives.

S5 Proposal

The "S5" initiative, proposed by Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland, called for veto restraint in the face of atrocity crimes, as well as other reform measures.³³ Those other measures focused

28. U.N. Secretary-General, *The Secretary-General's High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, ¶¶ 244-60, U.N. Doc. A/59/565, (Dec. 1, 2004).

29. *Id.* ¶ 249.

30. *Id.*

31. G.A. Dec. 62/557, U.N. Doc. A/62/49 (Vol. III), at 106 (Sep. 15, 2008).

32. U.N. President of the G.A., Note by the President of the General Assembly, U.N. Doc. A/63/960 (Sep. 10, 2009).

33. See Press Release, G.A. Plenary Press Release, General Assembly Resumes Debate on Security Council Reform, With Several Divergent Proposals Still Under Consideration: Background, U.N. Press Release, GA/10484 (July 10, 2006) [hereinafter *2006 GA Press Release*]; see also G.A., Submission of Permanent Missions of Switzerland, Costa Rica, Jordan, Liechtenstein and Singapore, A/60/L.49 (Mar. 17, 2006) [hereinafter *GA Submission of Permanent Missions*].

not on the enlargement of the UNSC but on its working methods in order to enhance the accountability, transparency and inclusiveness of its work with a view to strengthening its legitimacy and effectiveness.³⁴

G4 Proposal

Four Member States—Brazil, Germany, India, and Japan—put forward a proposal, calling for six new “national permanent seats” for the economically strongest and most influential countries—putting themselves and two unspecified African countries as candidates for such seats.³⁵ According to the proponents of this proposal, genuine reform of the Council can only be achieved by expanding both permanent members and non-permanent members with the new national permanent members enjoying the same right to veto as the existing permanent members.³⁶ The proposal would increase the membership of the UNSC from fifteen to twenty five by adding, in addition to the six permanent seats, four non-permanent seats. The six new permanent seats would be allocated as follows: two from Africa; two from Asia; one from Latin America and the Caribbean (GRULAC); and one from Western European and Others Group (WEOG).³⁷ The new permanent members would not be entitled to exercise the right of veto until the question of the extension of that right to new members is decided upon separately by a review conference. The four new non-permanent members would be allocated as follows: two from Africa, one from Asia, and one from GRULAC.³⁸

34. 2004 *Open-ended WG Report*, *supra* note 23, at ¶¶ 17-24; Rep. of the Open-ended Working Group on Question of Equitable Representation on and Increase in Membership of the Security Council and Other Matters related to the Security Council, Annex 1 Enclosure, ¶ 15 G.A. Rep. U.N. Doc. A/62/47 (Oct. 9, 2008) [hereinafter *2008 Report of Open-ended WG, Enclosure*]. Such measures included inter alia proposals for: more substantive exchanges of views among the UNSC, the G.A. and ECOSOC; the UNSC exploring ways to assess the extent to which its decisions have been implemented; subsidiary bodies of UNSC to include non-members with strong interest and relevant expertise in their work; and permanent members using their veto to explain their reason for doing so.

35. *Id.* at ¶¶ 11-12; Intervention by H.E. Mr. M.S. Puri Ambassador Acting PR of India during negotiations on “Size of an enlarged Council and working methods of the Security Council” on 7 April 2009 (Apr. 7, 2009).

36. *See* Statement by Mr. Vivek Katju, Special Secretary, International Organizations and Political issues, at the Informal GA Plenary Meeting on “Intermediate model” at the United Nations, 3 September 2009 (Sept. 3, 2009).

37. 2008 *Report of Open-ended WG, Enclosure*, *supra* note 34.

38. *Id.* at ¶¶ 11-12.

AU Proposal

The African Union (AU) proposed to increase the number of UNSC seats from fifteen to twenty-six. The eleven additional seats would be distributed as follows: two permanent and two non-permanent seats for Africa; two permanent and one non-permanent for Asia; one non-permanent for the Eastern European Group (EEG); one permanent seat and one non-permanent seat for the GRULAC; and one permanent seat for the WEOG. Under that proposal, new permanent members would be granted the right to veto.³⁹

Uniting for Consensus Proposal (UfC)

Forty Member States, whose leaders included Italy, Pakistan, South Korea, and Colombia, proposed the Uniting for Consensus (UfC) proposal, calling for retaining the five permanent seats but increasing the number of non-permanent seats from ten to twenty members. The twenty non-permanent seats would be allocated as follows: six from Africa; five from Asia; four from the GRULAC; three from WEOG; and two from the EEG. The proposal would create a new category of non-permanent seats allocated not to states but to regional groups. Each of the five groups would decide on arrangements among its members for immediate election or rotation of its members on the seats allocated to its group.⁴⁰ The proposal contemplated that those five regional groups could elect their members on a rotational basis and for a period of between three to five years, without the possibility of reelection.⁴¹

Given the number and variety of proposals for reforming the UNSC before the General Assembly, little progress has been made in the General Assembly towards reaching any consensus.⁴² During the course of the discussions of the Open-ended WG in 2008, two Permanent Members, the United Kingdom and France, issued a joint statement in that they agree the

39. *Id.* at ¶ 10.

40. *Id.* at ¶¶ 13-14.

41. Question of Equitable Representation on and Increase in the Membership of the Security Council and Related Matters, Argentina, Canada, Colombia, Costa Rica, Italy, Malta, Mexico, Pakistan, Republic of Korea, San Marino, Spain and Turkey: Draft Resolution, Reform of the Security Council, Limits to Re-election and Role of Geographical Groups, ¶ 5 U.N. Doc. A59/L.68 (July 21, 2005) [hereinafter Question of Equitable Representation Draft Resolution]; see also Press Release, G.A. Plenary Press Release, 'Uniting For Consensus' Group of States Introduces Text on Security Council Reform to General Assembly, Proposes Maintaining Permanent 5, with 20 Elected Members, U.N. Press Release GA/10371 (July 26, 2005) [hereinafter 2005 GA Press Release].

42. 2008 Report of Open-ended WG, Enclosure, *supra* note 34, at ¶ 8.

UNSC should be reformed to ensure that it better represents the world today while remaining capable to take the effective action necessary to confront today's security challenges.⁴³ They reaffirmed their support for the candidacies for permanent seats for Germany, Brazil, India, and Japan, as well as a permanent seat for Africa (the G4 proposal). They stated that they were ready to consider an intermediate solution, which might include, *inter alia*, a new category of non-permanent seats with longer terms, which might evolve into permanent seats at some future time.⁴⁴ The Co-Chairs of the Open-ended WG suggested that the UNGA may wish to consider a transitional or intermediary approach to reforming the UNSC, including the creation of extended non-permanent seats of various durations as a compromise for making progress on the issue of enlarging the UNSC and the veto.⁴⁵

Indeed, all five Permanent Members have made statements supporting enlarging membership of the UNSC but were of one voice that any such enlargement should be based on a broad consensus and not undermine the efficiency and effectiveness of the UNSC.⁴⁶ The United States and Russia have stressed that only a modest expansion⁴⁷ will ensure the Council's continued effectiveness.⁴⁸

In the end, little progress has been made on the issue of the enlargement of the UNSC and the veto. Member States seem to agree that UNSC expansion should contemplate additional seats, but not much else.⁴⁹

43. *Id.* at 13.

44. *Id.*

45. *Id.* ¶¶ 17, 25-28.

46. *Id.* ¶ 19.

47. *Id.* ¶¶ 29-31 (outlining various options on the number and category of seats proposed); *see also 2008 Report of Open-ended WG, Enclosure, supra* note 34; Letter Dated 20 March 2008 from Permanent Representative of Cyprus to United Nations Addressed to the President of the General Assembly, Enclosure, Annex II, G.A. Rep. U.N. Doc. A/62/47 (Oct. 9, 2008) (compilation of ideas and positions, including ideas for an intermediate approach to enlarging the UNSC, Elements for Security Council enlargement, and appeal to Permanent Members to exercise restraint on invoking the veto regarding war crimes, genocide, and crimes against humanity, "Elements for Working Methods").

48. *See, e.g.,* Press Release, G.A., Plenary Meetings Coverage, Member States Call for Removing Veto Power, Expanding Security Council to Include New Permanent Seats, as General Assembly Debates Reform Plans for 15-Member Organ, *in passim*, U.N. Press Release GA/12091 (Nov. 20, 2018) [hereinafter *2018 GA Press Release*].

49. *2008 Report of Open-ended WG, Enclosure, supra* note 34, at ¶¶ 29-31; *see also 2008 Report of Open-ended WG, Enclosure, Letter Dated 20 March 2008 from Permanent Representative of Cyprus, supra* note 47.

IV. WHERE IS THE UN HEADING IN REFORMING THE UNSC?

Enlargement of the UNSC

Recent years have not witnessed any significant progress in the efforts to enlarge the UNSC. The principal obstacle to achieving progress lies not with the Five Permanent Members of the UNSC. They have all endorsed the enlargement of the UNSC in principle with a general caveat that any such enlargement should not undermine the efficiency and effectiveness of the UNSC to address matters under Chapter VII dealing with international peace and security.⁵⁰

For many years, the United States has maintained that it supports an expansion of the UNSC, stressing, however, that it supports only “a modest expansion” of both permanent and non-permanent members in order not to undermine the efficiency and effectiveness of the UNSC to perform its vital functions.⁵¹ In regard to the criteria for choosing additional permanent members of the UNSC, the US has stated that such consideration must take into account the candidates’ ability to contribute to the maintenance of international peace and security.⁵²

The UK supports the expansion to make the UNSC more representative, but, like the US, cautions against compromising the effectiveness of the Council.⁵³ France, similarly, has stressed the need to make the UNSC more representative without compromising its effectiveness.⁵⁴ Russia also supported expanding the Council to make it more representative but stresses that such efforts should not undermine the UNSC’s ability to react to challenges effectively and efficiently. Russia takes the position that the maximum membership of the UNSC should not exceed the low twenties.⁵⁵ China has expressed support for increasing the representation of developing countries, particularly African States, on the UNSC.⁵⁶

The problem essentially lies with the inability of the recognized regional groups within the UNGA to agree among themselves on how to

50. See, e.g., 1998 GA Press Release, *supra* note 21; see also 2018 GA Press Release, *supra* note 48.

51. See 2018 GA Press Release, *supra* note 48, at ¶¶ 10-11.

52. *Id.* at ¶ 11.

53. 2008 Report of Open-ended WG, Enclosure, *supra* note 34, at 8, 13; 2018 GA Press Release, *supra* note 48.

54. See 2008 Report of Open-ended WG, Enclosure, *supra* note 34; 2018 GA Press Release, *supra* note 48.

55. 1998 GA Press Release, *supra* note 21, at 6-7.

56. 2018 GA Press Release, *supra* note 48, at 2.

enlarge the membership of the UNSC. The Members of the UNGA, particularly the members of the Group of 77, which represents 132 of the 193 Member States and includes Member States from all of the regional groups except for WEOG, have not been able to agree on which of the many proposals for enlargement to support.⁵⁷ Even within the WEOG, there is disagreement as to whether there should be an additional permanent seat and who might occupy the seat.⁵⁸

While the UK and France have long endorsed the G4 proposal, none of the other Permanent Members have done so. Nor have any of the recognized UN regional groups endorsed the proposal.

GRULAC members other than Brazil, both large and small, have different ideas as to how to reform the UNSC membership and which GRULAC member should occupy any permanent seat on the UNSC—or even whether there should be a permanent seat for an individual country versus some kind of non-permanent regional seat.⁵⁹ Thus, many GRULAC countries support the UfC proposal calling for regional seats to be filled for extended periods on a rotational basis.⁶⁰ The situation is similar in regard to other regional groups, including the WEOG.⁶¹ Thus, none of the regional groups other than Africa have a proposal for enlarging the UNSC.

Additionally, the African proposal has other problems. Given the concerns raised by the Five Permanent Members that any expansion not be so large as to undermine the effectiveness and efficiency of the UNSC to perform its vital functions, it seems unlikely that the AU proposal calling for an expansion of up to twenty six members of the UNSC would succeed even if other regional groups came around to supporting the proposal. Putting aside the issue of the size of the expansion, the AU, like other regional groups, faces the issue of which of its Member States would be given the new permanent seats it has proposed—even regarding the proposed two African seats, let alone the other regional groups. While much attention has been focused on such African Member States as South Africa, Egypt, and Nigeria,⁶² in its proposals, the AU has been careful not

57. See Question of Equitable Representation Draft Resolution, *supra* note 41; see also 2005 GA Press Release, *supra* note 41.

58. See 2006 GA Press Release, *supra* note 33; see also GA Submission of Permanent Missions, *supra* note 33.

59. See S5 and UfP proposals discussed above and various African supporters.

60. See Press Release, U.N. General Assembly Plenary Press Release, *General Assembly Resumes Debate on Security Council Reform with Several Divergent Proposals Still Under Consideration*, ¶ 4, U.N. Doc. GA/10484 (July 20, 2006) (“Background” mentioning Argentina, Colombia, Costa Rica, and Mexico).

61. *Id.*

62. See 2008 Report of Open-ended WG, *Enclosure*, *supra* note 34.

to formally identify which Member States it proposes to occupy any new seats.

While the Asian group does not have such a proposal, the G4 proposal prominently features both Japan and India as proposed new permanent members. There is a widespread—but not universal—support to recognize the importance of Japan in the UN.⁶³ However, not unexpectedly, the proposal to elevate India to a permanent seat is not nearly as widespread, generating differences with other Asian group members large and small. Thus, many Member States within the region have supported other proposals.⁶⁴

It appears that the regional groups within the UNGA are not close to resolving the many differences among them as to how much and how to expand the UNSC membership, making it unlikely that there will be any such expansion in the near future.

Veto reforms

The United States and Russia oppose any tampering with the veto.⁶⁵ China has been coy, but has expressed skepticism of even voluntary restraints on the veto.⁶⁶ Only the UK and France have voiced support for restricting the use of the veto.⁶⁷ Consistent with their longstanding positions, the restrictions they have called for are of a voluntary nature, and do not require any Charter amendment.⁶⁸

The initiative to restrict the use of the veto by the Five Permanent Members in some manner has received growing support among the Members of the UNGA. The 1979 S5 proposal calling for such reform garnered some twenty-five Member States before the S5 withdrew their proposal in 2012.⁶⁹ Subsequently, the sponsors of the S5 proposal continued their initiative. In 2015, Liechtenstein submitted to the Secretary General and the UNSC a proposed “Code of Conduct” regarding UNSC

63. *Id.*

64. *Id.*

65. See G.A. Res. A/RES/53/30, *supra* note 25; 2018 GA Press Release, *supra* note 48.

66. Stuart M. Patrick, *Limiting the Security Council Veto in the Face of Mass Atrocities*, Council on Foreign Relations (Jan. 23, 2015, 1:31 PM), <https://www.cfr.org/blog/limiting-security-council-veto-face-mass-atrocities>; see generally Jean-Baptiste Jeangène Vilmer, *The Responsibility Not to Veto*, 24 GLOBAL GOVERNANCE 331 (2018).

67. See 1998 GA Press Release, *supra* note 21; See G.A. Res. A/RES/53/30, *supra* note 25; 2018 GA Press Release, *supra* note 48.

68. 2018 GA Press Release, *supra* note 48; see also Patrick, *supra* note 66; Vilmer, *supra* note 66, at 341.

69. See generally Press Release, G.A. Plenary Press Release, *supra* note 33; 2004 Open-ended WG Report, *supra* note 23; 2008 Report of Open-ended WG, *Enclosure*, *supra* note 34.

action against genocide, crimes against humanity, and war crimes.⁷⁰ supported by 107 Member States. The Code of Conduct is open to all Member States of the U.N.⁷¹

The Code of Conduct arose out of the work of a group of twenty-four Member States of the Accountability, Coherence and Transparency Group (ACT Group) in consultation with civil society and the Secretariat of UN.⁷² As proposed, “[a]t its heart, the Code of Conduct contains a general and positive pledge to support Security Council action against genocide, crimes against humanity and war crimes—to prevent and put an end to these crimes.”⁷³ More specifically, the Code of Conduct calls upon the Permanent Members to not vote against credible UNSC resolutions that are aimed at preventing or ending those crimes.⁷⁴

The number of Member States supporting the Code of Conduct has grown over the years. As of 2020, some 121 States supported the Code.⁷⁵ Notably, among the Member States supporting that ACT initiative at the time are not only the small and medium States that had previously launched the S5 reform proposal, but two of the four Member States that had made the G4 proposal (Japan and Germany), many Member States that were supporting the UfC proposal, many European, African, Latin American, and Asian Member States, as well as two of the Five Permanent Members—the UK and France.⁷⁶ The number of Member States supporting the Code of Conduct has grown over the years.⁷⁷

Along the same lines, a joint initiative of France and Mexico calling for voluntary restraint by the Permanent Members, regarding UNSC resolutions implicating mass atrocity crimes, has been endorsed by over 100 Member States.⁷⁸

70. See U.N. Security Council, *Code of Conduct regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes*, U.N. Doc. A/70/621-S/2015/978 (Dec. 14, 2015); see also Amb. Christian Wenaweser and Sina Alavi, *Innovating to Restrain the Use of the Veto in the United Nations Security Council*, 52 CASE W. RES. J. INT’L L. 65 (2020).

71. Wenaweser & Alavi, *supra* note 70, at 67.

72. *Id.* at 66-67.

73. U.N. Security Council, *Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary General*, U.N. Doc. A/70/621 – S/2015/978 (Dec. 14, 2015).

74. Wenaweser & Alavi, *supra* note 70, at 67.

75. *Id.* at 66-67.

76. As described by France, the Code of Conduct proposed a commitment by the Permanent Five not to exercise their right to veto in situations of serious human rights crises when their vital interests are not in play. See Vilmer, *supra* note 66, at 335.

77. See U.N. Security Council, *supra* note 70.

78. Vilmer, *supra* note 66, at 331, 334, 340.

Given the longstanding opposition of at least three of the five Permanent Members (US, Russia, and China) to any legally binding restrictions on the exercise of the veto, it is understandable that the calls within the UNGA for reforms relating to the exercise of the veto have focused on voluntary restraints or procedural reforms that do not require any Charter amendment.⁷⁹

Supporters of reforming the use of the veto by voluntary restraints can take heart from the success the UNGA has had in achieving agreement on certain procedural reforms in the working methods of the UNSC.⁸⁰ Nonetheless, while they continue to press the case for more substantive voluntary reforms, the continuing opposition of three of the Permanent Members makes even such voluntary reforms unlikely. Perhaps, if agreement were to be reached on the subject of the expansion of the UNSC, there would be an added incentive for the three, as part of an overall package, to more favorably consider some form of voluntary restraints. Only time will tell.

In the meantime, with the recent invasion of Ukraine by Russia and its invoking of the veto to frustrate any action by the Security Council regarding the crisis, the General Assembly revived and overwhelmingly endorsed⁸¹ a procedural proposal of some two years ago by Liechtenstein for the General Assembly to respond to such vetoes.⁸² The procedural reform creates a standing mandate for the Assembly to be convened automatically within ten days every time a veto has been cast in the Council.⁸³

The permanent member or members responsible for casting a veto would be accorded precedence in the list of speakers, essentially inviting such member or members to lead off and address the Assembly meeting convened under this resolution.⁸⁴

The new resolution makes an exception to this mandate for convening a meeting to discuss a veto where the General Assembly has already

79. 2008 Report of Open-ended WG, Enclosure, *supra* note 34, at ¶¶ 17-24; 2004 Open-ended WG Report, *supra* note 23, at ¶ 15.

80. See, e.g., U.N. President of the S.C., Note by the President of the Security Council, U.N. Doc. S/2017/507 (Aug. 30, 2017) (“For a consideration and user-friendly list of recent practices and newly agreed measures which will serve as guidance for the Council’s work.”).

81. G.A. Res. 76/262 (Apr. 26, 2022); see also Ben Donaldson, *Liechtenstein’s ‘Veto Initiative’ Wins Wide Approval at the UN. Will It Deter the Major Powers?*, UNA UK (Apr. 28, 2022), <https://una.org.uk/news/liechtensteins-veto-initiative-wins-wide-approval-un-will-it-deter-major-powers>.

82. U.N. Security Council, *supra* note 70 at 69-71.

83. See Donaldson, *supra* note 81.

84. *Id.*

convened a special session on the same situation under the Uniting for Peace resolution adopted by the General Assembly in 1950, in connection with the Korean conflict.⁸⁵ Notably, a special emergency session under the Uniting for Peace resolution process was called for by the Security Council on 27 February 2022 to examine the situation in the Ukraine following Russia's invasion—the eleventh such emergency special session under the Uniting for Peace resolution.⁸⁶

This proposal for the new procedural reform had eighty-three co-sponsors from every regional group and three Permanent members—the UK, France and the US—and was adopted by consensus.⁸⁷ The principal proponent for this procedural reform has suggested that the authors of this initiative “hope that the adoption of this procedural reform will spur a wider debate as to whether the Council should not only reconsider the use of the veto but open space for “innovation””⁸⁸

Only time will tell how this new procedural reform will play out, especially in terms of the related Uniting for Peace resolution already in place—and already invoked for example in regard to the Ukraine situation.⁸⁹ Only time will tell whether the hope for further “innovation” regarding the veto will be realized.

The foregoing has examined the prospects for UNSC reform of the veto within the framework of the UNGA. However, this issue has been the subject of discussion within civil society and the academic community as well. It would be remiss in this discussion concerning the future of the UNSC during the 21st Century to fail to take account of those developments, if only briefly.

With respect to civil society, several legal professional entities have weighed in on the issue, with some advocating legally binding restraints on the exercise of the veto in situations where the UNSC is addressing atrocity crimes⁹⁰ and others advocating for voluntary restraints.⁹¹

85. See GA Res. 76/262, *supra* note 81, ¶ 1; see GA Res. 377A(V) (Nov. 3, 1950) (providing that an “emergency special session” can be convened within twenty-four hours where the Security Council fails to exercise its primary responsibility for international peace and security because of a lack of unanimity of the permanent members. The resolution provides that such a session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the members of the United Nations); see also Larry D. Johnson, “Uniting For Peace”: Does It Still See Any Useful Purpose?, 108 AJIL UNBOUND, 106-15 (2014).

86. See S.C. Res. 2623, ¶ 3 (Feb. 27, 2022); see also *Security Council vote sets up emergency UN General Assembly session on Ukraine crisis*, UN NEWS (Feb. 27, 2022), <https://news.un.org/en/story/2022/02/1112842>.

87. See Donaldson, *supra* note 81.

88. *Id.*

89. *Id.*

90. See Vilmer, *supra* note 66, at 342.

With respect to academia, there has been considerable discussion of the issue. Many of those addressing the issue have begun to advocate for mandatory, legally binding restraints on the exercise of the veto where resolutions before the UNSC implicate mass atrocity crimes.⁹² Pursuant to that view, international law has evolved to the point where such restrictions on the use of the veto already exist as a matter of law—without any need to amend the Charter.⁹³

These arguments build on the UNGA’s Declaration on Responsibility to Protect⁹⁴ and evolving international law and practice as it relates to the Genocide Convention⁹⁵ and the 1949 Geneva Conventions⁹⁶ as well as the evolving principle of *jus cogens* as they apply within the context of the Purposes and Principles of the Charter.⁹⁷ The thrust of these arguments is that the exercise of the veto of a UNSC resolution to prevent or punish genocide, serious war crimes, and crimes against humanity violates binding treaty obligations of Member States, including the Permanent Members of the UNSC, as well as the principle of *jus cogens*, and is contrary to purposes and principles of the UN Charter.⁹⁸

Thus, proponents of that view point to the fact that the Genocide Convention contains an obligation to “prevent genocide” and the 1949 Geneva Conventions provide for states parties “to respect and ensure respect for those Conventions.”⁹⁹

These ideas raise serious and complex issues of international law. While it is beyond the scope of this paper to provide an in-depth analysis of

91. *Id.* at 335, 339. The American Bar Association recently adopted a policy urging the Permanent Members to commit “in principle” to voluntary restraint in exercising their veto power with respect to resolutions proposing measures to prevent genocide, serious war crimes, ethnic cleansing, or crimes against humanity. *Midyear Meeting 2022 - Item 606*, ABA HOUSE OF DELEGATES, Feb. 15, 2022.

92. *See e.g.*, JENNIFER TRAHAN, *EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES* (Cambridge Univ. Press 2020).

93. *Id.* at 142-247.

94. G.A. Res. 60/1 ¶ 138-9 (Oct. 24, 2005).

95. G.A. Res. 260 A (III), at 277 (Dec. 9, 1948).

96. The Geneva Conventions I, Aug. 12, 1949, 75 U.N.T.S. 31; The Geneva Conventions of 12 August 1949 II, Aug. 12, 1949, 75 U.N.T.S. 85; The Geneva Conventions of 12 August 1949 III, Aug. 12, 1949, 75 U.N.T.S. 135. The Geneva Conventions of 12 August 1949 IV, Aug. 12, 1949, 75 U.N.T.S. 287.

97. *See Trahan, supra* note 92, at 142-242.

98. *Id.*

99. *See* The Geneva Conventions, *supra* note 96 at I, III. *See also* Common Article 3 enumerating a number of “grave breaches” or war crimes and provision in Additional Protocols I and II providing for an obligation “to ensure respect.”

those issues, it is useful to identify some of those issues.¹⁰⁰ First, the inclusion of crimes against humanity raises an issue of which crimes against humanity the proponents have in mind—beyond those covered in the enumerated treaties. Initially, there is an issue of the status of crimes against humanity following the adoption by the ILC of draft articles and commentary on the subject.¹⁰¹ The UNGA continues to consider the subject.¹⁰²

Regarding the treaties identified as creating obligations to prevent mass atrocity crimes by non-signatory parties to those treaties (such as the Genocide Convention and the Geneva Conventions), the question arises as to whether every Permanent Member and non-permanent member of the UNSC is a party to those treaties. If not, there is the argument that they would not be bound by the obligations under those treaties.

More importantly, there is also the question of whether the Permanent Members (and non-permanent members) of the UNSC, when performing the functions of the UNSC, would trigger an obligation under those treaties. The Charter provides that UN Member States agree that in carrying out the functions of the UNSC, Members States are acting “on their behalf.”¹⁰³ Thus, under the Charter when fulfilling the functions of the UNSC, it can be argued that UNSC members are not acting in their national capacity but in their individual capacity as part of a principal organ of the UN.¹⁰⁴

100. Notably, these theories have been described in a recent work on the law and practice of the Security Council as “legally unconvincing.” See MICHAEL WOOD & ERAN STHOEGER, *THE UN SECURITY COUNCIL AND INTERNATIONAL LAW* 30-31 (Cambridge Univ. Press, 2022).

101. U.N. General Assembly, Draft Article on Prevention and Punishment of Crimes Against Humanity, U.N. Doc. A/74/10 (Aug. 9, 2019).

102. The issue before the GA is whether to proceed to the preparation of an international convention based on the articles or to proceed more cautiously. See U.N. General Assembly Plenary Meetings Coverage, *Adopting 29 Legal Texts, General Assembly Reaffirms Sixth Committee’s Vital Role in Progressive Development of International Law*, U.N. Doc. GA/12303 (Dec. 15, 2020); see also Sean Murphy, *Striking the Right Balance for a Draft Convention on Crimes Against Humanity*, JUST SECURITY (Sept. 17, 2021), <https://www.justsecurity.org/78257/striking-the-right-balance-for-a-draft-convention-on-crimes-against-humanity/>.

103. U.N. Charter, art. 24 ¶ 1: “In order to enhance prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

¹⁰⁴ Simma, *supra* note 2, at 404: “As an organ of the UN, the SC acts on behalf of the Organization and not on behalf nor the individual member states. Accordingly, its actions and decisions are attributed to the UN Organization as a whole and not to individual members, such as, for instance, the members of the SC.”; see also at 407 (describing discussions in the UNSC endorsing the view that Member States do not act as the agent of the individual member state when fulfilling the functions of a member of the UNSC).

On the other hand, the proponents of the view that legal limitations on the exercise of the veto already exist also argue that it doesn't matter whether the Permanent Members of the UNSC are parties to these treaties because the obligation to prevent atrocity crimes is applicable under the principle of *jus cogens*.¹⁰⁵ While the ILC adopted twenty-three draft conclusions and a draft annex together with commentaries on the subject of *jus cogens* and has transmitted the draft conclusions to Governments for comments and observations,¹⁰⁶ the UNGA continues to consider the subject.¹⁰⁷

The argument that the principle of *jus cogens* applies to the obligations under the treaties relating to mass atrocities raises not only the issue whether that position is accepted in international law, but also the issue of the extent of a state's obligation pursuant to that principle. As even the proponents of the application of the principle acknowledge, there is uncertainty in this area of the law.¹⁰⁸ In this respect, it appears that uncertainty remains about norm conflicts between *jus cogens* prohibitions on the commission of atrocity crimes and inconsistent treaty or customary international law rules following the International Court of Justice's decision in *Jurisdictional Immunities of the State*.¹⁰⁹

Putting aside the issue of which mass atrocity crimes may be covered by the principle of *jus cogens*, there is an added issue of the extent that the principle applies to the UN as an international organization and to the members of the UNSC acting on behalf of the organization.¹¹⁰ The complexity of this issue has been acknowledged by those seeking to recognize legal limitations on the Permanent Members.¹¹¹

105. See Trahan, *supra* note 92.

106. See U.N. General Assembly, *Fourth Report on Peremptory Norms of General International Law (jus cogens)* by Dire Tladi, *Special Rapporteur**, A/CN.4/727 (Jan. 31, 2019).

107. *Id.*

108. Trahan, *supra* note 92, at 156. Professor Trahan points out: "It is unclear, however, whether all 'underlying crimes' of crimes against humanity as they are formulated in the Rome Statute are protected by *jus cogens*" and "Similarly, there does not appear to be clarity regarding which war crimes have been recognized as *jus cogens*."; see also Thomas Kleinlein, *Jus Cogens Re-examined: Value Formalism in International Law*, 28 EUR. J. INT'L L. 295 (2017) (for a review of recent analyses of different approaches to *jus cogens*).

109. See *e.g.*, *Germany v. Italy*, International Court of Justice, judgement, at ¶¶ 92-97 (Feb. 3, 2012).

110. See Simma, *supra* note 2; see also U.N. General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, A/56/10 (2001). For an analysis of the application of the principle of *jus cogens* to the work of the Security Council, see Wood and Stöcker, *supra* note 100 at 78-83.

111. See, *e.g.*, Trahan, *supra* note 92, at 167 n.120.

Proponents of such existing legal limitations on the veto have argued that the Permanent Members are obligated to refrain from invoking the veto in regard to resolutions seeking to prevent mass atrocity crimes in view of the requirement that they act in accordance with the Purposes and Principles of the Charter. However, this argument also raises issues.

The Charter identifies four “Purposes” in Article 1: 1) “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, in conformity with principles of justice and international laws, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”; 2) “to develop friendly relations among nations ...”; 3) “to achieve international co-operation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights ...”; and 4) “to be a center for harmonizing the actions of nations in the attainment of these common ends.”¹¹²

Article 24 (2) of the Charter specifically calls upon Members of the UNSC to “act in accordance with the ‘Purposes and Principles of the United Nations,’” and further provides that “the specific powers granted to the Security Council for the discharge of these duties are laid down in chapters VI (Pacific Settlement of Disputes) VII (Action with Respect to Threats to the Peace and Breaches of the Peace, and Acts of Aggression), VIII (Regional Arrangements¹¹³) and XII (International Trusteeship System).”¹¹⁴

All the Chapters subject to the elaboration of “specific powers” under Article 24(2) deal with and specifically reference only the purpose relating to the maintenance of international peace and security. The other Chapters omitted from that enumeration, Chapters IX (International Economic and Social Co-operation), X (Economic and Social Council), and XI (Declaration Regarding Non-Self-Governing Territories) address matters other than peace and security and directly relate to the other broader Purposes and Principles enumerated in the Charter. If the requirement to act in accordance with the Principles and Purposes is to be considered in terms of the “specific powers” granted in the enumerated chapters, there is an argument that the only Purposes and Principles relevant to the exercise of

112. U.N. Charter art. 1.

113. U.N. Charter art. 24 ¶ 2. The regional arrangements addressed in Chapter VIII are ones for dealing with international peace and security under Art. 52 of the Charter.

114. *Id.*

those specific powers relate entirely or principally to Article 1—to maintain international peace and security—and not the other paragraphs in Article 1. Thus, the only “purpose and principle” specifically referenced to be substantively applicable to the functions exercised in Chapters VI, VII and VIII is that relating to the maintenance of international peace—and security.¹¹⁵

The proponents of recognizing existing legal limitations on the exercise of the veto pursuant to the “Purposes and Principles,” reference in particular the language in Article 1(1) “in conformity with principles of justice and international law” to support such legal limitations on the UNSC in the exercise of the veto and, generally, all of the organs of the UN.¹¹⁶ However, this argument raises issues. Initially, there is an issue of whether the Purposes were intended to establish legal limitations on the UNSC—or any other UN organ. According to the history of the Charter, the “Purposes” were merely designed to provide a guide for the conduct of UN organs in a fairly flexible manner . . .¹¹⁷ There is also an argument that the reference to “principles of justice and international law” in Article 1(1) refers specifically to the means for the adjustment of international disputes which might lead to a breach of the peace—and not to collective measures as provided in Chapter VII.¹¹⁸

Thus, the proponents of recognizing existing legal limitations on the exercise of the veto based on the Purposes and Principles of the UN—as set out in Article 1 and the requirement in Article 24 (2) that the UNSC act in accordance with those purposes—raises the fundamental issue of whether those Purposes and Principles were intended to establish legal limitations or policy guidelines.¹¹⁹ As one noted Charter scholar has opined: “A restriction of the powers of the S.C. based on Article 24(2), second sentence, which in the eyes of the authors of the Charter would appear ‘legalistic,’ would run counter to the purpose of the UN Charter.”¹²⁰

CONCLUSION

The UN Security Council continues to perform a vital function for the UN and the World related to the maintenance of international peace and

115. U.N. Charter art. 33; U.N. Charter art. 39; U.N. Charter art. 52.

116. See e.g., Trahan, *supra* note 92.

117. Simma, *supra* note 2, at 50.

118. *Id.* (Paragraph 1 of Art. 1 is composed of two parts, the first of which describes the essential “Purpose” of the Organization, namely, to maintain international peace and security, whereas the second paragraph (sic part) sets out the means designed to achieve this Purpose).

119. *Id.* at 403. See also Wood and Stthoeger, *supra* note 100.

120. *Id.*

security. No observer of the UN would question that the UNSC has not performed perfectly and, at times, has disappointed even its strongest supporters. Nor would they question that the UNSC is in need of a reform to make it more representative of the UN's universal membership. There is also widespread support for limiting the exercise of the veto in situations implicating mass atrocity crimes. Unfortunately, the prospect for achieving such reform are not good, for a variety of reasons discussed above.

That does not mean that reform is not possible. The recent adoption by the UNGA of the Liechtenstein procedural proposal calling for the automatic meeting of the UNGA to discuss any veto that occurs in the Council is an example of what can be done outside of the Council to keep the pressure on the Permanent Members for reform within the Council—even if made possible only by such an extreme event as the Russian invasion of Ukraine.

What is required for even a chance of a significant change, however, is perseverance. For those who believe the time for a reform has come, the fight continues.