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Making Effective Use of Existing Legal Obligations in the Face of Atrocity Crimes based on Remarks Delivered in the UN Trusteeship Council by Professor Jennifer Trahan, New York University, October 22, 2018

As we commemorate the 70th anniversary of the adoption of the Genocide Convention, the international community has not done well in ensuring that “never again” means “never again.”

There are three current challenges to addressing the crimes of genocide, crimes against humanity, and war crimes. The political landscape is growing increasingly less tolerant of pursuing accountability. And although there is a general agreement that the international community bears a responsibility to protect (“R2P”) against atrocity crimes, in situations such as Syria, there has been no responsibility shown and no protection. And there has been extensive use of the veto by at least some permanent members of the United Nations Security Council.

As to how to strengthen support for international justice in an increasingly hostile landscape, I will simply ring the warning bell that the field appears to be facing increasing challenges and needs the support and engagement of those states and individuals still committed to it.

Over the last twenty years, we have seen the responsibility to protect grow into a broad doctrine, encompassing a “continuum of prevention, reaction and rebuilding,” and formulated in terms of three pillars of responsibility: that states have primary responsibility to protect their population, that the international community will assist states to meet that obligation, and that other states will step in when such protection is not provided.

Too often people speak of R2P as if it is optional, a nice moral aspiration, but nothing more. In fact, there are hard law legal obligations underlying R2P.

Under the Genocide Convention, Article 1 imposes an obligation to “prevent and punish” genocide. The obligation to “prevent” depends on means. In this regard,

countries with particular ties or particular positions of influence, or ones intervening in a situation, would have particularly strong obligations of due diligence.

There is also the obligation to “punish” genocide in Article 1 of the Convention.

The International Court of Justice has recognized the obligation of third states to ensure respect for the Geneva Convention.

Next is the issue of the use of the veto power by certain permanent members of the UN Security Council in the face of genocide, crimes against humanity, and war crimes. Veto use has been mixed in the past. The US, UK, and France used the veto related to apartheid-era crime, although sanctions were ultimately imposed. In the case of Rwanda, there was no veto, but permanent members displayed no particular interest in taking action. Periodically, the US has used the veto in reference to Israel, for various reasons. There is also the threat of a veto, or 'silent veto,' that results in a lack of timely response, for example in situations in Darfur, Sri Lanka, and Myanmar. And there have been twelve vetoes related to the situation in Syria.

In all these situations, I ask: are these kinds of vetoes in line with what was negotiated in San Francisco? Are they in line with the UN Charter? There is no indication that they are.

For the last twenty years, there have been a number of initiatives calling for voluntary veto restraint in the face of genocide, crimes against humanity, and/or war crimes.

These started with the report of the International Commission on Intervention and State Sovereignty and have continued with the work of the “Small Five” group of states (Costa Rica, Jordan, Liechtenstein, Singapore, Switzerland), the French- Mexican initiative (now endorsed by 101 states), and the ACT group of states’ Code of Conduct.

These represent twenty years of agreement that use or threat of use of the veto in the face of atrocity crimes is problematic.

However, they are all framed as “soft law” legal obligation—as a Code of Conduct or “political declaration.” Moreover, three of the permanent members of the Security Council have not joined any of these initiatives.

Three arguments support the conclusion that there are legal limits to the use of the veto power in the situations discussed:

1. The veto power derives from the UN Charter, which is subsidiary to jus cogens norms. Thus, a veto that violates jus cogens norms, or permits the continued violation of jus cogens norms, would be illegal or ultra vires.
2. The veto power derives from the UN Charter, which states that the Security Council “[in] discharging [its] duties” “shall act in accordance with the purposes and principles of the United Nations.” A veto in the face of a credible dra[?] resolution

aimed at curtailing or alleviating the commission of genocide, crimes against humanity or war crimes does not accord with these principles.

3. A permanent member of the Security Council that utilizes the veto power also has other treaty obligations, such as those under the Genocide Convention. A Permanent Member's use of the veto that would enable genocide, or allow its continued commission, would violate that state's legal obligation to "prevent" genocide.

To move forward on R2P, we need to remind ourselves that there are legal obligations underlying it. These remarks are not solely addressed to states on the UN Security Council, but also member states of the General Assembly and individual states in their bilateral relations. Are you doing all possible to "ensure" these protections? That is what is required by treaty obligations.

Why did R2P play virtually no role related to the situation in Syria? It was blocked by veto use in the face of atrocity crimes. I suggest a critical look at whether unlimited veto use in the face of genocide, crimes against humanity and war crimes accords with the UN Charter and international law.

One could even imagine the General Assembly requesting an advisory opinion from the International Court of Justice on this issue: "Is unrestrained veto use in the face of genocide, crimes against humanity and war crimes in accordance with international law?" I will end with that thought.