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The United Nations Security Council: Ways out of the Veto-Dilemma

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Dedication

I thank my parents for their support. Without you, my academic experience abroad would not have been possible. I dedicate this research paper to all people in this world who suffered or suffer, directly or indirectly, from mass atrocity crimes.

Abstract

Since February 2022, Ukraine has been at war with Russia. The war was initiated by Russia without any international legal legitimacy. Russia is a permanent member of the most powerful international executive body in the world - the United Nations Security Council (UNSC). As a permanent member, Russia holds the power to block draft resolutions of the UNSC with a veto.

The main responsibility of the UNSC is the maintenance of peace and security. To this end, the UNSC is allowed to order decisive peacekeeping measures. In the Russo-Ukrainian War, however, the UNSC is unable to do so because the relevant draft resolutions are blocked by Russia - the aggressor itself. Even a reform of the veto *per se* - by amending the Charter of the United Nations (UN Charter) - can be blocked by vetoing the corresponding resolution. Progress is a distant prospect. This example reveals the most serious functional problem of the UNSC: the veto-dilemma.

This minor dissertation examines the history of the veto-dilemma and explores its legal foundations. Two case studies are provided to demonstrate the human rights relevance of the veto-dilemma and to prove its negative role in the context of mass atrocity crimes. The thesis concludes by summarizing the main legal possibilities to regulate the veto power in order to contain its negative impact on human rights and to ensure the functionality of the UNSC. The findings are applied to the case studies and reveal that the UNSC's use of the veto has often been unlawful in the past.

While the thesis does not offer an indisputable solution to the veto-dilemma, it does offer hope. It proves that international law provides mechanisms - such as the principles and purposes of the UN Charter or *ius cogens* norms - that, if lawfully applied by international courts, can save the United Nations from a long crisis of impotence.

Table of Contents

Contents i

Declaration i

Dedication ii

Abstract iii

Table of Contents iv

1. Introduction 1

2. The Veto-Dilemma 3

2.1 The Historical Background of the P-5 Veto Power 3

2.2 Historical Interpretation of Art 27(3) UN Charter 6

2.2.1 Procedural and Non-Procedural Resolutions 7

2.2.2 The ‘Double-Veto’ 8

2.2.3 Abstention from Voting 9

2.2.3.1 Obligatory Abstention 10

2.2.3.2 Voluntary Abstention 11

2.3 Reforming Article 27(3) UN Charter: The Legal Prerequisites 12

2.4 Past Veto Reform Proposals 14

2.5 Conclusion 16

3. Article 27(3) UN Charter: A Threat to Human Rights? 17

3.1 Introduction 17

3.2 General Scenarios 18

3.3 The Case Studies and the Research Objective 20

3.4 The South African Apartheid Regime 22

3.4.1 Apartheid: A Brief Retrospective 23

3.4.2 Forced Relocation 24

3.4.3 Apartheid Massacres 26

3.4.3.1 Sharpeville Massacre 26

3.4.3.2 Soweto Uprising 28

3.4.4 Resulting Human Rights Violations 29

3.4.5 The UN Security Council Role 30

3.4.6 Conclusion 36

3.5 Russo-Ukrainian War 36

3.5.1 Historical Background of the Conflict 37

3.5.2 The Russian Invasion of Ukraine 38
3.5.3 Resulting Human Rights Violations 40
3.5.4 The UN Security Council Role 41
3.5.5 Conclusion 44
4. Countering the Veto-Dilemma 45
4.1 The 'Uniting for Peace Resolution' 45
4.2 Voluntary Veto Restriction 47
4.3 Veto Legality in Light of Constitutional Purposes and Principles 48
4.3.1 UN Purposes 49
4.3.2 UN Principles 49
4.4 Other Hard Law Obligations 51
4.5 Jus Cogens 53
4.5.1 The Prohibition of Atrocity Crimes 54
4.5.1.1 Genocide 55
4.5.1.2 War Crimes 55
4.5.1.3 Crimes Against Humanity 56
4.5.2 The Prohibition of Aggression and Apartheid 56
4.5.3 The Relation between *Jus Cogens* and Art 27(3) UN Charter 57
4.5.4 Effects on the Case Studies 59
4.5.4.1 Vetoes During the South African Apartheid Regime 59
4.5.4.2 Vetoes During the Russo-Ukrainian War 60
4.6 Conclusion 60
5. Final Conclusion 61
Bibliography 65

The United Nation Security Council: The Veto-Dilemma

1. Introduction

Art 27(3) of the UN Charter grants permanent members (P-5) of the UN Security Council (UNSC) the power to veto substantive resolutions.[1] The veto power (or veto right) constitutes the main difference between the P-5 (the United States of America (US), the Russian Federation (Russia), the United Kingdom (UK), the French Republic (France), and the People's Republic of China (China)) and non-permanent members of the UNSC. This privilege was once thought to manifest the geopolitical balance after the Second World War in 1945.[2] Through its use, hundreds of resolutions have been prevented since the foundation of the UN (UN) and it became obvious that the P-5 exploit this power to represent their individual interests.[3] The UNSC's idiosyncratic use of veto power was particularly apparent during the Cold War and the corresponding proxy warfare between the Eastern and the Western Bloc.[4] Instrumentalizing Art 27(3) UN Charter in this way led to the paradoxical situation that the most powerful international peacekeeping body now blocked draft resolutions aimed at preventing atrocity crimes[5] in conflict regions.[6] With the progressive expansion of the UN and the increasingly apparent functional problems of the UNSC, the demand for an equal voting power and thus the reform of Art 27(3) UN Charter intensified.[7] At the very least the international community demanded, that Art 27(3) UN Charter should be limited in connection with draft resolutions directed against the commission of atrocity crimes.[8]

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[1] UN, Charter of the United nations, 1945, 1 UNTS XVI, Article 27; *hereinafter* 'Art 27(3) UN Charter'.
[2] Bosco, David L., *Five to Rule Them All: The UN Security Council and the Making of the Modern World*, New York, OUP, 2009, 36; Trahan, Jennifer, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, Cambridge, Cambridge University Press, 2020, 10; Security Council Report, *The Veto*, Securitycouncilreport.org, New York, 2015, 1-3.
[3] UN, UNGA, *Report of 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*, A/58/47, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/417/02/PDF/N0441702.pdf?OpenElement, last accessed: 7 August 2023, New York, 2004, Annex III; Hassler, Sabine, Reforming the UN Security Council Membership: The Illusion of Representativeness, Oxon: Routledge, Abingdon, 2013, 7-8.
[4] Saunders in Bott, Sandra, *Neutrality and Neutralism in the Global Cold War: Between or Within the Blocs?*, Routledge, London, 2016, 145-146; *See infra* chapter 3.4.6.
[5] Genocide, crimes against humanity, and war crimes are hereby referred to as 'atrocity crimes'.
[6] Wouters Jan and Ruys Tom, *Security Council Reform: A New Veto for a New Century?*, Egmont Paper 9, Royal Institute for International Relations, Academia Press, Brussels, 2005, 15; *See infra* chapters 3.3, 3.4, 3.4.6 and 3.5.5.
[7] Id at 3-4; Carswell, Andrew J., *Unblocking the UN Security Council: The Uniting for Peace Resolution*, Journal of conflict & security law 18.3, 2013, 453; United Nations, Meetings Coverage and Press Releases, 17 November 2020, *Delegates Call for Veto Power Limits, More Permanent Seats for Africa, as General Assembly Concludes Debate on Security Council Reform*, GA/12289, 2020, available at: https://www.un.org/press/en/2020/ga12289.doc.htm, last accessed: 29 September 2023.
[8] *See infra* chapter 2.4.

However, the P-5 can prevent any reform of Art 27(3) UN Charter with their power of veto as stated in Art 108 UN Charter. Each P-5 member thus has the ability to prevent a reform of Art 27 UN Charter by vetoing the corresponding draft resolution. Either one accepts the UNSC's inherent inequality and the negative consequences of the veto power, or one tries to amend the UN Charter, which is destined to fail and thus effectively leads to the same point of departure. This thesis characterizes this phenomenon as the 'veto-dilemma'. Instead of resigning to the two doomed approaches and accepting the current tragedy of the UN, possible ways out of the dilemma will be explored.

The thesis will address three main questions. How did the veto right evolve and what problems arose during its evolution? Does the use of the veto power demonstrably promote human rights violations and/or atrocity crimes? Are there any promising approaches to solve the veto-dilemma?

To answer the first question, the history of Art 27(3) UN Charter is outlined. Subsequently, the scope of the veto power and related interpretive challenges of the UN Charter will be analyzed. This is followed by a presentation of the most relevant attempts to reform the veto power to date. In order to explore ways out of the veto-dilemma, this first section presents a holistic frame of the problem.

The resulting findings are then applied in a case study to reveal the link between Art 27(3) UN Charter and the causation of human rights violations and/or atrocity crimes. The two case studies focus on the apartheid regime of South Africa and the military invasion of Ukraine by Russia. Emphasis is placed on the related human rights violations, and the respective voting behavior of the UNSC. The causal link between Art 27(3) UN Charter and serious human rights violations demonstrates the acute necessity for a solution of the veto-dilemma.

To address the third question, this paper considers to which extend Art 27(3) UN Charter is limited by various legal instruments, such as the regulations of Chapter I UN Charter, other hard law obligations and *jus cogens*. These considerations are directly related to the findings of the case study and their individual potential for solving the veto-dilemma is evaluated.

2. The Veto-Dilemma

This first chapter provides an outline of the UNSC's genesis and the circumstances that led to the lining as well as to the current interpretation of the P-5s' veto power. This approach is essential to grasp the legal structure as well as the scope of Art 27(3) UN Charter. Building on that, the general prerequisites for a legal reform of Art 27(3) UN Charter are elaborated and previous attempts to amend the UN Charter in this regard are summarized. As a result, the veto-dilemma will be clearly framed and the path to the subsequent case study is paved.

2.1 The Historical Background of the P-5 Veto Power

The failure of the global community to prevent the atrocities of World War II was widely interpreted as a failure of the former League of Nations *per se*. The Allies wanted to lay the foundation for a new and more effective international organization - the UN. After long negotiations, the UN Charter was drafted at the San Francisco Conference and signed by 50 of the initial 51 member states on 26 June 1945.[9] A core issue during the negotiations was the establishment of a new executive body and the highly debated definition of its powers.

It is therefore hardly surprising that the UNSC was subject to a wide variety of academic and political debates since the birth of the UN. At the latest after the cold war, it became very obvious that the UNSC was legally capable to influence the outcome of potentially mass destructive scenarios. The UNSC is undoubtedly the UN's superior body. It is empowered to adopt binding resolutions for all of the UNs' member states and holds the authority to initiate the use of force. Its primary responsibility - the maintenance of international peace and security - seems clearly definable.[10] However, its institutional nature, its functionality, and its inherent right to block substantive resolutions seem to be problematic - especially in the face of modern armed conflicts like Russia's military invasion of Ukraine.[11] In order to understand why the UNSC was endowed with this power, the path from the negotiations to its founding and the shaping of the veto right is briefly described.

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[9] Stettinius, Edward Reilly, *Charter of the UN: Report to the President on the Results of the San Francisco Conference by the Chairman of the US Delegation*, *the Secretary of State*, Washington, 1945, 20-27; Meisler, S., *UN : a history,* Grove Press, New York, 2011, 1-20.

[10] *Supra* note 1, Art 24.

[11] *See* Wouters and Ruys, *supra* note 6, at 3-4.; Nihreieva, Olena, *The 2022 Russian Invasion of Ukraine through the Prism of International Law: a Critical Overview*, Peace & Security - Paix et Sécurité Internationales 10, 2022, 4; Kolb, Andreas S, *The UN Security Council Members' Responsibility to Protect A Legal Analysis*, 1st ed., Springer, Berlin Heidelberg, 2018, 1-47; *See infra* part 3.5.

The establishment of the UNSC's voting procedure during the San Francisco Conference on the 26 June 1945 was preceded by intensive negotiations between the Union of Soviet Socialist Republics (USSR), the US, and the UK during the previous years.[12] The core of the negotiations revolved around the following questions: Which states should form the UNSC, and should they hold their seats permanently? How should the UNSC's voting procedure be structured and should there be a right of veto? What scope should the veto power cover - should it also apply to UNGA (UNGA) resolutions, and should it be applicable in the event of a P-5 member's individual involvement in a conflict?

The US, under Franklin Delano Roosevelt, argued in the early 1940s that the great powers should act as a joint executive force to preserve international peace and security.[13] This idea laid the foundation for the composition of the UNSC and the P-5.[14] The other nations of the Moscow Declaration (China, the USSR and the UK - France was proposed as a permanent member during the Yalta Conference) agreed to the permanent distribution of seats.[15] The concept of the P-5, was severely criticized by many states. However, during the San Francisco conference, the great powers implied their permanent seats as an indispensable element for the formation of the UNSC and thus also for the transition from the League of Nations to the UN. Lastly, the critical states had to give in due to high bargaining pressure.[16]

In the first proposals, a veto right was neither envisaged by the US, nor the UK or China.[17] The USSR, however, believed that furnishing the great powers with the right of veto was irrevocable. Stalin disagreed with the more inclusive approach - supported by the US, the UK and China - arguing with the concept of 'unanimity'. Accordingly, decisions of the executive body were to be made only under the condition of consensus between all great powers.[18] In

[12] *See* Wouters and Ruys, *supra* note 6, at 5.
[13] *See* Trahan, *supra* note 2, at 10.
[14] Id.
[15] Office of the Historian, Foreign Relations of the US: Diplomatic papers, 1944, General, Volume I*, Tentative Chinese Proposals for a General International Organization*, Chapter V, available at: https://history.state.gov/historicaldocuments/frus1944v01/d422, last accessed: 1 August 2023; Office of the Historian, Foreign Relations of the US: Diplomatic papers, 1944, General, Volume I*, Tentative Proposals by the United Kingdom for a General International Organization*, available at: https://history.state.gov/historicaldocuments/frus1944v01/d404, Chapter III, paragraphs (paras) 25-30, last accessed: 1 August 2023.
[16] Köchler, Hans, *The Voting Procedure in the UN Security Council,* Democracy and the International Rule of Law, Propositions for an Alternative World Order, Selected Papers Published on the Occasion of the Fiftieth Anniversary of the UN, Springer, Vienna and New York, 1995, 85-116.
[17] *See* Foreign Relations of the US, *supra* note 15; Luck, Edward C., *UN Security Council : Practice and Promise*, Routledge, London, 2006, 13-14.
[18] Id.

Stalin's opinion, this was the only way to avoid a rift between the great powers in the event of international conflicts. The US initially pursued a majority voting procedure instead, by which a resolution could be adopted by a two-thirds majority of the P-5.

However, it was not only the question of introducing a veto power *per se* that was strongly disputed, but also its scope of application in the event of its establishment.[19] The great powers agreed - with the exception of the USSR - that the right of veto should only be exercised in scenarios in which the vetoing party was not individually involved. Designing the UN Charter in this way would have resulted in two consequences. First, the P-5s' power would have been significantly limited during international conflicts and second, a higher degree of impartiality would have been achieved. The USSR under Stalin wanted to prevent such a cut in power at all costs.[20] Even before the Yalta meeting, the US submitted a recommendation to the USSR on the procedural configuration of the right to vote. This proposal agreed in principle to the introduction of a veto power, but only if a great power was not a participating force in the underlaying international conflict. The proposal was also agreed to by the UK, but Stalin remained firm in his stance and rejected the limitation of the veto power.

The idea of a veto power was generally met with strong opposition from the UNs' broad membership, but they had almost no voice in the founding process.[21] The great powers tried to convince other states of the new voting procedure by pointing out that the UNSC's decision-making process would be more effective than the past governance by the League of Nations.[22] Most notably, other member states sensed a major threat to the UNSC's functionality through the abuse of the veto power whenever a great power was individually engaged in a conflict relevant to the corresponding draft resolution.[23] Following the US' view, a P-5 member should always be excluded from exercising the right to veto when involved in the corresponding conflict - otherwise impartiality was not guaranteed.[24]

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[19] Bailey, Sydney D, *New Light on Abstentions in the UN Security Council*, International affairs, Volume 50 (4), London, 1974, 554-555.
[20] Id at 555-560.
[21] Paul, James A., *Of Foxes and Chickens: Oligarchy and Global Power in the UN Security Council*, Rosa Luxemburg Stiftung, New York, 2017, 20-24.
[22] *See* Wouters and Ruys, *supra* note 6, at 5-6; Simma, Bruno. et al., *The Charter of the UN : a Commentary*, Ed. Bruno. Simma et al. Third edition, Oxford University Press, Oxford, 2012, Chapter V.
[23] *See* Wouters and Ruys, *supra* note 6, at 12.
[24] Office of the Historian, Foreign Relations of the US: Diplomatic papers, Conferences at Malta and Yalta, 1945*, US Delegation Memorandum*, available at: https://history.state.gov/historicaldocuments/frus1945Malta/d357, last accessed: 1 August 2023.

The disagreements in connection with the UNSC's voting procedure were only one of several points of contention between the great powers during the creation of the UN Charter. Disputes went so far that the debate over the veto power and its scope of application eventually threatened to jeopardize the entire draft of the UN charter.[25] It was obvious that designing the veto power in line with the USSR's vision would leave a large gateway for arbitrary voting decisions. But ultimately, the USSR's proposal was accepted by the great powers. According to the P-5 the increase in power was justified by the UNSC's total commitment to maintaining international peace and security.[26] Although tensions between the East (USSR and China) and the West (US, UK and France)[27] already surfaced during the end of World War II and heralded the decades-long Cold War ahead, the great powers ultimately united unchallenged in the notion of the veto power. The global community's general exclusion of participation in the veto negotiations shows that the founding of the UNSC was rather aiming at political supremacy than at a new international organization with equal rights at its core.[28]

The UN Charter thus included the P-5s' veto power as stated in Art 27(3) UN Charter and was signed by 50 of the initial 51 member states on 26 June 1945, at the end of the San Francisco conference. This outcome was inevitable, since the realization of the entire UN Charter was threatened by the discrepancies between the great powers and the future UN broad membership.[29] In the end the final draft of Art 27(3) UN Charter was far from resolving the ambiguities concerning the scope of the veto power and certain procedural issues, e.g., the possibility of a double veto. These issues could only be solved through the later interpretation of Art 27(3) UN Charter, which will be discussed in the following chapter.

2.2 Historical Interpretation of Art 27 UN Charter

During the San Francisco Conference, the UNSC's voting procedure and thus the right of veto was stated under Art 27 UN Charter as follows:

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[25]Office of the Historian, Foreign Relations of the US: Diplomatic papers, 1944, General, Volume I, Dumbarton Oaks Conversations, available at: https://history.state.gov/historicaldocuments/frus1944v01/pg_835, last accessed: 1 August 2023.
[26] *See* Wouters and Ruys, *supra* note 6, at 4-5.
[27] *Hereinafter*: P-3.
[28] *See* Paul, *supra* note 21.
[29] *See* Wouters and Ruys, *supra* note 6, at 4-5; *See* Köchler, *supra* note 16, at 10; Kirgis, Frederic L., *The Security Council's First Fifty Years*, The American journal of international law volume 89 (3), Harvard, 1995, 507.

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Under Art 27(3) UN Charter, each P-5 member has the right to veto UNSC resolutions. The voting decisions must be on non-procedural matters, as can be inferred from Art 27(2) UN Charter. Already at the San Francisco Conference, the P-5 realized, that certain problems regarding the correct interpretation of Art 27 UN Charter could arise. On the one hand, the concept of 'procedural matters' was not clearly defined, and on the other hand, there was the danger of veto abuse within the legal gray area of the so-called 'double veto'. There was also uncertainty regarding the effect of voting abstention by a P-5 member. Due to the difficulties in interpreting Art 27 UN Charter, a subcommittee to the 'technical committee 1' of the UNSC commission (Commission III - consisting of the four sponsoring nations China, US, UK and USSR) was formed to resolve the existing ambiguities during the San Francisco Conference.[30] The Subcommittee's questions were later addressed by the great powers through the 'San Francisco Declaration'.[31] The following section outlines how the main interpretive issues of Art 27 UN Charter were addressed during and after the San Francisco Conference.

2.2.1 Procedural and Non-Procedural Resolutions

Since the veto right of the P-5 only referred to non-procedural issues, it was imperative to create legal certainty regarding the distinction between procedural and non-procedural issues. There was only clarity from the outset that Art 27(3) UN Charter would not give the P-5 access to veto resolutions of the UNGA, but only those brought to the UNSC. The UN Charter itself does not contain a legal definition of the term 'procedural'. Nor can a clear distinction be made

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[30] *For the terms 'procedural matters' and 'double veto' see infra* chapter 2.2.1 and 2.2.2; *See* Wouters and Ruys, *supra* note 6, at 6; Gross, Leo, *The Double Veto and the Four-Power Statement on Voting in the Security Council*, Harvard Law Review, Volume 67 (2), Harvard, 1953, 255; Stavropoulos, Constantin A., *The Practice of Voluntary Abstentions by Permanent Members of the Security Council Under Article 27, Paragraph 3, of the Charter of the UN*, The American Journal of International Law Volume 61 (3), 1967, 739; UN, *The San Francisco Conference*, available at: https://www.un.org/en/about-us/history-of-the-un/san-francisco-conference, last accessed: 1 August 2023.
[31] *See* Wouters and Ruys, *supra* note 6, at 6.

between procedural and substantive resolutions from referring to the structure of the UN Charter. In the following decades of veto exercise a broad approach of interpreting the scope of its application was chosen. A typical example of a purely procedural question is the mere listing of an item on the agenda of the UNSC - which is therefore (as a procedural matter) not accessible by the veto right.[32] According to the UNSC's established voting practice, the definitional deficit is resolved as follows: Once the procedural nature of an issue cannot be clarified, the corresponding problem of clarification constitutes a substantive issue. The question about the nature of the initial (potentially procedural) issue is therefore substantive and thus falls within the scope of the veto right.[33]

2.2.2 The Double Veto

While under this common practice one definitional problem is circumvented, another problem of the so-called 'double veto' is raised: The veto power of the P-5 is limited to non-procedural resolutions of the UNGA. The negative vote of a P-5 member thus blocks non-procedural resolution drafts. The wording of Art 27(2) and 27(3) UN Charter excludes procedural resolutions from the scope of the veto. The assessment of the procedural character of a resolution is in itself a non-procedural, i.e., a substantive question. The veto right can therefore apply to this assessment. Thus, if the UNSC wishes to influence a purely procedural resolution, it can raise the question of its legal nature. If a P-5 member consequently votes against the preliminary characterization as 'procedural', the resolution is blocked, and the scope of the veto right is thus vastly expanded.[34]

The wording of the UN Charter indicates a restrictive use of the double-veto, however, the practice of the P-5 shows that the actual frame of the double-veto is not determined. The controversy regarding the 'double veto' thus remains unresolved until today. In subsequent years of the San Francisco Conference, the possibility of the double veto was heavily disputed.[35] The wide design of the P-5's authorization with regard to a comprehensive veto right and the establishment of the double veto met with so much resistance that the exact wording was

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[32] Wood, M. C. and Eran Sthoeger, *The UN Security Council and International Law*, Cambridge University Press, Cambridge and New York, 2018, 29.
[33] Id at 29-32; *See* Wouters and Ruys, *supra* note 6, at 7.
[34] Feldstein, A., *Double Veto in the Security Council - New Approach*, Buffalo Law Review, Volume 18 (3), 1968, 550.
[35] Liang, Yuen-li, *The So-Called 'Double Veto'*, The American Journal of International Law, Volume 43 (1), 1949, 134-144; A Rudzinski, Alexander W, The So-Called Double Veto: Some Changes in the Voting Practice of the Security Council, The American Journal of International Law, Volume 45 (3), 1951, 443-461.

ultimately not adopted in the UN Charter.[36] Even though the possibility of vetoing the preliminary question does not appear in the wording of Art 27 UN Charter, the option of a double veto remains. It can be stated that due to a non-binding agreement of the P-5, the double veto has not been used since 1959.[37] However, this does not exclude its possible application in the future, and therefore legal uncertainty about the double veto practice remains.[38]

2.2.3 Abstention from Voting

During the Dumbarton Oaks Conference also the possibility of a UNSC member's abstention from voting was problematized.[39] Despite the discrepancies, an open wording was chosen for the rule on abstention. The legal principle governing a P-5 member's abstention is now set forth in Art 27(3) UN Charter as follows: '*...in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting'.*[40] This formula leaves room for interpretation: Its main problem concerns the accurate determination of cases in which a P-5 member shall abstain from voting and what effect a P-5 member's obligatory or voluntary abstention has on the outcome of a draft resolution.

As will become apparent in the following, the reference to Chapter VI and para 3 of Art 52 UN Charter only in theory provides a clear definition of cases requiring an obligatory abstention. The obligation to abstain refers to cases in which a 'dispute' exists.[41] In the past, the P-5 have exploited the possibility to bypass an abstention by not considering the threshold for a 'dispute' to be reached and rather describing a case as a 'situation'. Furthermore, the question arises, if a P-5 member can abstain from a vote without causing the effect of a veto under Art 27(3) UN Charter?[42]

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[36] *See* Wouters and Ruys, *supra* note 6, at 8.
[37] *The practice of double veto was exercised, for example, during the clarification of diplomatic relations with Spain in 1946, during Albania's application for UN membership in the same year, during border issues arising out of the Greek Civil War in 1947, and on the Czechoslovak question in 1948*; *See* Gross, *supra* note 30, at 270-271.
[38] *See* Wouters and Ruys, *supra* note 6, at 8-10.
[39] Liang, Yuen-Li, *Notes on Legal Questions Concerning the UN*, The American Journal of International Law, Volume 48, 1954, 695.
[40] *See supra* note 1, Art 27.
[41] Id.
[42] *See* Bailey, *supra* note 19, at 554.

2.2.3.1 Obligatory Abstention

In order to clearly characterize cases that require an obligatory abstention, the definitional concept of a 'dispute' needs to be clarified first. Only by drawing a clear distinction between 'disputes' and conventional 'situations' the scope of mandatory abstentions under Art 27(3) UN Charter is precisely established. Looking at past cases of obligatory abstention, it stands out that the concept of a 'dispute' is interpreted restrictively by the P-5.[43] During the beginning in the UNSC's practice, the issue of obligatory abstention surfaced several times.[44] Iran directed the first complaint in the history of the UN against the USSR in the context of the Anglo-Soviet occupation.[45] While Iran emphasized that there was a 'dispute' between it and the USSR, the USSR argued that the matter was a mere 'situation'. The UNSC took the precarious view that the existence of a dispute had to be decided by the council itself and concluded that the USSR had no obligation to abstain.[46] Even if the goal of the Allies' occupation of Iran was mainly to prevent German war activities, the USSR's actions (bombing of Iranian airports and use of heavy war machinery) certainly constituted an armed attack by today's international legal standards.[47] To deny the existence of a 'dispute' under these circumstances accurately illustrates an example of a politicized approach by the P-5.

Another draft resolution (proposed by Algeria, Colombia, Ethiopia, Malaysia, Nepal, Senegal, and Yugoslavia) condemning the US' invasion of Nicaragua was vetoed by the US in December 1989.[48] During the invasion, the US deployed armed forces and conducted numerous military operations that resulted in the deaths of hundreds of civilians. The requirements for an obligatory abstention under Art 27(3) UN Charter apparently were met since these actions obviously constituted a 'dispute', but the US did not comply.

A striking example of how the P-5 dealt with codified prerequisites of Art 27(3) UN Charter dates back to February 2014. At that time, Russia annexed the Ukrainian territory of Crimea by

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[43] *Most items are now described as questions, occasionally as situations, but never as disputes. The only matter which the Security Council has determined as a dispute was the India-Pakistan question (21 April 1948)*; Cited from Bailey, *supra* note 19, at 563-564.
[44] Id at 556; Micaud, Charles A., *Voting Procedures in International Political Organizations*, *Wellington Koo, Jr.*, The Journal of Politics, Volume 10 (3), 1948, 573-576.
[45] UN SCOR (Security Council Official Records), 3rd meeting, 28 January 1946, 30-43; 19th meeting, 14 February 1946, 276; 23rd meeting, 16 February 1946, 357-359.
[46] Id; Bailey, *supra* note 19, at 556; *See* Micaud, *supra* note 44, at 558.
[47] Eshraghi, F., *Anglo-Soviet Occupation of Iran in August 1941*, Middle Eastern Studies, Volume 20 (1), 1984, 27-52.
[48] Security Council, Draft Resolution S/21048, 2902nd meeting, 23 December 1989, available at: https://www.securitycouncilreport.org/un-documents/document/s21048.php, last accessed: 3 August 2023.

using military forces and held a referendum to be recognized as the territory's sovereign. A draft resolution on the matter was intended to call on the international community not to recognize the referendum.[49] Although by all common definitions there was a 'dispute' between Russia and Ukraine and the resolution was based on Chapter VI of the UN Charter, the draft was vetoed by Russia.[50] Furthermore, the P-5 assume that in the event of an obligatory abstention by a permanent member, the rest of the P-5 votes are still 'concurring' under Art 27(3) UN Charter - i.e. there is no prerequisite of all P-5's 'affirmative' votes in this regard.[51]

In summary, obligatory abstention under Art 27(3) UN Charter never play a major role in UNSC practice. So far, the obligation to abstain from voting has rarely been enforced and the wording of Art 27(3) UN Charter never established an accepted standard as a regulatory mechanism in this regard - although the restrictive word choice seems very clear.[52] The P-5 make unhindered use of the veto right despite the fulfilled prerequisites of Art 27(3) UN Charter. A future change in this practice seems very unlikely, as the P-5 express little interest in limiting their power.[53]

2.2.3.2 Voluntary Abstention

The voting practice of the UNSC created legal certainty regarding the consequence of an obligatory abstention - it is not equivalent to a veto. However, the wording of Art 27(3) UN Charter does not clearly indicate what legal consequence occurs if a P-5 member voluntarily abstains from voting. When the UN Charter entered into force, it was unknown how a voluntary abstention would affect the voting procedure on a non-procedural matter since the wording of Art 27(3) refers to the 'concurring' votes of the P-5.[54] The point for consideration is whether a voluntary abstention by a P-5, is or is not tantamount to a veto - thus preventing the adoption of a non-procedural decision on the matter involved by the UNSC. In the first place it is

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[49] *See infra* chapter 3.5.4.
[50] Dorosh, Lesia, and Ivasechko, Olha, *The UN Security Council Permanent Members' Veto Right Reform in the Context of Conflict in Ukraine*, Central European Journal of International & Security Studies, Volume 12 (2), 2018, 158; Security Council Report, *UN Security Council Handbook*, Security Council Report, New York, 2019, available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/the-un-security-council-handbook-by-scr-1.pdf, last accessed: 8 August 2023, 24.
[51] Wellington Koo Jr., *Voting Procedures in International Political Organizations*, Columbia University Press, 1947, 156.
[52] *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia, Notwithstanding Security Council Resolution 276, Advisory Opinion, International Court of Justice, 1971; *See* Security Council Report, *supra* note 50, at 24.
[53] *An exception to this, for example, was France's effort in October 2013 to introduce a code of conduct through the UNGA, according to which the P-5 shall not use their veto power if this would promote mass-atrocity crimes, See infra* chapter 4.2; *See* Bailey, *supra* note 19, at 563-564.
[54] Id at 565.

contended that the long practice of not regarding voluntary abstentions as an equivalent to a veto is inapplicable to decisions under Chapter VII of the UN Charter. Chapter VII of the UN Charter furnishes the UNSC with powers during threats to the peace, breaches of the peace and acts of aggression. When the practice of voluntary abstention was developed in the early Council of only eleven members it was impossible for a decision to be adopted with all P-5 abstaining, as such a decision would not obtain the required seven votes. Today the Membership of the UNSC increased to fifteen members. If the old practice was applied to the modern increased UNSC, a draft resolution suggesting major enforcement measures under Chapter VII of the UN Charter could be adopted by the necessary majority of nine, even if all P-5 abstain from voting.[55] Such a procedure contradicts the fundamental *modus operandi* of the UNSC. A solution to this issue established during the past 50 years of UNSC voting practice. Accordingly, a voluntary abstention is thereby not treated as an equivalent of a veto but as a 'concurring' vote.[56] The same approach was adopted with regard to non-participation in a council meeting. Thus, abstentions of any kind cannot prevent a resolution as long as there are affirmative votes by nine members in total and no veto from a P-5 member.[57] Needless to say, clear political signals can be sent by abstaining.

2.3 Reforming Art 27(3) UN Charter: The Legal Prerequisites

The dogmatic and practical problems presented in connection with Art 27(3) UN Charter were mostly solved by interpretation of the treaty and by the UNSC's procedural practice. However, one question remains outstanding in this regard: Can the P-5 voting privilege stated in Art 27(3) UN Charter be amended? The core of this paper lies in demonstrating reasons to reform or regulate the right of veto and in presenting possible solutions for increasing the UNSC's functionality. However, before the need to reform Art 27(3) UN Charter can be derived from case study findings, it is essential to define the legal prerequisites for an amendment of the UN Charter.

The UN Charter can only be amended through the gateway of Art 108 UN Charter. A possible future amendment of the UN Charter was obviously foreseen by its drafters, as Art 109 UN

[55] *See* Stavropoulos, *supra* note 30, at 738-739.
[56] *The first instance occurred on 29 April 1946*; Id at 742; United Nations Department of Political and Security Council Affairs, Repertoire of the Practice of the Security Council 1946-1951, U.N. Doc. ST/PSCA/1, available at: https://digitallibrary.un.org/record/240012?ln=en, last accessed: 7 August 2023, 1954, Chapter IV, Part III, 173.
[57] *See* Security Council Report, *supra* note 50, at 25.

Charter states that an amendment should be considered at least 10 years after its entry into force.[58] However, the threshold of Art 108 UN Charter is very high. Stringent procedural requirements for a constitutional amendment are not unusual, since such fundamental statutory changes always imply a high degree of democratic legitimacy.[59] Accordingly, Art 108 UN Charter requires as follows:

'Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the United Nations General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.'

The amendment of the UN Charter thus always requires unanimous ratification of a reform proposal by the P-5. Art 108 UN Charter is therefore *lex specials* to the general veto right under Art 27(3) UN Charter, applying to the specific procedural case of a charter amendment. Presupposing these legal conditions, a successful reform of Art 27(3) UN Charter seems very unlikely - if not impossible in light of the current political division of the P-5.[60] However, a proposed amendment to the UN Charter is likely to fail, even before ratification under Art 108 UN Charter, because the P-5 could exercise their veto right under Art 27(3) UN Charter. A proposed UN Charter amendment by the UNGA constitutes, after all, a non-procedural matter, which can be accessed by the P-5 within the framework of Art 27(3) UN Charter and therefore vetoed in an early stage. In conclusion, the veto right can be used to block all amendments to the UN Charter, including amendments to the veto right *per se*. Herein lies the veto-dilemma.

These legal hurdles lead to a *de facto* dependence of the UN Membership on the political will of the P-5, whenever the UN Charter is to be amended. Albeit the UN Charter was successfully amended in the past, these amendments have never touched the veto power or the supremacy status of the P-5 in its core.[61] It is easy to understand that the P-5 do not want to abandon their

[58] Leigh-Phippard, Helen, *Remaking the Security Council: The Options*, World Today, Volume 50 (8/9), 1994, 167-172.
[59] *For example:* Bundesrepublik Deutschland (Federal Republic of Germany), Grundgesetz für die Bundesrepublik Deutschland (Basic Law), BGBl. S. 1, 1949, Art 79(3); Preuss, Ulrich K., *The Implications of 'Eternity Clauses': The German Experience*, Israel Law Review, Volume 44 (3), 2011, 446.
[60] *See infra* chapter 3.5.
[61] *For example:* General Assembly Resolution, Question of equitable representation on the Security Council and the Economic and Social Council, 1991(XVIII), 17 December 1963, available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-

special status. Unfortunately, the maintenance of this antiquated power structure results in an inherent inequality within the UN. This very stagnation leads to a great difficulty in effectively adapting the UN to a dynamically developing world order.

2.4 Past Veto Reform Proposals

The history of the P-5 veto power showed how bitterly UN members contested the P-5 voting privilege. The disputes were on the one hand of political nature, i.e., they concerned the national composition of the UNSC, and on the other hand of legal dogmatic nature, i.e., the ambiguities of Art 27(3) UN Charter had to be resolved by means of interpretative methods and legal practice. The design of the veto right was initially also disputed between the P-5, but the greatest criticism of the veto right today comes from the UN members that do not enjoy P-5 status.[62] In the course of the UNSC's practice, various countercurrents have emerged aiming to legally restrict the use of the P-5 veto or to reform it in principle.

Crucial to the argument against Art 27(3) UN Charter is the possibility of politicizing the veto in a way that is contrary to human rights and international legal standards. Art 27(3) UN Charter may be exercised in an arbitrary manner by a P-5 itself or in support of another member state. Thus, not only own political goals of a P-5 but also goals of a state not involved in the voting process can be pursued.[63] If, for example, an anti-human rights regime is to be condemned by a draft resolution, a P-5 member can block the condemnation by a veto in return for economic cooperation.[64] This unilaterally strengthens the economic relationship between the P-5 state and the state that is hostile to human rights but makes it impossible for the UNSC to condemn the corresponding human rights infringements effectively. For allied states of the P-5, this can be seen as a free pass to commit human rights violations with impunity. Exploiting this gateway certainly contradicts the UN's purposes and principles and thus infringes the UNSC's obligation of compliance with Art 24(2) UN Charter.[65] Various approaches are being used to achieve a reform and essentially, they all aim at greater equality among UN members, less arbitrative

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CF6E4FF96FF9%7D/WMP%20A%20RES%201991A%20XVIII.pdf, last accessed: 7 August 2023; *See* Leigh-Phippard, *supra* note 58, at 170; *See* Wouters and Ruys, *supra* note 6, at 19.

[62] *See* Wouters and Ruys, *supra* note 6, at 19-20.

[63] Richard Butler, *Reform of the UN Security Council*, Penn State Journal of Law & International Affairs , Volume 1, 2012, 29.

[64] *See* Wouters and Ruys, *supra* note 6, at 14.

[65] See infra chapter 4.3.

voting procedure, increased functionality of the UNSC, and prevention of grave human rights violations through idiosyncratic veto use.[66]

A consistently raised reform proposal consists of excluding the veto power for all resolutions under Chapter VI of the UN Charter, thus depriving issues concerning the peaceful settlement of disputes from the veto power. After the first UNSC blockade, this idea was supported by Australia, China, and France.[67] Other reform proposals go even further. They suggest that even resolutions concerning measures under Chapter VII of the UN Charter must not be blocked by an exercise of the veto power by the P-5.[68] One reform proposal, put forward by the African Union and other individual states of the UNGA, aimed to enable the blocking of a resolution only if several P-5 members exercise their veto power together. [69] In effect, Art 27(3) UN Charter would no longer constitute a 'veto'. However, none of the aforementioned proposals were successful.

With the adopted resolution 48/26 the UNGA recognized the *'changed international situation'* and decided to include the *'Question of equitable representation on and increase in the membership of the Security Council'* in 1993.[70] Triggered by the Secretary-General's initiative, the Open-Ended Working Group (OEWG) was initiated one year later. The OEWG sought to increase the number of UNSC permanent members to represent the global community more accurately and believed that the only way to improve the situation was to conduct international negotiations.[71] All the submitted proposals for expanding the permanent member contingent were rejected by the UNSC.[72] With the UN Millennium Declaration the need for extensively

[66] *See* Trahan, *supra* note 2, at 47-51.
[67] *See* Wouters and Ruys, *supra* note 6, at 21.
[68] *See* UNGA, *supra* note 3, Annex X.
[69] *See* Wouters and Ruys, *supra* note 6, at 21-23; Fassbender, B., *Pressure for Security Council reform*, in Malone, D.M. (ed.), *The UN Security Council: From the Cold War to the 21st Century,* Boulder, London, 2004, 268.
[70] General Assembly Resolution, *Question of equitable representation on the Security Council*, 48/26, 29 November 1993, available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WMP%20A%20RES%2048%2026.pdf, last accessed: 7 August 2023; [70] *See* Wouters and Ruys, *supra* note 6, at 19.
[71] General Assembly, *A more secure world: our shared responsibility: Report of the High-level Panel on Threats, Challenges and Change*, A/59/565, 2 December 2004, available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/gaA.59.565_En.pdf, last accessed: 8 August 2023; United Nations, UN Millennium Project, Sachs, Jeffrey D., *Investing in development: a practical plan to achieve the Millennium Development Goals*, Sterling, Va.: Earthscan, London, 2005, available at: https://digitallibrary.un.org/record/564468?ln=en, last accessed: 8 August 2023, 9.
[72] *See* General Assembly Resolution 48/26, *supra* note 70; *See* Trahan, *supra* note 2, at 49.

reforming UNSC *'in all its aspects'* was emphasized.[73] Former Secretary-General Kofi Annan also proposed a comprehensive change in the composition of the UNSC in 2004.[74] The number of seats of the permanent members should be increased or an extensive rotation of seats should be introduced in order to enable a more emancipated national representation in the UNSC.[75] Several proposals aimed at furnishing the European Union and the African Union with a permanent membership status or to give a permanent seat to countries with strong economies and large populations, such as India, Germany, the Arabic States or Brazil.[76]

2.5 Conclusion

In conclusion, all the attempts to amend Art 27(3) UN Charter remained unsuccessful. Given the political tensions between the P-3 on the one hand and Russia and China on the other, it is very unlikely that the chances of successfully reforming the veto right through an UN Charter amendment will improve.

Through the historical review of the veto-dilemma, it became clear that the political tension between East and West existed even before the UN Charter came into force and intensified during the Cold War. This tension still runs like a thread through UNSC policy to this day - which will become evident from the following case studies. The P-5 furnished themself with the greatest possible leeway around the interpretative questions of Art 27(3) UN Charter. Through the right of veto in conjunction with the privilege of being the only body to order the use of force, the P-5 hold an almost unshakable position of supremacy in the UN - this immutable distribution of power can have severe consequences if the UNSC is blocked by the veto exercise.

Reforming Art 27(3) UN Charter is not the only possible approach to enhance the P-5's functionality and to prevent the negative effects of veto exercise. To provide access to a deeper examination of the legality of Art 27(3) UN Charter, the next section of the thesis addresses the effects of the veto use on human rights during conflict scenarios.

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[73] *See* Trahan, *supra* note 2, at 48; UN GA Res 55/2, General Assembly Resolution, *United Nations Millennium Declaration*, 55/2, 8 September 2000, available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_55_2.pdf, last accessed: 7 August 2023, paras 29-30.
[74] *See* General Assembly A/59/565, *supra* note 71, at 1-5.
[75] *See* Trahan, *supra* note 2, at 48; *See* General Assembly A/59/565, *supra* note 71, at 66-68.
[76] *See* Wouters and Ruys, *supra* note 6, at 20; Winkelmann, I., *Bringing the Security Council into a New Era*, Max Planck Yearbook of United Nations Law, Volume 1, 1997, 75-83.

3. Art 27(3) UN Charter: A Threat to Human Rights?

3.1 Introduction

The veto right was included in the UN Charter in order to make international measures subject to the condition of 'unanimity' between the P-5.[77] Clearly, the veto right was also intended to safeguard the sovereignty of the P-5 after World War II. However, it certainly was not in the interest of the UN to endow the UNSC with a procedural right that, if exercised improperly, would contravene the fundamental values of the UN Charter.[78] Yet this is precisely what can occur in the face of a UNSC's veto-related blockade. In cases where measures to prevent atrocities such as genocide, crimes against humanity, and war crimes (hereby referred to as 'mass atrocity crimes') cannot be enforced, international peace and countless individual rights of civilians are at stake. The following case study focuses on establishing evidence of a causal relationship between the exercise of the veto power and the causation or promotion of mass atrocity crimes.[79]

Consequently, the objective of this chapter is to examine the effect of Art 27(3) UN Charter, *'what is, after all, only one procedural rule of a single organ of one international organisation'*, on mass atrocity crimes and other human rights violations.[80] Besides *Fassbender's* dogmatic observations, according to which the right of veto is a last remnant of external sovereignty fighting against the current of an already manifested international constitutionalism, the right of veto also plays a very practical role.[81] The veto's potential and actual consequences on individual rights appear particularly in *Trahan's* line of thought. Thereafter, the use of veto may have a significant impact on mass atrocity crimes and should be legally evaluated in the light of its inherent threat to human rights.[82] According to *Trahan*, in cases where the veto right leads

[77] *See supra* chapter 2.1.
[78] *See* Trahan, *supra* note 2, at 33.
[79] *The thesis is less concerned with the question of retribution or compensation for human rights infringements by the UNSC. The International Court of Justice and also the International Criminal Court have dealt with mass atrocity crimes since their creation. However, the actual attribution of responsibility and the implementation of legal retribution emerged only in the context of dealing with the Yugoslav wars. Moreover, the question of punishing the Security Council in cases of clear attribution of responsibility remains largely unresolved*; Meron, Theodor, *Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes*, The American Journal of International Law, Volume 112 (3), 2018, 433.
[80] Conlon, *Bardo Fassbender, UN Security Council Reform and the Right of Veto: A Constitutional Perspective*, Nordic Journal of International Law = Acta Scandinavica Juris Gentium, Volume 67 (4), 1998, 499-501.
[81] *See* Fassbender, *supra* note 69, at 129-150.
[82] *The present thesis is inspired by Trahan's conception of Article 27(3) UN Charter as a risk to the effective prevention of mass atrocity crimes, resulting in a concomitant violation of the highest international principles of law*; *See* Trahan, *supra* note 2, at Introduction 1-9.

to atrocity crimes, its exercise violates *jus cogens*, essential purposes and principles of the UN Charter, and in some cases international conventions.[83] These violations constitute a case-specific illegality of Art 27(3) UN Charter. In conclusion, *Trahan's* legal-dogmatic approach to the veto-dilemma proves to be much more effective and flexible than mere practical reform proposals that are bound to fail facing an almost certain veto-blockade under Art 108 UN Charter.

Only if the illegality of the veto right is irrefutably proven at a legal level and resonated at an international level, an effective regulation of Art 27(3) UN Charter by the international judicial system seems achievable. This conception will also be followed in the present paper and will be further elaborated in chapter 4. As a preceding step, the case study is conducted. After that, the legality of Art 27(3) UN Charter is assessed on the basis of the gained findings.

3.2 General Scenarios

This chapter examines Art 27(3) UN charter as a possible catalyst or potential causative factor of mass atrocity crimes and other human rights, by presenting corresponding scenarios in abstract terms. As a result, the research framework for the specific case studies is defined.

The imaginable scenarios in which a P-5 member may be responsible for causing or perpetuating mass atrocity crimes or grave human rights violations are numerous. The basic requirement in most cases is the existence of an international conflict, a civil war or an oppressive regime that harbors an inherent potential for human rights infringements.[84] The international conflict situation must evoke the UNs' obligation to act, so a certain threshold must be reached. The UNs' obligation arises either from international treaties, *jus cogens*, and gateways of the UN Charter, such as Arts 2(4), 24(1) or Chapter VII UN Charter.[85] Various channels are available for initiating, drafting, implementing, and ultimately enforcing the according measures: The UNSC, the UNGA, the Secretary General and other UN bodies.[86]

Binding executive measures can only be adopted by the UNSC. As Art 24(1) UN Charter makes clear, its task is to maintain international peace and security. According to Chapter VII of the

[83] *See infra* chapter 4.
[84] *Recent examples are the found in the Afghanistan War, the Iraq War and the Syrian Civil War.*
[85] *See infra* chapter 4.
[86] *See* Charter of the United Nations, *supra* note 1, Art 7.

UN Charter, the UNSC can order not only economic sanctions but also the use of force and thus intervene profoundly in the sovereignty of the targeted states. It also approves peacekeeping missions, which proved to be the most efficient mechanism to protect human rights and rebuild a constitutional order in crisis areas.[87]

One example where the UN contributed significantly to protecting human rights on a large scale and restoring the rule of law is the establishment of the UN Transitional Authority in Cambodia (UNTAC).[88] This peacekeeping mission was facilitated by the UNSC Resolution 745.[89] If this resolution had been stopped by a veto of one of the P-5 members, the countless executions would have been continued and the genocide would have been unnecessarily prolonged. As a consequence, the perpetuation of atrocity crimes would have certainly been attributable to the vetoing member.[90]

The UNGA as the main policy-making body of the UN, on the other hand, recommends measures in the form of non-binding resolutions. The fact that these resolutions are just recommendations and that the implementation of military intervention in crisis areas can legally only be authorized by the UNSC, is not diminishing their potentially tremendous impact.[91] For example, UNGA resolutions can draw attention to the violation of international legal norms, the formation of oppressive regimes and ultimately the commission of mass atrocity crimes in crisis regions. The UNGA recommendations thus act as an important catalyst for subsequent executive decisions by the UNSC. The UNSC Provisional Rules of Procedure allow any member of the UNGA to bring draft resolutions to the UNSC.[92] If such UNGA proposals are not implemented due to a UNSC veto-blockade, the abuses they address are not challenged, and

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[87] *There are 12 UN peacekeeping operations currently deployed and there have been a total of 71 deployed since 1948*; *Quoted from* United Nations, *Maintain International Peace and Security*, available at: https://www.un.org/en/our-work/maintain-international-peace-and-security, last accessed: 8 August 2023;

[88] Sothirak P., Hong M., and Wade G., *Cambodia : Progress and Challenges Since 1991*, Institute of Southeast Asian Studies, Singapore, 2012, 153-156.

[89] Security Council, Resolution 745, 3057th meeting, 28 February 1992, available at: https://digitallibrary.un.org/record/138379?ln=en, last accessed: 8 August 2023.

[90] *In Cambodia, politically motivated executions have been widespread since the 1975 coup by the Communist Party of Kampuchea and the Kampuchea People's National Liberation Armed Forces. A UN investigation found that these actions resulted in up to 2.2 million estimated deaths, of which about 800,000 were caused by violence*; *See* Sothirak, Hong, and Wade, *supra* note 88, at 193.

[91] *There are few exceptions to the principle by which military intervention requires authorization by the Security Council. Among these are, for example, the Uniting for Peace mechanism, the customary international law doctrine of 'humanitarian intervention' or the 'right to intervene'*; *See* Stahn, Carsten, *Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and 'What the Law Ought to Be*, Journal of Conflict & Security Law, Volume 19 (1), 2014, 41.

[92] United Nations, Security Council, *Provisional Rules of Procedure of the Security Council*, S/96/Rev.7, New York, 1993, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N83/400/17/IMG/N8340017.pdf?OpenElement, last accessed: 8 August 2023.

the consequences for the occurrence or perpetuation of human rights violations may be devastating.

However, in many cases it is not even necessary for the P-5 to actually exercise the veto power in order to effectively block the UNs' intervention efforts. Since the veto is known as an unchallengeable blockade mechanism, it is often sufficient for a P-5 member to simply threaten the later exercise of the veto during the planning stage of a UNSC measure. Since these threats of the veto mostly occur behind the scenes at informal UNSC meetings, detailed corresponding sources are poorly accessible. Nevertheless, the importance of the tactical veto threat can hardly be disputed. In fact, a large number of potential draft resolutions are never formally blocked by a veto but are prevented by the threat of a veto in their initial stages. During the Syrian Civil war alone, eleven UNSC measures were prevented by the P-5 through the threats of a veto.[93] The emphasis of the thesis is not on the veto threats, but on its actual documented exercises. This is due, on the one hand, to the much more accessible state of information and, on the other hand, to the logical conclusion that, with the veto-dilemma resolved, any threats to exercise the veto would run dry.

During the past UNSC practice, veto blockades prevented efforts to stop the commission of atrocity crimes, prevented investigations in the affected states, and prevented the punishment of those responsible.[94] This outcome is less based on a legitimate weighing of the legal interests involved in the conflict than on the P-5's unilateral assertion of a national political will. Consequently, the question must be asked whether the P-5 should be considered as a contributor to the resulting human rights violations and whether the veto right codified in Art 27(3) UN Charter plays a decisive role as a corresponding causation lever.

3.3 The Case Studies and the Research Objective

The case study examines two foci of grave human rights violations. It is divided into the observation of a past scenario and the observation of a present conflict.

First, the apartheid regime of South Africa and its discriminatory policies between 1948 and 1994 are considered.[95] The focus lays on the regime's forced relocation program and two

[93] *See* Trahan, *supra* note 2, at xiv Foreword.
[94] *See* Trahan, *supra* note 2, at 33.
[95] The term 'South Africa' is used for 'The Union of South Africa' and 'The Republic of South Africa' as well.

massacres during apartheid. The politicization of the UNSC's voting behavior during this period is outlined and a reference to the proxy warfare in the South-West African territory is drawn. The UNSC's voting pattern during the apartheid period is provided for a number of reasons: The suffering perpetrated on the disadvantaged groups of society at that time was on an immeasurable scale and took place in the midst of an internationally connected global community guided by the rule of law. The apartheid problem was addressed in countless UNGA resolutions and brought before the UNSC many times - yet the P-3 consistently blocked any relevant resolution by exercising their veto power. Thus, the apartheid era represents a prime example of the abuse[96] of Art 27(3) UN Charter in order to enforce political, respectively cold war interests and at the same time it highlights the failure of the UN to prevent human rights violations due to the veto rule.

As a second case study, the current developments of the Russo-Ukrainian War are examined. The study focuses on the events unfolding since the Russian invasion of Ukraine in February 2022. This example is chosen for several reasons: In recent history a great power rarely violated applicable international law through an international act of aggression in such obvious manner. In most cases, the political objectives of great powers were pursued through the establishment of proxies, but Russia chose the path of launching a full-scale military invasion against Ukraine in front of a world audience.[97] The topic is of outstanding importance to the discussion of the veto-dilemma since Russia systematically uses Art 27(3) UN Charter to block relevant UN initiatives.

In both case studies, the focus of the investigation centers on the commission of specific international law violations. In this regard, the assessment is guided by the threshold of mass atrocity crimes, which is also used by *Trahan*.[98] Included within this investigative scope are the crime of genocide, crimes against humanity, and war crimes, which are briefly outlined below.

The basis for the legal codification of the crime of genocide is found in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which was

[96] From a *lex lata* perspective, the term 'abuse' is actually incorrect, since the veto power of the P-5 was codified as unconditional; *See* Carswell, *supra* note 7, at 470.
[97] *For example*: Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, International Court of Justice, 27 June 1986.
[98] *This threshold was also applied by France when it introduced a reform proposal to the UNSC in 2001, according to which the P-5 should voluntarily waive their veto rights in cases of mass atrocity crimes*; *See* Dorosh and Ivasechko, *supra* note 50, at 173; *See* Trahan, *supra* note 2, Introduction.

adopted by the UNGA in 1948.[99] The contained definition of genocide is very narrow. This high hurdle is the result of strong obligations that the parties must fulfill in order to combat the crime, and also of the high level of punishment that the crime entails. The definition of the crime was adopted in Art 6 of Rome Statute of the International Criminal Court (Rome Statute) in 1998.[100]

Crimes against humanity and war crimes are legally defined in Art 7 and Art 8 of the Rome Statute. Both crimes encompass a wide range of violative acts. The main difference between the two types of crimes lies in the objective prerequisites for committing them. Crimes against humanity are grave human rights violations committed by a *de facto* authority against the civilian population, whereas war crimes presuppose a war scenario and an act of violation by a combatant. The specific requirements of war crimes are also set forth in the four Geneva Conventions of 1949.[101]

In addition to mass atrocity crimes, the cases are also examined for 'ordinary' human rights violations. The focus of the investigation lays on the potential role of the P-5 as a causation lever and on the corresponding causation mechanism of Art 27(3) UN Charter.

3.4 The South African Apartheid Regime

The African continent was the scene of many violent conflicts and oppressive regimes since the beginning of colonization. South Africa's apartheid regime, introduced and led by a white elite, stands out in this regard in two ways. In terms of time, the vast majority of African states emancipated themselves from the colonial powers as early as the mid-twentieth century. In South Africa, this process began much later, and the colonial legacy did not end until the 1990s. In structural terms, there was probably no systematic social segregation comparable to that under South Africa's apartheid system. With a meticulous apparatus of authorities and complex

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[99] Schabas, William A., *Genocide in International Law: The Crime of Crimes*, Second Edition, Galway, 2009, 3-5.
[100] United Nations, Rome Statute of the International Criminal Court, 1998, 2187 UNTS 3.
[101] International Committee of the Red Cross (ICRC), Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 UNTS 85; Geneva Convention III Relative to the Treatment of Prisoners of War, 1949, 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS 287; Wijk, Joris, *Amnesty for War Crimes in Angola: Principled for a Day?*, International Criminal Law Review, Volume 12 (4), 2012, 747.

legal initiatives, the rights of countless people were disregarded, and the decades-long division of an entire society made possible.

To maintain the apartheid-structure and protect it from revealing external influences, the South African Border Wars were waged.[102] After all Namibian independence efforts failed before the UN and the International Court of Justice (ICJ), The South West Africa People's Organization (SWAPO) formed the militant subgroup People's Liberation Army of Namibia (PLAN) to enforce independence from South Africa through military pressure. Within the militant independence movement, SWAPO was strongly supported by the then Eastern Bloc (USSR, China, Cuba).[103] As a result, war broke out between SADF and PLAN in 1966, which later spread to Angola and morphed into a devastating civil war.[104] The border wars were not only instrumentalized for propaganda purposes by the apartheid regime but also became an international pawn between East and West, as reflected in the veto exercise during this episode.[105]

Since the lives of so many people were affected in a terrible way before the eyes of an increasingly reflective global community and because several attempts by the UN to challenge the underlying racist system failed, the apartheid period provides a platform of inquiry to illuminate the destructive role of the veto power. The veto-dilemma can be outlined vividly in the corresponding voting pattern of the P-5 during the cold war period.

3.4.1 Apartheid: A Brief Retrospective

The legal codification of apartheid[106] dates back to 1948, when the National Party came to power in South Africa. The actual socio-cultural process of oppression and segregation of the Khoikhoi, San and other South African peoples by European colonialists already began in the 17th century, after settlers from the Netherlands arrived at the Cape Region.[107] A large part of

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[102] Elkhawas, M., *South Africa and the Angolan Conflict*, Africa Today, Volume 24 (2), 1977, 35-36; Stapleton, T., *Africa: War and Conflict in the Twentieth Century*, Routledge, 2018, 120-124.
[103] International Status of South-West Africa, Advisory Opinion, International Court of Justice, 11 July 1950.
[104] *See* Saunders, *supra* note 4, at 144-146.
[105] *See* Wouters and Ruys, *supra* note 6, at 15.
[106] *The term 'apartheid" is derived from the Afrikaans word for apartness or separation; Cited from* Eden, Paul, *Chapter 5: The Practices of Apartheid as a War Crime: A Critical Analysis*, Yearbook of International Humanitarian Law, Volume 16, 2013, 90.
[107] Hinds, Lennox S., *Apartheid in South Africa and the Universal Declaration of Human Rights*, Crime and Social Justice, Volume 24, 1985, 5.

the indigenous[108] South African population was killed in the first century after the arrival of the Europeans and the survivors as well as imported slaves from Asia were forced to work for white settlers.[109]

The partly British and partly Dutch occupied South Africa was brought together under colonial rule after the Anglo-Boer War, at the beginning of the 20th century.[110] As a result, the white population administered the colonized territory and structurally deprived the indigenous population of most rights.[111] The National Party came to power in 1948, serving the narrative of strict racial segregation, white privilege, and regulation of migrant labor. In the subsequent years, racial discrimination was codified and institutionalized.

In the mid-20th century, all state sovereignty was exercised by a small white elite. Social life, the legal system, health care and all politics were controlled by the white population, and the black population was disadvantaged as well as legally disenfranchised in all areas.[112] While states throughout whole Africa were liberating themselves from colonial dependence and oppression, South Africa pursued a policy of racial suppression until the 1990s and abolished apartheid only after years of international isolation with a new constitution in 1994.

3.4.2 Forced Relocation

An essential part of the segregation policy and one of the most significant human rights infringements by the apartheid regime, was the forced relocation of the black South African population to the townships in the rural Bantustans. 'Bantustans', which the government trivialized as 'homelands', were enclaves in rural areas of South Africa to which the black population was deported.[113] Despite glorifying announcements by the government, the settlement projects were ill-planned, and the forcefully resettled people were thus exposed to atrocious living conditions.[114] The South African government invested a lot of effort to market

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[108] The author uses the term 'indigenous peoples' or 'black South Africans' as a collective description for aboriginal peoples of South Africa. It is not forgotten that the indigenous population of South Africa consists of many ethnicities and cultures, which cannot be conclusively described in a few terms.
[109] *See* Hinds, *supra* note 107, at 7-8.
[110] Id at 8.
[111] Evans, Laura, *Survival in the "Dumping Grounds": A Social History of Apartheid Relocation*, BRILL, Boston, 2019, 1-8.
[112] Id at 2, *See* Hinds, *supra* note 107, at 8.
[113] Ibeanu, Okechukwu, *Apartheid, Destabilization and Displacement: The Dynamics of the Refugee Crisis in Southern Africa*, Journal of Refugee Studies, Volume 3 (1), 1990, 55; *See* Evans, *supra* note 111, at 1.
[114] Desmond, Cosmas, *The Discarded People : an Account of African Resettlement in South Africa*, Penguin, Harmondsworth, 1971, 80-90; *See* Evans, *supra* note 111, at 99-102.

the forced resettlement as a form of 'integration into ethnically correct territories' and placed an elite that seemingly administered the Bantustans in independent manner. This elite used ethnic nationalism as a narrative to strengthen the framework of the Bantustans.[115] However, the alleged ethnic legitimacy of the Bantustans was exposed as a fabrication during the 1980s and was no longer tenable.[116]

One of the most profound sources of forced relocation is provided by the Surplus People Project's resettlement documentation.[117] The project was composed of various academic specialists and volunteer activists who chronicled the forced relocation policy since 1980. In the 1970s, forced mass relocation was carried out with increasing vigor under then Prime Minister John Vorster. In only 20 years between 1960 and 1980, over 3.5 million indigenous South Africans were relocated from their homes to townships - estimates put the number far higher.[118] Legally, the resettlement program was made possible by the Group Areas Act of 1950 (GAA),[119] which assigned population groups to different townships according to their racial designation 'Colored', 'African' or 'Indian'.[120] Between 1969 and 1962, nearly one million people were relocated under the legal basis of the Group Areas Act.[121] Furthermore, over a million workers and their families were relocated from white-managed farms to the Bantustans. This dramatically lengthened their commutes and the huge pool of labor in the Bantustans significantly depressed wages.[122]

Apartheid could not entirely prevent the settlement of indigenous South Africans in urban areas. The will of the displaced population to escape the poor living conditions of the Bantustans was often greater than the fear of the government's coercive measures. However, those who did not comply with the resettlement laws could only stay in the outskirts of larger cities and, of course, were not allowed to fully participate in social life.

As a result of the resettlement policies, the apartheid's forced relocations pushed millions of people into rural outskirt areas and exposed them to poor living and working conditions. The

[115] *See* Evans, *supra* note 111, at 13.
[116] Id.
[117] Surplus People Project, *Forced Removals in South Africa : Volume 1 of the Surplus People Project* Report, Cape Town, 1983, 6; *See* Evans, *supra* note 111, at 2.
[118] Hallett, Robin, *Desolation on the Veld: Forced Removals In South Africa*, African Affairs, Volume 83 (332), London, 1984, 301-320; *See* Surplus People Project, *supra* note 117, at 6.
[119] Republic of South Africa, Group Areas Act of 1950.
[120] *See* Evans, *supra* note 111, at 13; *See* Ibeanu, *supra* note 113, at 55; *See* Hallett, *supra* note 118, at 315.
[121] *See* Hallett, *supra* note 118, at 315-316; *See* Ibeanu, *supra* note 113, at 55.
[122] *See* Hallett, *supra* note 118, at 315.

number of indirect deaths caused by the forced displacement and subsequent lack of medical care or malnutrition in the Bantustans remains uncertain.[123] What is certain, however, is that the past apartheid policies led to a deep spatial separation and social divide between the white and the non-white population.

3.4.3 Apartheid Massacres

Besides legally manifested inequality, the resettlement program and the exploitation of non-white labor, a large number of black South Africans were directly killed by authorities of the apartheid regime.[124] Because of their brutality and direct link to the apartheid ideology, two massacres stand out in particular. The Sharpeville Massacre, which took place on 21 March 1960 and the Soweto Uprising, which took place between 16 and 18 June 1976.

3.4.3.1 Sharpeville Massacre

Sharpeville is a municipality established by the South African government under the GAA and was a prototype village of the Bantustan policy. Sharpeville had more than 30,000 inhabitants, the majority of whom were children. The residents were almost exclusively black South Africans who worked in nearby towns and were separated from the spatially white population.[125] Because Sharpeville was more or less built from scratch and composed of many families from different places of origin, there was little common cultural intersection, little hope for an educated future, and no strong local economy to meet the basic needs of the residents. In essence, Sharpeville was a labor-oriented township located between two large industrial cities, Vanderbijlpark and Vereeniging, with no militant ambitions against the apartheid regime. However, pockets of unrest increased throughout South Africa due to new apartheid laws, the resulting forced relocations and the now codified racial segregation. These currents of revolt did not go unnoticed by the Sharpeville community, as South Africa was transforming into a

[123] Dixon, Bill, *A Violent Legacy: Policing Insurrection in South Africa from Sharpeville to Marikana*, British Journal of Criminology, Volume 55 (6), 2015, 1133.
[124] *The following massacres were perpetrated by the South African state: the anti-pass campaign (1919), the Port Elizabeth workers' strike (1920), the Bulheck massacre (1921), the Bondelswart massacre (1922), the Durban beer boycott killings (1929), the anti-pass cam- paign killings at Worcester (1930) and Vereenigning (1938), Rand miners' strike massacre (1946), May Day demonstration in Johannesburg (1950), Sharpville massacre (1960), and the SOWETO massacre (1976) are part of a long roll-call (Nnoli 1987); cited from* Ibeanu, *supra* note 113, at 54.
[125] Stultz, Newell M., *Evolution of the UN Anti-Apartheid Regime*, Human Rights Quarterly, Volume 13 (1), 1991, 4-6.

more and more divided state since the 1940s.[126] Since the 1950s, the strongest opposition to the apartheid movement has been the African National Congress (ANC), which distanced itself from any violent action at the beginning of its party history. However, through deepening cooperation with the Pan African Congress (PAC), the ANC entered into more vehement patterns of protest. The PAC organized nationwide protests against the expanded apartheid laws on 21 March 1960, in the course of which a large part of Sharpeville's population was involved. Some advance protests and minor rioting between the South African Police (SAP) and protesters resulted in the deaths of 2 protesters from SAP gunfire.[127] On the day of the main protest, up to 25,000 Sharpeville residents were on the streets to demonstrate. There were a few protesters armed with sticks and similar simple means, but they did not pose a serious threat against more than 300 heavily armed police officers equipped with military vehicles and machine guns. The police officers were stationed at the Sharpeville Police Department, which was separated from the protesters by a fence.

In the afternoon, two shots were fired out of the crowd into the air. The police then opened fire on the demonstrators. The gunfire killed 69 people and injured over 300 others. By some the death toll is estimated to be far higher.[128] The initial gunshots by the police officers sent the demonstrators fleeing, but the police did not cease their fire. Many of the victims died from bullet wounds in their backs. The motives of the police for this atrocity are disputed. Only white police officers were involved in the massacre. The large crowds and their pent-up anger against the white establishment certainly frightened the police officers. But the uncontrolled brutal reaction and the causing of dozens of deaths can definitely not be justified by this. According to the Truth and Reconciliation Commission's investigations, the police deliberately opened fire on an unarmed crowd. There were much less intervention-intensive measures that should have been taken to de-escalate the situation. However, these were not considered by the police.[129] On the same day, demonstrators were also shot by police in Cape Town, and a similar scenario played out in Cato Manor. The Sharpeville massacre was not an isolated case of excessive violence by white perpetrators against a non-white population, as will be seen in the next case.

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[126] Martin, Brian, *Justice Ignited: The Dynamics of Backfire*, Rowman & Littlefield Pub., Lanham, 2007, 7-10.
[127] Frankel, Philipp, *An Ordinary Atrocity: Sharpeville and its Massacre*, Yale University Press, New Haven, 2001, 60-89.
[128] Baines, Gary, *Remembering Sharpeville: The Killing of 69 Black South Africans on March 21st, 1960,* History Today, Volume 60 (3), 2010, 35.
[129] Id at 34; *See* Dixon, *supra* note 123, at 1131-1132.

3.4.3.2 Soweto Uprising

At the beginning of 1976, the government adjusted the syllabus of all schools in the Transvaal. The students of this region were exclusively black Africans. From now on, all subjects were to be taught in Afrikaans instead of English. Afrikaans was seen by the black population in many ways as the language of the colonial oppressors and was therefore disliked. In addition to this language adjustment, the government wanted to stop overcrowding in the Bantu schools and therefore standardized class sizes at the national level from 1975 onwards. As a result of this measure, a transition year between junior school and secondary school was omitted in the short term and led to a double starting year of secondary schools in 1976. This led to overcrowding in secondary schools and to a considerable lack of teaching resources - and thus to widespread dissatisfaction among the students concerned.[130] From this nationwide frustration a students' motivation to rebel against the school system arose.

Thus, during March of 1976, first peaceful protests by severely affected students at secondary schools took place. In the middle of May 1976, the tempers of the protests changed.[131] In early June almost 3,000 students took part in the protests against the unified school language Afrikaans.[132] The demonstrations included stone-throwing and minor riots.[133]

On the morning of 16 June 1976, the first momentous confrontation occurred between police officers and students outside Orlando West High School. A group of about 50 heavily armed police officers was supposed to break up a demonstration of 2000 students. After the students threw rocks at the police officers, the police opened fire on the group of demonstrators, killing eleven students in the process. Among the fatalities was the child Hector Peterson.[134] The murder of a child further incited the protests. A day later, administrative buildings of the Bantustan were set on fire. On June 17, police shot and killed 54 protesters, according to the Cillie Commission. In the course of later investigations, another 30 deaths could allegedly not be clearly attributed to the police - which is not convincing since the fronts of the riots (between

[130] Brown, Julian, *The Road to Soweto: Resistance and the Uprising of 16 June 1976*, Boydell & Brewer Ltd., Woodbridge, Suffolk, 2016, 155; Karis, T. and Gerhart, G., *From Protest to Challenge: A Documentary History of African Politics in South Africa, 1882-1990*, Volume 5, Indiana University Press, Bloomington and Indianapolis, 1997, 166.
[131] *See* Brown, *supra* note 130, 155-156.
[132] Id at 158.
[133] Republic of South Africa, *Report of the Commission of Inquiry into the Riots at Soweto and Elsewhere from the 16 June 1976 to the 28 February 1977*, Volume 2, Government Publisher, Pretoria, 1980, 75-90.
[134] Id at 110-115; *See* Brown, *supra* note 130, at 165-167.

police and demonstrators) were clear. In total, 138 people died as a result of violence in just 3 days. While the government first officially announced only 28 deaths, estimates cite a total of 700 murders during the Soweto Uprising.[135] The protesters refrained from demonstrations after the deaths but exerted considerable pressure on the apartheid regime through involvement of the public. As a result, the schools were reopened in July 1976 and Afrikaans was abolished as a general school language.[136]

3.4.4 Resulting Human Rights Violations

After outlining the apartheid regime's actions against its non-white population, the question now poses which specific rights - in accordance with the research objective - were violated.

Apartheid was envisioned as a systematic act of injustice during the negotiations for the draft Rome Statute and suggested as a war crime under Art 8 of the Rome Statute.[137] In the 1970s, a proposal was made by the UNGA to declare apartheid as a crime against humanity in an international convention.[138] In 1977, the practices of apartheid were included in the list of grave breaches under Art 85 of the Additional Protocol to the Geneva Conventions (AP I) while crimes against humanity were codified in the Nuremberg Charter.[139] Also, the status of apartheid as an international crime under customary international law is discussed.[140] After all, the establishment of an apartheid system is certainly a crime against humanity under Art 7(1)(j) of the Rome Statute. However, since this law only came into force after the abolition of apartheid in South Africa, there is no retroactivity and - strictly speaking - no violation of the Rome Statute by the South African government. However, the scope of injustice was already sufficiently codified under Art 85 AP I.

The forced relocation of millions of indigenous Africans certainly fulfilled the prerequisites of a 'Deportation or forcible transfer of population' under Art 7(1)(d) Rome Statute. Regarding

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[135] *See* Republic of South Africa, *supra* note 133, at 16; *See* Brown, *supra* note 130, at 170-171; Brink, Elsabé, *Soweto, 16 June 1976: It All Started with a Dog*, Kwela Books, Cape Town, 2001, 9-27.
[136] Frankel, Philipp, *The Dynamics of a Political Renaissance: The Soweto Students' Representative Council*, Journal of African Studies, Volume 7 (3), 1980, 170.
[137] United Nations, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, *Official Records, Vol III: Reports and other Documents*, Rome, 1998, 18.
[138] *See* Hinds, *supra* note 107, at 6.
[139] ICRC, Additional Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, 1978, 1125 UNTS 3; *See* Eden, *supra* note 106, at 90; United Nations, Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (IMT Charter), 82 UNTS 280, 8 August 1945, Art 6.
[140] *See* Eden, *supra* note 106, at 104.

the deaths in the course of the described massacres, no justifications can be considered - the victims were murdered by the use of firearms on the part of the police. The massacres established a violation of Art 7(1)(a) Rome Statute.

According to this study, the violations of the apartheid regime fell within the scope of mass atrocity crimes under Art 85 AP I as well as Art 6(c) of the Nuremberg Charter. However, the actions of the apartheid regime are also covered by the legal corpus of the UDHR. The human rights standards set out therein are recognized by most states of the world as customary international law since 1948 and some even hold *jus cogens* status.[141] Racial segregation under the apartheid system, which was reflected in education, housing, culture, the labor market, the justice system, and all other spheres of life, represents a prime example of a violation of the fundamental equality principles of the UDHR. This unequal treatment has found its way into legislation since 1948 and has been vehemently enforced by the South African authorities, as shown above.[142]

In summary, it is held that the legislation and enforcement acts of the apartheid regime also violated Arts 5, 6, 7, 8, 9, 10, 12, 13, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of the UDHR. In other words, non-white individuals were mostly deprived of the status of legal persons and their human dignity was largely stripped away by the apartheid system.[143]

3.4.5 The UNSC Role

After demonstrating the commission of mass atrocity crimes and other human rights violations, the following part of the study examines the role played by the UNSC in exercising the veto power in connection with the apartheid question.

By the 1960s, a strong anti-apartheid trend was emerging in the UN. The UNSC managed to adopt six resolutions strongly condemning the apartheid regime and its discriminatory

[141] *See* United Nations, *supra* note 139, Art 6(c); Filártiga v. Peña-Irala, US District Court for the Eastern District of New York, 1980, 966; Case Concerning United States Diplomatic and Consular Staff in Teheran (USA v. Iran), International Court of Justice, 1980, 342; *See* Hinds, *supra* note 107, at 6; Özdan, S., *The Human Rights Challenge to Immunity in International Law*, Palgrave Macmillan, Cham, 2022, 47-75; *See infra* chapter 4.5.
[142] The Population Registration Act, No. 30 of 1950 divided the population into categories of skin color ('*white, colored and native*') and severely restricted the legal spheres of the population groups thus created - hence explicitly violating the equality norm of the UDHR; *See* Hinds, *supra* note 107, at 9.
[143] *See* Hinds, *supra* note 107, at 10.

legislation - one resolution was a direct response to the Sharpeville massacre.[144] Especially the UNGA took initiative and answered to South Africa's apartheid policy by introducing Resolution 1761 in 1962. It established the Special Committee Against Apartheid, aiming at holding South Africa accountable for apartheid crimes, focusing public attention on the debate, and urging South Africa to sign the International Convention on the Suppression and Punishment of the 'crime of Apartheid'. The consequences of the UNGA's procedure became apparent in 1974, when South Africa only barely retained its membership status in the UN but was denied a seat in the UNGA. In the years that followed, the UNGA took further measures to combat the apartheid regime. The UN Commission on Human Rights deepened its investigations related to the apartheid system, individual countries imposed economic sanctions, international cultural cooperation like sport events was restricted, and South Africa was finally pressured to sign the Declaration on Apartheid and its Destructive Consequences in 1989.[145] As a result of international pressure, freedom movements in South Africa were enabled and a platform for negotiations was created, which eventually culminated in new elections and the abolition of the apartheid system in 1994.[146]

Without the international platform of the UN and the pressure of the UNSC and the UNGA, a redirection of South Africa would probably not have taken place. Still one consistent question remains: Why didn't the UN's most powerful body - the UNSC - effectively intervene sooner?

The answer to this question can be gleaned from the relevant draft resolutions and the voting record of the P-5. In total, the apartheid issue, and the racist actions in the South African region[147] were condemned within the framework of only six adopted resolutions. The vast

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[144] *See* Stultz, *supra* note 125, 7-14; Security Council, Resolution S/4300, Question Relating to the Situation in the Union of South Africa, 1 April 1960; Security Council, Resolution S/5386, On the Situation of South Africa, 7 August 1963; Security Council, Resolution S/5471, On the Situation of South Africa, 4 December 1963; Security Council, Resolution S/282, The Question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Republic of South Africa, 23 July 1970; Security Council, Resolution S/417, On the Situation of South Africa, 31 October 1977; Security Council, Resolution S/554, On the Situation of South Africa, 17 August 1984.

[145] Id at 21.

[146] Shearar, Jeremy Brown, *Against the World : South Africa and Human Rights at the UN 1945-1961*, First Edition, Unisa Press, Pretoria, 2011, 1-2.

[147] *Including the former Republic of Rhodesia.*

majority of draft resolutions were blocked before the UNSC.[148] The adaption of the most impactful resolutions failed in the face of one or more vetoes by the P-5.[149]

A vetoed draft resolution submitted by Ghana, Morocco and the Philippines of 1963 already recognized *'that the practice of racial discrimination is incompatible with the principles of the Charter of the UN and should be condemned wherever it occurs'*.[150] The link between the human rights abuses in Southern Rhodesia and South Africa's apartheid regime was condemned in 10 draft resolutions between 1963 and 1973, all of which were blocked individual or combined P-3 vetoes.[151]

In October 1974, the apartheid practice South Africa was explicitly condemned and the membership between a member state (South Africa) and the UN was reviewed for the first time.[152] The corresponding draft resolution S/11543 introduced by Kenya, Mauritania and the United Republic of Cameroon reaffirmed, *'that the policies of apartheid are contrary to the principles and purposes of the Charter of the UN and inconsistent with the provisions of the Universal Declaration of Human Rights, as well as South Africa's obligations under the Charter'*.[153] With regard to human rights violations, the draft resolution considers, *'that effective measures should be taken to resolve the present situation arising out of the policies of*

[148] *See* UNSC, *supra* note 144; Security Council, Draft Resolution S/5425/Rev.1, The situation in Southern Rhodesia (vetoed by the UK), 13 September 1963; Security Council, Draft Resolution S/9696 and Corr.1 & 2, Question concerning the situation in Southern Rhodesia (vetoed by UK and USA), 17 March 1970; Security Council, Draft Resolution S/9976 S/PV.1556, Question concerning the situation in Southern Rhodesia (vetoed by UK), 10 November 1970; Security Council, Draft Resolution S/10489, Question concerning the situation in Southern Rhodesia (vetoed by UK) , 30 December 1971; Security Council, Draft Resolution S/10606, Consideration of questions relating to Africa of which the Security Council is currently seized and implementation of the Council's relevant resolutions the situation in Southern Rhodesia (vetoed by UK), 4 February 1972; Security Council, Draft Resolution S/10805/Rev.1, Question concerning the situation in Southern Rhodesia (vetoed by UK), 29 September 1972; Security Council, Draft Resolution S/10928, Question concerning the situation in Southern Rhodesia (vetoed by UK and USA), 22 May 1973; Security Council, Draft Resolution S/11543, Relationship between the UN and South Africa (vetoed by France, UK and USA), 30 October 1974; Security Council, Three Draft Resolutions S/12312/Rev.1, The question of South Africa (vetoed by France, UK and USA), 31 October 1977; Security Council, Draft Resolution S/18163, Complaint by Angola against South Africa (vetoed by France, UK and USA), 18 June 1986; Security Council, Draft Resolution S/18705, The question of South Africa (vetoed by UK and USA), 20 February 1987; Security Council, Draft Resolution S/19585, The question of South Africa (vetoed by UK and USA), 8 March 1988.
[149] *All adopted resolutions were mere condemnations - no effective measures were implemented;, See* Security Council, *supra* note 144.
[150] Security Council, Draft Resolution S/5425/Rev.1, The situation in Southern Rhodesia (vetoed by the UK), 13 September 1963.
[151] *See* Security Council Draft Resolutions between 1963 and 1973, *supra* note 148.
[152] United Nations, Security Council, Official Records, 1808th meeting, 13 October 1974.
[153] *See* Security Council Draft Resolution S/11543, *supra* note 148.

apartheid of the Government of South Africa' and recommended *'the expulsion of South Africa from the UN in compliance with Article 6 of the Charter'*.[154]

The Austrian delegate Mr. Jankowitsch opened the 1808th SC session by stating: *'The basis for this consistent preoccupation with South Africa has been the universal recognition of the fact that basic concepts of the Charter and of the Universal Declaration of Human Rights were being openly violated by successive Governments of what was formerly known as the Union of South Africa and is now, after its withdrawal from the Commonwealth, the Republic of South Africa...South Africa's attitude towards the Organization has further been characterized by its constant disregard of its duties vis & vis the Mandated Territory of South West Africa (Namibia) and its continued refusal to abide by UN decisions against Southern Rhodesia...For a long time, world opinion has been unanimous in its view of South Africa's race policies.'*[155]

Although there was international awareness of the apartheid regime's atrocities in the 1970s - as can be seen from the countless efforts of the UNGA - the USA, France and UK made use of Art 27(3) UN Charter and vetoed the draft resolution S/11543.[156] The blocking of the resolution took place despite the P-3's apparent recognition of the atrocities committed by the apartheid regime, thus sharing the views of the African Member States. At their core, the P-3's rationales for voting against South Africa's exclusion from the UN largely overlapped. Accordingly, the vetoes were justified by the P-3 on the grounds that it was more important to maintain an international platform of communication through South Africa's continued membership in the UN than to punish the apartheid state through exclusion.[157] The USA stated: *'Even in this grievous case the US continues strongly to adhere to the view that resort to force and other forms of violence are not acceptable means to induce change'*. This argumentation is comprehensible if a measure is as intensive as the exclusion of a nation from the UN, yet the P-3 constantly reproduced this argument, even though corresponding draft resolutions were only aimed at economic sanctions.

In 1977, Benin, Libyan Arab Jamahiriya and Mauritius submitted the draft resolution S/12312 to the UNSC calling for strict economic sanctions against South Africa to bring the apartheid regime to heel.[158] However, this less intrusive measure also failed to materialize due to a veto

[154] Id.
[155] *See* United Nations, *supra* note 152, at para. 2-8.
[156] Id at para. 5.
[157] Id at para. 54, 74, 95.
[158] *See* Security Council Draft Resolution S/12312/Rev.1, *supra* note 148.

by the USA, France, and the UK. The economic sanctions were rejected more or less with the same argumentation as South Africa's vetoed exclusion from the UN. The USA stated: *'We believe that the Security Council should pronounce itself on those measures that can unite us, not those that would divide us.'*[159]

It must be asked at this point, if South Africa is not to be excluded, what other measures besides economic sanctions or an expulsion were to be considered to combat a regime that is hostile to large parts of its own population? How are the member states and especially the UNSC supposed to fulfill their obligation under Art 24 of the UN Charter if the only solution accepted by the UNSC was communication - which has obviously failed for decades?

The USSR delegate replied accurately - but obviously not without own political interest - to the veto exercise of the P-3: '*Judging from the latest reports, Pretoria is completely ignoring the reaction of the world community to the crimes it has committed. It is ignoring the reaction of the UN to the latest events in the country. This is all a direct consequence of the many years of connivance with the South African racists on the part of certain Western countries, without whose support the policy of apartheid inside the country itself would have collapsed, as would the acts of aggression against other African States.'*[160]

The path of 'communication' chosen by the UNSC during the following ten years obviously failed. The apartheid regime continued to entrench unchanged racist structures in society and violate human rights. Due to this stagnation, a draft resolution based on Chapter VII of the UN Charter was submitted in 1987, which condemned apartheid in the strictest terms and was intended to implement economic sanctions against the South African regime. However, this draft resolution was also blocked by vetoes from the USA and the UK.[161] The same applies to a resolution in the following year 1988. This attempt to weaken South Africa economically and push it into compliance with international human right standards was again stopped by negative votes of the USA and the UK.[162]

The divergence of opinion between the P-3 on the one hand and China and the USSR on the other shows that the South African hot spot constituted a political pawn between East and West.

[159] United Nations, Security Council, Official Records, 2045th meeting, 31 October 1977, 38.
[160] Id at 62.
[161] *See* Security Council Draft Resolution S/18705, *supra* note 148.
[162] *See* Security Council Draft Resolution S/19585, *supra* note 148.

This politicization of veto use is also undoubtedly evident in the South African Border Wars, the Namibian independence movement, and the proxy war in Angola.[163] The involved civil war groups in the Angolan war were, according to their political orientation, either supported by the Western (US of America, France, UK, South Africa) or the Eastern Bloc (USSR, China, Cuba).[164] For the warfare in Angola, the region of Namibia was used as a tactical military springboard.[165] In conclusion, Angola experienced an ongoing war between 1975 and 2002.[166]

South Africa's military aspirations, but above all the Western and Eastern blocs' underlying support of the civil war parties, played a major role in the war.[167] Clearly, the proxy warfare by the great powers was motivated by Angola's oil reserves and the militarily important access to the South Atlantic during the Cold War.[168] At the same time, any socialist threat was deliberately instrumentalized by the South African government to develop a narrative against opponents of apartheid.[169] *Wouters and Ruys* accurately conclude, that 56 vetoes (by France, UK and USA) were exercised for arbitrary political reasons in connection with South Africa and Southern Rhodesia, in order to protect the apartheid regime and thus the Western political supremacy in the South African region.[170]

Apartheid in South Africa was ultimately abolished in the 1990s because of international pressure and its economic boycott by many states.[171] Ironically, years before the P-3 deemed the economic sanctions requested under the outlined blocked draft resolutions to be ineffective.

[163] *See* Saunders, *supra* note 4, at 144-146.
[164] *See* Elkhawas, *supra* note 102, at 35-36.
[165] *See* Security Council Draft Resolution S/14664/Rev.2, *supra* note 148.
[166] *Armed conflicts caused a death toll of up to 500,000 Angolan nationals (and up to 1,000,000 in total), which equaled about 4 percent of the total population. Up to 100,000 people were maimed by landmines, about a third of the population was relocated, and in 2000, 4 million citizens were still dependent on humanitarian aid to survive*; *from* United States Bureau of Citizenship and Immigration Services, 4 December 2000, *Angola: Current political and human rights conditions in Angola*, 4 December 2000, available at: https://www.refworld.org/docid/3dedf3204.html, last accessed: 28 September 2023.
[167] *See* Ibeanu, *supra* note 113, at 58; *See* Saunders, *supra* note 4, at 145-146.
[168] See United States Bureau of Citizenship and Immigration Services, supra note 166, at 743; *See* Elkhawas, *supra* note 102, at 35-36.
[169] *See* Elkhawas, *supra* note 102, at 35-36.
[170] *See* Wouters and Ruys, *supra* note 6, at 15; *See* Security Council Draft Resolutions S/12312/Rev.1, S/12311/Rev.1, S/12310/Rev.1, *supra* note 148.
[171] Kynoch, Gary, *Township Violence and the End of Apartheid: War on the Reef*, New Edition, Boydell & Brewer, Woodbridge, 2018, 1-14.

3.4.6 Conclusion

It cannot be denied that the UNSC played an important role in the fight against apartheid by adopting the condemning resolutions. However, these resolutions did not order any effective measures that would have been necessary to put an end to the corresponding human rights violations and mass atrocity crimes.[172] It cannot be contested that the UNSC failed to effectively combat a regime of injustice for almost half a century. It is safe to assume that an earlier imposition of strict economic sanctions - as called for in the draft resolutions described above - would have severely affected the apartheid regime and thus a political turnaround could have taken place earlier. Several member states introduced effective suggestions to combat the apartheid regime in the form of 15 draft resolutions, but these were consistently blocked by the P-3 in exercise of Art 27(3) of the UN Charter.[173] Consequently, the case study proves a causal relationship between the exercise of the veto right under Art 27(3) UN Charter and the perpetuation of the apartheid regime - and thus the trigger of mass atrocity crimes. Furthermore, it can be stated that the P-3 were aware of the apartheid regime's hostile approach to human rights and the specific crimes committed against the population when they exercised their veto power. Thus, the harmful use of the veto during the precarious human rights situation is objectively attributable to the P-3. It thus can be summarized that the P-3 strategically used their veto power to achieve political stability during the Cold War - but in doing so, promoted atrocity crimes and human rights violations.

3.5 The Russo-Ukrainian War

'Under the Charter of the UN, the Russian Federation has the power to veto a Security Council draft resolution. But it does not have the power to veto the truth.'

Samantha Jane Power.[174]

The Russo-Ukrainian War is an intermittent military conflict between Russia and Ukraine that unfolds since 2014. The present case study focuses on the ongoing commission of mass atrocity

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[172] *See* UNSC, *supra* note 144; Wessels, André, *The UN Arms Embargo Against South Africa, 1977-1994*, War & Society, Volume 29 (2), 2010, 137-153.
[173] *See* Wouters and Ruys, *supra* note 6, at 15; *See* Security Council Draft Resolutions S/12312/Rev.1, S/12311/Rev.1, S/12310/Rev.1, *supra* note 148.
[174] United Nations, Security Council Official Records, 7138th meeting, 15 March 2014, 3.

crimes, beginning with Russia's military invasion of Ukraine on 24 February 2022.[175] In order to clarify the political background of the dispute and to enable an understanding of the corresponding UNSC's policy, the history of the conflict is briefly outlined.

3.5.1 Historical Background of the Conflict

The modern state of Ukraine is a culturally and historically highly complex territory that forms an important global political crossroads between the East and the West. The area was initially settled by Vikings in the 9th century and later fought over by Mongols and Tartars before becoming part of the Mongol Empire in the 13th century.[176] From the 16th century Ukraine belonged to the Polish-Lithuanian Kingdom under which the population was heavily exploited. Later, the territory fell under the Russian Empire. The Ukrainian Nation was founded after the revolution of 1917.[177]

Today, a differentiated national awareness exists in large parts of Ukraine. During the period of the USSR, Ukraine counted as one of its republics and was subject to its administration. But even under Soviet domination an independent Ukrainian culture and a corresponding national consciousness existed.[178] After the collapse of the USSR, Ukraine was divided between pro-Russian and pro-Western tendencies. However, since the second millennium, a liberal-democratic Western identity has formed within the nation and a liberal government emerged during the fight against post-Soviet corruption.[179]

With the fall of communism and the abolition of the Warsaw Pact, Russia lost much of its influence over Ukraine at the international legal level. Ukraine's latent rapprochement with the West and the NATO alliance vehemently threatened Russia's influence over the militarily and economically important region. Consequently, the ongoing liberalization of Ukraine plays a crucial role in the conflict between East and West, which has - silently - continued even after the end of the Cold War.[180] On one side of the conflict is a nation yearning for Western values

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Bucken-Knapp, G., and Sildre, J., *Messages from Ukraine*, University of Toronto Press, Toronto, 2022, 39-40; Marchuk, Iryna, *Domestic Accountability Efforts in Response to the Russia-Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine*, Journal of International Criminal Justice, Volume 20 (4), 2022, 788.
[176] Bauer, Yehuda, *The Russo-Ukrainian War Through a Historian's Eyes*, Israel Journal of Foreign Affairs, Volume 16 (1), 2022, 15-18.
[177] Plokhy, Serhii, *The Cossack Myth: History and Nationhood in the Age of Empires*, Cambridge University Press, Cambridge, 2012, 1-12.
[178] *See* Bauer, *supra* note 176, at 15-18.
[179] Id.
[180] Id.

and a strong democratic system, and on the other is a great power which - under Vladimir Putin's leadership - is pursuing the desire of a Russian Empire in the 19th century mold.[181]

In 2014, Russia began a military operation against Ukraine to annex the tactically important and ideologically divided Crimean Peninsula.[182] Since then, an intermittent military conflict between the states continues. The conflict reached a new climax with Russia's military invasion of Ukraine territory in 2022. The resulting war challenged the functionality and authority of the UN UNSC to the utmost and revealed a veto dynamic - guided by great power interests - that is strikingly similar to the previous case study. Since the beginning of the war, the great powers, which are strongly divided due to the conflict, have been causing veto blockades that are strongly comparable to the P-5's voting trend during the time of the South African apartheid regime.

3.5.2 The Russian Invasion of Ukraine

On 24 February 2022, Russian President Vladimir Putin announced a 'special military operation'. In truth, this disguise concealed a full-scale military invasion of Ukraine, which Russia started on the same day by carrying out air strikes in Ukrainian territory.[183] Ukrainian President Volodymyr Zelensky declared a state of war and mobilized all troops and reserves of the Ukrainian military.[184] In the following days, Russian troops continued to advance towards Kiev amid fierce fighting. After the battle for Kiev intensified and Russian air strikes began to target the coastal region, hundreds of thousands of Ukrainians were forced to flee.[185] Russia's offensive was met with unexpected resistance from the Ukrainian military, and the city of Kharkiv was defended successfully.

After the first days after the invasion, several hundred Ukrainian civilians were killed, and thousands injured. Civilian targets were destroyed by bombing and around 1.3 million refugees left the country.[186] On 5 March 2022, an agreed ceasefire was violated by the Russian Army

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[181] Kovalska-Pavelko, Iryna, *The Russian-Ukrainian War of 2014-2022: A Historical Retrospective*, Cuestiones Políticas, Volume 40 (74), 2022, 652.
[182] *See* Dorosh and Ivasechko, *supra* note 50, at 158.
[183] New York Times, Matthew Mpoke Bigg, *How Russia's war in Ukraine has unfolded, month by month: A timeline of Russia's full-scale invasion of Ukraine, which began one year ago*, available at: https://www.nytimes.com/article/ukraine-russia-war-timeline.html, last accessed: 28 September 2023.
[184] *See* Bucken-Knapp, G., and Sildre, J, *supra* note 174, at 39.
[185] Id at 40.
[186] Id.

and a further evacuation of large parts of the war zone was prevented by Russian bombings. Russian forces also attacked an important nuclear power plant and thereby risked uncontrollable nuclear contamination.[187] Shortly after the start of the invasion, the European Union (EU), together with other states, announced Ukraine's financial and militarily support.[188] By mid-March 2022, over three million Ukrainians had fled their homeland, and hundreds of thousands were trapped in the war zone. In Mariupol, a hospital was captured by Russian troops and its patients taken hostage.[189] During spring 2022, Russia intensively attacked Ukraine from the maritime region and increasingly targeted civilian structures. In May 2022, the city of Mariupol was captured entirely by Russia and thousands of civilians were killed in the offensive. The following month, Ukraine also lost the Luhansk region among fighting resulting in many casualties.[190]

Ukraine's counteroffensive unfolded in August 2022. By the end of 2022 large parts of the territories annexed by Russia were recaptured. Ukraine expanded its attacks to include military targets far out on Russia's national ground through drone strikes. In January 2023, a shelter for Russian soldiers in Donetsk was attacked by Ukraine, killing and injuring hundreds of Russian soldiers. In the following weeks, Russia suffered heavy losses during new attempts to conquer Ukrainian territory, and the front line became stagnant.

What was initially planned as a short-term surprise attack from a Russian point of view turned into a devastating war of position on Ukrainian territory. About 200,000 Russian combatants died in the offensive. On the Ukrainian side, about 100,000 people have been killed, of which at least 30,000 were civilians. Ukraine is strongly resisting Russia's internationally designated 'act of aggression'.[191] The operational effectiveness of the Ukrainian military is primarily based on military and financial support by the P-3 and other countries such as Germany. In return, Russia is supported by China. At the political level, dynamics emerged that seem reminiscent of the Cold War era.

[187] Id at 42.
[188] Id at 40.
[189] Id at 42; Gostin, Lawrence O., and Rubenstein Leonard S., *Attacks on Health Care in the War in Ukraine: International Law and the Need for Accountability*, Journal of the American Medical Association, Volume 327 (16), 2022, 1541-1542.
[190] *See supra* note 183.
[191] Id.

3.5.3 Resulting Human Rights Violations

Since the beginning of the Russian invasion, a large number of mass atrocity crimes have been witnessed.[192] Among the perpetrators are Russian troops and Russian mercenaries as well as Ukrainian soldiers, but the vast majority of mass atrocity crimes were committed by the Russian side.[193] The reappraisal of the crimes by war tribunals and domestic courts started but is only proceeding at a slow pace.[194] According to Ukrainian Prosecutor General Andriy Kostin, up to 80,000 Russian war crimes were already recorded by Ukrainian authorities.[195] Among the crimes are 'indiscriminate shelling of civilians, willful killing, torture, conflict-related sexual violence, looting and forced displacement on a massive scale'.[196] Human rights organizations documented 8,000 civilian deaths and 14,000 war injuries, most of which were caused by rocket attacks and other heavy weapons of war, although the number of unreported cases is estimated to be much higher.[197]

The Office of the UN High Commissioner for Human Rights' (OHCHR) Independent International Commission of Inquiry on Ukraine states that Russian authorities have seriously violated international human rights and international humanitarian law in large parts of Ukraine.[198] The investigation provides evidence of executions, torture, rape, deportation and

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[192] Dudko, Oksana, *A Conceptual Limbo of Genocide: Russian Rhetoric, Mass Atrocities in Ukraine, and the Current Definition's Limits*, Canadian Slavonic Papers, Volume 64 (2-3), 2022, 134.

[193] United Nations, 2022, *Report of the Independent International Commission of Inquiry on Ukraine*, A/77/533, available at: https://www.ohchr.org/sites/default/files/2022-10/A-77-533-AUV-EN.pdf, last accessed: 28 September 2023; United Nations, 2022, *The situation of human rights in Ukraine in the context of the armed attack by the Russian Federation, 24 February to 15 May 2022*, available at: https://www.ohchr.org/en/documents/country-reports/situation-human-rights-ukraine-context-armed-attack-russian-federation, last accessed: 28 September 2023; Human Rights Watch, 2022, *Ukraine: Apparent POW Abuse Would Be War Crime*, available at: https://www.hrw.org/news/2022/03/31/ukraine-apparent-pow-abuse-would-be-war-crime, last accessed: 28 September 2023.

[194] International Criminal Court, 2 March 2022, *Ukraine: Situation in Ukraine: ICC-01/22: Investigation,* available at: https://www.icc-cpi.int/situations/ukraine, last accessed: 28 September 2023; Case of Vadim Shishimarin, Case No. 760/5257/22, District City Court of Kyiv and Kyiv Court of Appeals, 29 July 2022; Case of Aleksandr Bobykin and Aleksandr Ivanov, Case No. 535/244/22, Kotelevskyy District Court in the Poltava Oblast, 31 May 2022; *See* Marchuk, *supra* note 174, at 787.

[195] *See* Marchuk, *supra* note 174, at 787-803.

[196] CNBC, Amanda Macias, 1 February 2023, *Russia has committed more than 65,000 war crimes in Ukraine, prosecutor general says*, available at: https://www.cnbc.com/2023/02/01/ukraine-russia-war-65000-war-crimes-committed-prosecutor-general-says.html, last accessed: 28 September 2023.

[197] United Nations, Krzysztof Janowski, 24 March 2023, *UN Human Rights Ukraine released reports on treatment of prisoners of war and overall human rights situation in Ukraine*, available at: https://ukraine.un.org/en/224744-un-human-rights-ukraine-released-reports-treatment-prisoners-war-and-overall-human-rights, last accessed: 28 September 2023.

[198] United Nations, 2023, *Report of the Independent International Commission of Inquiry on Ukraine*, A/HRC/52/62, available at: https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf, last accessed: 28 September 2023.

transfer of Ukrainian children, use of human shields, attacks on civilians and destruction of civilian infrastructure. Therefore, the Russian side has clearly committed war crimes. In a few cases, the investigation also proved the commission of war crimes by Ukrainian soldiers.[199] The academic debate meanwhile focuses on whether the Russian military action even fulfilled the prerequisites of a genocide.[200]

Without delving too deeply into the myriad venues of individual crime, it can be stated that Art 8 of the Rome Statute, the Geneva Conventions, and numerous Arts of the UDHR were extensively violated by the aforementioned commission of war crimes - predominantly by Russian perpetrators. In conclusion, mass atrocity crimes and other human rights violations occurred on a large scale.

3.5.4 The UNSC Role

While the UNGA - with strong democratic support by 141 Member States - passed a resolution calling for an end to the war in Ukraine and urging Russia to leave Ukrainian territory immediately, assertive UNSC draft resolutions are blocked due to Russia's vetoes.[201] In connection with Russian attacks on Ukrainian territory, a total of four draft resolutions were submitted to the UNSC.[202] All of them were vetoed by Russia, while China consistently abstained from voting to demonstrate its corresponding political support. After the first two draft resolutions addressed Russia's attempted annexation of Crimea in 2014 and the downing of the Malaysia Airlines flight MH 17 by Russian-controlled forces in 2015, two later drafts are covering Russia's current military invasion.

[199] Id; United Nations, 5 July 2022, *Ukraine: High Commissioner updates Human Rights Council*, available at: https://www.ohchr.org/en/statements/2022/07/ukraine-high-commissioner-updates-human-rights-council, last accessed: 28 September 2023.
[200] Tchobo, D. L. R., *Potential International Crimes in Ukraine: Should Atrocities in Bucha Be Classified as Genocide, War Crimes, or Crimes Against Humanity?*, Law and Safety, Volume 85 (2), 2022, 13-20; *See* Dudko, *supra* note 192, at 133-145.
[201] General Assembly Resolution, *Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine*, A/ES-11/L.7, 16 February 2023, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/048/58/PDF/N2304858.pdf?OpenElement, last accessed: 29 September 2023.
[202] Security Council, Draft Resolution S/2014/189, (vetoed by the Russian Federation, abstention by China), 15 March 2014; Security Council, Draft Resolution S/2015/562, vetoed by the Russian Federation, abstention by Angola, China, and Venezuela), 29 July 2015; Security Council, Draft Resolution S/2022/155 (vetoed by the Russian federation, abstention by China, India, United Arab Emirates), 25 February 2022; Security Council, Draft Resolution S/2022/720, *Maintenance of peace and security of Ukraine* (vetoed by the Russian Federation, abstention by Brazil, China, Gabon, India), 30 September 2022.

Draft resolution S/2014/189 of 2014 condemned the militarily prepared annexation of Crimea by referring to the *'obligation of all States under Article 2 of the UN Charter to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'*.[203] According to the draft resolution, a future referendum by Russia must not be recognized internationally. The resolution was brought to the UNSC by 43 states and its adaption failed due to a veto by Russia, which asserted an alleged historical claim to Crimea.[204]

Draft resolution S/2015/562 of 2015 aimed at establishing an *'international tribunal for the sole purpose of prosecuting persons responsible for crimes connected with the downing of Malaysia Airlines flight MH17 on 17 July 2014'* under Chapter VII of the UN Charter but was also vetoed by Russia.[205] This voting behavior by Russia revealed a clear aggravation of the conflict between Russia and Ukraine. The UNSC's blockade prevented effective international intervention, which could have constructively influenced and thereby mitigated the later escalation of the conflict.

The third draft resolution S/2022/155 was brought to the UNSC immediately after the start of the Russian invasion on 25 February 2022, by 83 UN member states.[206] In addition to a comprehensive condemnation of international law violations, the draft resolution also decided, *'that the Russian Federation shall immediately cease its use of force against Ukraine and shall refrain from any further unlawful threat or use of force against any UN member state'*.[207] Russia vetoed the draft resolution, basing the invasion on the '*denazification*' of Ukraine, on the alleged actions of the Ukrainian government during the Maidan Revolution in 2014, and on the defense of the Donetsk People's Republic and the Luhansk People's Republic against Ukrainian '*Death-Squads*'.[208] The Russian delegate denied any unlawful abuse of the veto right and ironically called the draft resolution *'nothing other than yet another move in a brutal and inhumane chess game on this Ukrainian chessboard'*.[209] China abstained from the vote, asserting that sanctions against Russia would only worsen the human rights situation and lead to many deaths. At the time, China did not know that hundreds of thousands of war related

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[203] *See* Security Council, Draft Resolution S/2014/189, *supra* note 202.
[204] *See* United Nations, Security Council Official Records, 7138th meeting, *supra* note 174.
[205] *See* Security Council, Draft Resolution S/2015/562, *supra* note 202.
[206] *See* Security Council, Draft Resolution S/2022/155, *supra* note 202.
[207] Id.
[208] United Nations, Security Council Official Records, 8979th meeting, 25 February 2022, 12-14.
[209] Id.

fatalities would follow, and in hindsight it would most certainly have chosen a different justification-rhetoric.[210] Ukraine responded to Russia's 'd*enazification*' theory by stating that Kiev was worse off on the day the war began than it was in 1941 when it was attacked by the Nazi regime. Furthermore, all attempts of Russia to justify the war of aggression by referring to a highly complex historical background were firmly rejected.[211] The Ukrainian delegate held, that the *'attacks are war crimes and violations of the Rome Statute, whether one is a party to it or not'*[212] and that Ukraine *'has been exercising its right to self-defense under Article 51 of the Charter'* while *'Russia does not have that excuse'*.[213] However, nothing in his moving speech could change the fact that Russia used its veto power to stop the draft resolution - not even the evident breach of international law and the occurrence of numerous war crimes.

The most recent draft resolution, S/2022/720, was brought to the UNSC by Albania and the US on 30 September 2022. It followed up on the so-called referenda that Russia conducted in war zones under its control from 23 to 27 September 2022.[214] The draft resolution was determining, '*that the Russian Federation's attempts to annex the territory of Ukraine constitute a threat to international peace and security'* and declaring '*that the Russian Federation's unlawful actions with regards to the illegal so-called referenda taken on 23 to 27 September 2022 in parts of Ukraine's regions of Luhansk, Donetsk, Kherson, and Zaporizhzhya that are under the Russian Federation's temporary control can have no validity'*.[215] It furthermore condemned the Russian approach extensively at the international legal level and decided that Russia must cease its invasion and withdraw from Ukrainian territory[216]. The draft resolution was vetoed by Russia, while Brazil China, Gabon and India abstained from voting. The abstentions were mainly based on the assumption that sanctions are not the right way to stop a war, but only further negotiations.

The British delegate uttered prior to the vote, that the *'area Russia is claiming to annex is more than 90,000 square kilometers. This is the largest forcible annexation of territory since the Second World War. There is no middle ground on this. It is, in the end, a very simple question*

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[210] Id at 11-12.
[211] Id at 14-17.
[212] *See* United Nations, Security Council Official Records, *supra* note 208, at 15.
[213] Id at 16.
[214] United Nations, Meetings Coverage and Press Releases, 30 September 2022, *Security Council Fails to Adopt Resolution Condemning Moscow's Referenda in Ukraine's Occupied Territories, as Permanent Member Employs Veto*, available at: https://press.un.org/en/2022/sc15046.doc.htm, last accessed: 29 September 2023.
[215] *See* Security Council, Draft Resolution S/2022/720, *supra* note 202.
[216] Id.

of principle, as the Secretary-General has said. As members of the Security Council with the responsibility of maintaining international peace and security and upholding the UN Charter, we must condemn Russia's actions and vote in favour of draft resolution S/2022/720'.[217] Russia countered the condemnation of the referenda by claiming that they were conducted in accordance with international legal standards and reflected the actual will of the population.[218]

After the vote Albania deemed Russia's voting behavior to be an abuse of veto power by stating, that *'Russia misused a unique privilege that the Charter of the UN - the Charter that Russia is shattering in pieces with its actions - grants permanent members in order to help them to maintain peace and security and uphold international law, not to block the Council when the world needs it'*.[219]

Ukraine subsequently concluded, that the '*draft resolution was not adopted because of one negative vote - Russia's vote. We are tired of repeating it time and again: allowing Russia to avail itself of the right of the Soviet Union to veto decisions of the Security Council effectively prevents this organ from exercising its primary responsibility under the UN Charter - the maintenance of international peace and security'*.[220]

3.5.5 Conclusion

The four draft resolutions had one fundamental element in common - the only reason they failed was the veto exercise of a single great power that itself caused the underlying international conflict. It is difficult to irrefutably prove the causal relationship between the exercise of the veto and the commission or perpetuation of the aforementioned human rights violations. However, the adoption of the latter two draft resolutions would have opened up the possibility of taking assertive measures against Russia, an already economically weakened aggressor. Based on the present study, it can be stated with certainty that the UN acting purely as a communication platform between the warring parties has not prevented the commission of mass

[217] United Nations, Security Council Official Records, 9143rd meeting, 30 September 2022, 3.
[218] *According to media reports, voting was carried out through door-to-door visits by armed Russian soldiers, some of whom filled out the ballots themselves and recorded the names of those voting negatively*; Reuters, Pavel Polityuk, 24 September 2022, *Russia holds annexation votes; Ukraine says residents coerced*, available at: https://www.reuters.com/world/europe/ukraine-marches-farther-into-liberated-lands-separatist-calls-urgent-referendum-2022-09-19/, last accessed: 29 September 2023; *See supra* note 217, at 3-4.
[219] *See supra* note 217, at 4-5.
[220] *See supra* note 217, at 10.

atrocity crimes. Conversely, a causal relationship between the use of the veto and the occurrence of human rights violations in the Ukraine War can be assumed - at least in principle.

Furthermore, it can be stated that the UNSC has lost its functionality due to the veto blockade and is therefore incapable of acting against Russia's atrocities. The veto blockade is embedded in a resurgent East-West conflict, as evidenced by the P-3's voting conformity on the one hand and Russia's consistent vetoes as well as China's abstention on the other. In this respect, the case study reveals a striking overlap with the UNSC's voting dynamics during the South African apartheid regime. The provisions of the UN Charter - even considering the historical controversies of its creation - should not be a free pass to immunity for a P-5 member and be arbitrarily politicized.[221] Russia's and also the P-3's use of the veto demonstrated in both case studies violate the primary principle of the UNSC - *'the maintenance of international peace and security'*.[222] Thus, transitioning to the final section of the paper, one question remains: Are there any promising approaches to solve the veto-dilemma?

4. Countering the Veto Dilemma

The case study demonstrated that the right of veto can contribute to the commission of mass atrocity crimes or at least to their perpetuation. It also became clear that any attempts to amend the UN Charter accordingly failed due to the opposing will of the P-5. Consequently, this concluding section explores whether alternative solutions to the veto-dilemma exist. This includes approaches to shift executive power to the UNGA, efforts to persuade the P-5 to voluntarily abstain from the exercise of the veto and finally limiting Art 27(3) UN Charter by questioning its legality in light of the hierarchical relationship to other sources of international law.[223]

4.1 The 'Uniting for Peace Resolution'

The first approach to solving the veto-dilemma consists in shifting power from the UNSC to the UNGA in cases of veto blockade. In 1950, the 'Uniting for Peace Resolution' (UPR) was

[221] *See* chapter 2.1.
[222] *See supra* note 1, Art 24.
[223] *See* Trahan, *supra* note 2, at 52.

passed by the UNGA to deal with UNSC blockades.[224] The main idea behind UPR was that the UNGA, as a democratic body of the UN, should complement the role of the UNSC in cases of its blockade due to its lack of unanimity.[225] Thus, in case the UNSC would no longer be able to maintain international peace and security, the UNGA *'shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary... '*.[226] If one would apply the UPR to the Ukrainian war according to its wording, the UNGA could circumvent the UNSC's impotence and directly recommend the use of force against the main aggressor, Russia. Nevertheless, the UPR's decisive legal consequence - the extensive shift of power to the UNGA - constitutes its main weakness. While the UNGA's legal ability to advise on non-coercive measures is unquestioned[227], *'the use of armed force'* by the UNGA is highly contested and significantly exceeds its UN Charter authority.[228]

Since the adoption of UPR, only 11 resolutions have been based on it - none of which ordered coercive measures. Thus, it is often concluded that the UPR is not a legitimate basis of authorization for the UNGA to order military measures.[229] In any case, the P-5 quickly realized that the UPR held the potential to undermine the balance of power of other UN bodies and thus consistently prevented its full application.[230] In today's UN practice, the UPR represents only a procedural relic and therefore does not have any significant regulatory effect. Its revival is discussed in recent studies - for example, regarding the veto blockade during the Syrian war - and is proposed as a starting point for an effective transfer of powers between the UNSC and the UNGA.[231] However, since its use in UN practice has been rare, and only aimed at non-coercive measures, it no longer serves any practical purpose. Consequently, the UPR is not

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[224] *The UPR was adopted after the USSR blocked a complaint on North Korea's act of aggression*; General Assembly Resolution, Uniting for Peace, 5/377(V), 3 November 1950, available at: https://www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf, last accessed: 30 September 2023; Nanda, Ved P., *The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace, and the Responsibility to Protect*, Case Western Reserve Journal of International Law, Volume 52. (1-2), 2020, 135.

[225] Miluna, Ieva, *What Does the Uniting for Peace Resolution Mean for the UN Security Council?*, AJIL Unbound, Volume 108, 2014, 118-122.

[226] *See* UPR *supra* note 224.

[227] *See* supra note 1, Art 11 and 12; *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, International Court of Justice, 2004.

[228] *See* Carswell, *supra* note 7, at 455-456; *See* Nanda, *supra* note 224, at 137.

[229] Nahlawi, Yasmine, *Overcoming Russian and Chinese Vetoes on Syria through Uniting for Peace*, Journal of Conflict & Security Law, Volume 24 (1), 2019, 115-116.

[230] *See* Carswell, *supra* note 7, at 453.

[231] Id.; *See* Nahlawi *supra* note 229; Johnson, Larry D., *'Uniting for Peace': Does It Still Serve any Useful Purpose?*, AJIL Unbound, Volume 108, 2014, 106-115; Zavoli, Ilaria, *Peacekeeping in Eastern Ukraine: The Legitimacy of a Request and The Competence of the UN UNGA*, Journal of Conflict & Security Law, Volume 22 (1), 2017, 147-173.

suitable for solving the veto dilemma, but it is very well capable of further developing the corresponding academic debate.

4.2 Voluntary Veto Restriction

As shown in chapter one, attempts to reform the veto right have been made since the beginning of the Cold War - but without success. A more contemporary approach to solving the veto-dilemma consists of inviting the P-5 to voluntarily restrain their veto power whenever atrocity crimes could be facilitated as a result of a veto blockade. In the past, this path was pursued through various initiatives. These include the ACT Code of Conduct, the French-Mexican Initiative, and the 'Small Five Initiative'.[232] The ACT Code of Conduct pledged not to *'vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, or to prevent such crimes'* and received strong support within the UNGA.[233] The ACT Code of Conduct is similar to the French-Mexican Initiative introduced in 2001 aimed at limiting the veto power of the P-5 in the same cases.[234] This initiative was the first significant call by a P-5 member to limit the veto power and was supported by 105 member states.[235] In 2005, five UN Members took a different approach by drafting a resolution, according to which the UNGA should be more involved in UNSC decisions, and its working methods should be organized more transparently in order to preserve its functionality.[236]

All of the above initiatives tackle the problem of the veto dilemma at its core. Their weakness lies in the fact that they are soft law and that the approval of the P-5 is a necessary prerequisite for their successful implementation. In view of the political divergence within the P-5, the prospects for successful implementation seem poor. Undoubtedly, the initiatives have greatly advanced both the public discourse and the UN internal debate on the veto right. Thus, they hold great international legal value and potential - albeit without binding effect.

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[232] General Assembly and Security Council Resolution, A/70/621-S/2015/978, *Code of Conduct Regarding Security Council Action against Genocide, Crimes against Humanity or War crimes*, New York, 23 October 2015.
[233] Global Centre for the Responsibility to Protect, 08 December 2022, *List of Signatories to the ACT Code of Conduct*, available at: https://www.globalr2p.org/resources/list-of-signatories-to-the-act-code-of-conduct/, last accessed: 3 October 2023.
[234] United Nations, Security Council Official Records, 7052nd meeting, 29 October 2013; *See* Trahan, *supra* note 2, at 173.
[235] *See* Trahan, *supra* note 2, at 110-113.
[236] Id at 107-110.

4.3 Legality in Light of the UN Purposes and Principles

Whereas the first two solutions sought to re-regulate the *modus operandi* of the individual UN bodies, the following approaches focus on the legality of the veto *per se* in the face of atrocity crimes. The initial standards by which the legality of Art 27(3) UN Charter can be questioned are provided by the UN Charter itself.

In 1970, after the UNSC declared that South Africa's administration of Namibia was illegal, it requested an advisory opinion on the legal consequences for States of the continued presence of South Africa in Namibia from the ICJ.[237] The ICJ stated in the advisory opinion, *inter alia*, that the UNSC's powers may be limited through the gateway of Art 24(2) UN Charter by the principles set forth in Chapter I of the UN Charter.[238] By stating that *'the Security Council shall act in accordance with the purposes and principles of the UN'*, Art 24(2) UN Charter manifests a doorway to a constitutional legality check of the veto exercise. The veto right from Art 27(3) UN Charter lies within the scope of Art 24(2) UN Charter, since it is a *'Power'* of the UNSC.[239] Furthermore, it was pointed out that decisions of the UNSC only have binding effect on individual member states if they are in conformity with the UN Charter.[240] Similarly, the ICTY assumed the possibility of a constitutional review of the UNSC's actions in the *Tadic ́ Case* and concluded that the UNSC was bound and limited by the rights of the UN Charter.[241]

If one anticipates a constitutional reviewability of UNSC decisions in accordance with the mentioned standard of Art 24(2) UN Charter, the decisive question reads as follows: Does the UN Charter contain a purpose or principle from which the illegality of a veto exercise in the face of atrocity crimes can be derived? The answer to this question is provided by a look at the first chapter of the UN Charter. Under Art 1 UN Charter its purposes are listed whereas under Art 2 UN Charter its principles are defined.[242] For the present examination, the purposes set out in Art 1(1) and 1(3) UN Charter and the principles of Art 2(2), 2(3) and 2(4) UN Charter are of paramount importance.

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[237] *See* International Court of Justice, *supra* note 52; Higgins, Rosalyn, *The Advisory Opinion on Namibia: Which Un Resolutions Are Binding Under Article 25 of the Charter?,* The International and Comparative Law Quarterly, Volume 21(2), 1972, 270–272.
[238] *See* International Court of Justice, *supra* note 237, paras. 110-112; *See supra* note 1, Art 24.
[239] *See* Trahan, *supra* note 2, at 192.
[240] *See* International Court of Justice, *supra* note 237, paras. 113; *See supra* note 1, Art 25.
[241] Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, 15 July 1999, para. 28; *See* Trahan, *supra* note 2, at 182.
[242] *See supra* note 1, Art 1 and 2.

4.3.1 UN Purposes

Arguably, the most fundamental purpose of the UN Charter is to *'maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace...'*.[243] The other purposes of the UN Charter under consideration are to *'achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race...'*.[244] The human rights situation illustrated in the case of the South African apartheid regime as well as Russia's current war of aggression undoubtedly represent threats to international peace and security.[245] Due to the current veto blockade regarding the Ukraine conflict, the UN's hands are tied and compliance with the principle of Art 1(1) UN Charter is excluded.[246] Moreover, by vetoing almost any decisive measure against South Africa in the second half of the twentieth century, the UNSC (mostly the P-3) avoided resolving the international apartheid problem and failed to promote human rights, especially with regard to ethnic discrimination.[247]

4.3.2 UN Principles

Besides the above purposes, the following principles of the UN Charter are relevant in the legality review: All UN Members shall '*fulfil in good faith the obligations assumed by them in accordance with the present Charter*',[248] '*settle their international disputes by peaceful means*'[249] and '*refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the UN*'.[250] These principles are binding on '*All Members*' of the UN, including the P-5.[251]

Art 2(2) UN Charter sets out the condition that the P-5 must act in good faith when performing their obligations. The term '*Good Faith*' is not legally defined throughout the UN Charter and

[243] *See supra* note 1, Art 1(1).
[244] *See supra* note 1, Art 1(3).
[245] See chapter 3.
[246] See chapter 3.4.5.
[247] See chapter 3.4.3.
[248] *See supra* note 1, Art 2(2).
[249] *See supra* note 1, Art 2(3).
[250] *See supra* note 1, Art 2(4).
[251] *See supra* note 1, Art 2(2), 2(3) and 2(4).

subject to interpretation. *Basaran* describes good faith as the element that '*ensures a minimum standard of law in international relations*' and '*facilitates an international community in which stakeholders feel that they operate on a "multilateral" level playing field, and not on a mere ad hoc bilateral one*'. Accordingly, good faith is one necessary condition of a functional international community, since its multilateral treaty obligations are not necessarily enforceable by a superior judicial authority. Consequently, good faith is of special importance when there is a suspicion that a P-5 member is arbitrarily abusing its veto power instead of fulfilling its constitutional obligations while exercising the veto.[252] Thus, *Carswell* and *Trahan* also believe that the exercise of the veto is tied to the condition of good faith.[253] The first case study illustrated that the P-3 exercised their vetoes over measures against the South African regime primarily to maintain Western supremacy in the South-West African region and to minimize the influence of the Eastern Bloc.[254] By using the veto for political reasons during the Cold War, the P-3 failed to fulfill their obligations under the UN Charter, and instead acted in their own interests.[255] Therein lies an obvious violation of the good faith principle. The violation is even more obvious in the case of Russia's war of aggression.

In Russia's case, there is also a clear infringement of the principles of Art 2(3) and 2(4) UN Charter.[256] By launching an unprovoked war of aggression and vetoing the resulting UNSC resolutions, Russia is neither settling its '*international disputes by peaceful means*'[257] nor refraining in its '*international relations from the threat or use of force against the territorial integrity or political independence*'[258] of Ukraine.[259] The veto exercise described in this context thus clearly violates the principles of Art 2(3) and 2(4) UN Charter.[260]

The application of UN purposes and principles to the conducted legality test is, after all, not exhaustive. Depending on the individual veto use, further legal principles from Chapter I of the UN Charter can be applied via the gateway of Art 24(2) UN Charter. This clarifies once again that the veto right of the P-5 is not illegal *per se*, but an illegality of its use in specific constellations can be considered. The legal effect of an evident violation against the Purposes

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[252] *The maintenance of international peace and security*; *See supra* note 1, Art 24(1).
[253] *See* Trahan, *supra* note 2, at 195; *See* Carswell, *supra* note 7, at 470.
[254] See chapter 3.4.
[255] Id.
[256] See chapter 3.5.
[257] *See supra* note 1, Art 2(3).
[258] *See supra* note 1, Art 2(4).
[259] See chapter 3.5.
[260] See chapter 3.5.4.

and Principles of the UN Charter must - according to the presented interpretation of Art 24 UN Charter - be the nullity of the veto since it is *ultra vires* of the UNSC's powers.[261]

4.4 Other Hard Law Obligations

In addition to the UN Charter itself, there are other legal sources with binding effect on individual UN member states that can potentially be considered as a regulator of the veto power. Since this study reviews a limitation of Art 27(3) UN Charter particularly in the face of atrocity crimes, the Genocide Convention and the Geneva Conventions come to mind as they provide a suitable scope of application. All member states of the UN are parties to the Geneva Conventions and most members are parties to the Genocide Convention (including the P-5).[262] Consequently, the overwhelming membership of the UN is affected by the regulations of the conventions. The Genocide Convention legally defines the crime of genocide and obligates all parties to prevent and punish this crime at all times while the Geneva Conventions set differentiated humanitarian standards in warfare, which overlap to a large extent with the scope of atrocity crimes under the Rome Statute.[263]

If a P-5 member, by exercising its veto, were to facilitate or foster genocide under the Genocide Convention or the violation of humanitarian standards under the Geneva Conventions, the respective procedural voting behavior would violate the regulatory content of these conventions. This constitutes a serious breach of the Conventions and thus results in a punishable violation of international law.[264] In the Ukraine war, Russia is accused of violating the Genocide Convention, especially in the battle of Bucha.[265] Violations of the Geneva Conventions were committed by the apartheid regime and also during the Ukrainian War.[266] The crucial question at this point is: What is the hierarchical relationship between the

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[261] *See* Trahan, *supra* note 2, at 148-149.
[262] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 1948, 78 UNTS 277; United Nations, Office on Genocide Prevention and the Responsibility to Protect, *Ratification of the Genocide Convention*, available at: https://www.un.org/en/genocideprevention/genocide-convention.shtml, last accessed: 3 October 2023; ICRC, *States Party to the Following International Humanitarian Law and Other Related Treaties as of 25 September 2023*, available at: https://ihl-databases.icrc.org/public/refdocs/IHL_and_other_related_Treaties.pdf, last accessed: 3 October 2023.
[263] *See* 78 UNTS 277, *supra* note 262, Art 1, 2, 49 and 50; *See supra* note 100, Art 6, 7 and 8; Genser, J. & Stagno Ugarte, B., *The UN Security Council in the Age of Human Rights*, Cambridge University Press, Cambridge, 2014, 74.
[264] Hoffmann, J., Andre N., and Isabelle S., *Responsibility to Protect: From Principle to Practice*, 1st ed., Amsterdam University Press, Amsterdam, 2012, 18.
[265] *See* Tchobo, *supra* note 200, at 13-20.
[266] Murray, Christina, *The 1977 Geneva Protocols and Conflict in Southern Africa*, The International and Comparative Law Quarterly, Volume 33(2), 1984, 462-70; See chapter 3.4.2 and 3.5.3.

regulations of multilateral treaties and the regulations - or rather the procedural powers - of the UN Charter? The answer can be found in Art 103 UN Charter, which states that in '*the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*'.[267] The ICJ issued a corresponding decision in the *Lockerbie Case*, where it stated that in case of conflict, the powers of the UNSC take precedence over the obligations under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[268] This predominance of UN Charter rules can *mutatis mutandis* be applied to all other conflicting international agreements. *Trahan* argues that some of the provisions of the Genocide Convention and the Geneva Conventions already enjoy *jus cogens* status and/or could at least overcome the hierarchical hurdle of Art 103 of the UN Charter as part of the purposes and principles under Chapter I of the UN Charter.[269] However, this argument seems systematically misplaced:

Treaty obligations may properly be used as an interpretive guide to the question of whether the P-5's specific conduct constitutes a violation of *jus cogens* or of the purposes and principles of the UN Charter. However, the way in which specific *jus cogens* norms and the purposes and principles of the UN Charter compete with Art 27(3) UN Charter must be analyzed separately and not be confused with the hierarchical relationship of treaty obligations and the UN Charter.

The hierarchical relationship between the regulations of the UN Charter and other hard law obligations is clearly and conclusively regulated in Art 103 UN Charter. According to the wording and mentioned jurisprudence, the P-5's treaty obligations - in case of conflict with the UN Charter - do not provide an effective regulatory mechanism of Art 27(3) UN Charter and thus no solution to the veto-dilemma.[270] However, even if international treaties - in case of conflict with the UN Charter - are subordinate, their regulations may act as a valuable indicator for violations of the purposes and principles of the UN Charter or existing *jus cogens* norms.

[267] *See supra* note 1, Art 103.
[268] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), International Court of Justice, 10 September 2003, 569-601; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1975, 14 UNTS 118; *See* Trahan, *supra* note 2, at 220-221.
[269] *See* Trahan, *supra* note 2, at 221-222.
[270] *See* International Court of Justice, *supra* note 268; Heieck, J., *Beyond Responsibility to Protect: Generating Change in International Law*, in Richard, B. & Vassilis, T., 2016, 106.

4.5 *Jus Cogens*

The fourth possible source for legally regulating Art 27(3) UN Charter in face of atrocity crimes is provided by peremptory norms, the so-called *jus cogens*.[271] In order to explore peremptory norms as a regulatory mechanism, it is first necessary to clearly define the legal concept of *jus cogens*. The translation if the Latin term *jus cogens* means 'compulsory law'.[272] A legal definition of *jus cogens* is found in Art 53 of the Vienna Convention, which states:

„A treaty is void if...it conflicts with a peremptory norm of general international law…a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.“[273]

The language of the Vienna Convention was substantially inspired by Art 38(1) of the ICJ Statute in codifying the concept of *jus cogens.*[274] *Jus cogens* is thus part of public policy and confines the framework in which positive international law is set. The nature of *jus cogens* is universal and the legal concept of *jus cogens* is accepted by each legal system under the rule of law.[275] An autonomous deviation from the principles of *jus cogens* by the will of contracting parties to an international agreement is invalid.[276] Treaties, acts of international bodies, and the execution of rights under international treaties that violate *jus cogens* are void. *Jus cogens* thus stands hierarchically above any other source of international law.[277] The status of *jus cogens* is further reflected in Art 64 of the Vienna Convention, which states: '*If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm*

[271] Lachs, Manfred, *The Development and General Trends of International Law in our Time*, Académie de Droit International, Recueil des Cours, Volume 169, 1980, 202.
[272] *See* Heieck, *supra* note 270, at 107; Costelloe, D., *Legal Consequences of Peremptory Norms in International Law*, Cambridge University Press, Cambridge, 2017, 13.
[273] United Nations, Vienna Convention on the Law of Treaties (Vienna Convention), 1980, 1155 UNTS 331, 1980, Art. 53; *See* Genser, J., *supra* note 263, at 73.
[274] Weatherall, Thomas, *Jus Cogens: International Law and Social Contract*, Cambridge University Press, Cambridge, 2015, 131.
[275] Id at 3; Parker, K. & Neylon, L. B., *Jus Cogens: Compelling the Law of Human Rights*, 12 Hastings International & Comparative Law Review, Volume 411, 1989, 423; *See* Heieck, *supra* note 270, at 108.
[276] Schwelb, E., *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, American Journal of International Law, Volume 61, 1967, 946-949; Orakhelashvili, A., *Peremptory Norms in International Law*, Oxford University Press, Oxford, 2008, 187-190.
[277] *See* Heieck, *supra* note 270, at 107; Crawford, J., *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2005, 187;

becomes void and terminates'.[278] With this its definition of *jus cogens*, the Vienna Convention did not codify a new legal conception, but rather reflected a globally existing understanding of peremptory norms.[279] The unchallenged status of peremptory norms is intended to ensure that fundamental principles of international law are effectively upheld. Sources of *jus cogens* include treaty law, customary international law, and general principles of law. The Vienna Convention lacks a catalogue of already existing peremptory norms and the determination of *jus cogens* status is ambiguous. For the emergence of *jus cogens*, an *opinio juris sive necessitas*[280], evidenced by state practice and its recognition by judicial organs is necessary.[281] Therefore, the ICJ examines the 'character' of the relevant norm - for instance in the *Nuclear Weapons* Case.[282] Judicial organs thus play a decisive role in the determination of *jus cogens*.[283]

However, the focus of this chapter is not on determining new peremptory norms, but on examining an effective regulation of the P-5 veto exercise under Art 27(3) UN Charter by already existing peremptory norms.[284] The excluding effect of Art 103 UN Charter does not apply to *jus cogens*, as it constitutes no '*obligations under any other international agreement*' or subsidiary customary law.[285] As *Heieck* states, the '*real issue, therefore, is not whether jus cogens norms are superior to the UN Charter and binding on the P5*' but rather how to identify the applicable peremptory norms and how to determine to which extend *jus cogens* is limiting the P-5 in specific scenarios.[286]

In the following, already existing peremptory norms with regulatory relevance to Art 27(3) UN Charter in face of atrocity crimes are examined and considered in relation to the preceding case study.

4.5.1 The Prohibition of Atrocity Crimes

This thesis uses the collective term of 'atrocity crimes' for genocide, crimes against humanity, and war crimes. All these types of crime are prohibited under international law. The

[278] Vienna Convention Art 64; *See* Weatherall, *supra* note 274, at 6.
[279] *See* Trahan, *supra* note 2, at 150.
[280] *See* Weatherall, *supra* note 274, at 203.
[281] Id.
[282] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, International Court of Justice, 1996, 226, 258; *See* Costelloe, *supra* note 272, at 1-2.
[283] *See* Weatherall, *supra* note 274, at 124-162.
[284] *See* Trahan, *supra* note 2, at 148-150; *See* Heieck, *supra* note 270, at 107.
[285] *See supra* note 1, Art 103; *See* chapter 4.4; *See* Heieck, *supra* note 270, at 106.
[286] *See* Heieck, *supra* note 270, at 109.

corresponding prohibitions and/or legal principles are for the most part acknowledged as peremptory norms and thus enjoy the status of *jus cogens*.[287]

4.5.1.1 Genocide

The prohibition of the crime of genocide is regularly evidenced by state practice, especially since the end of World War II. The prohibition is codified, *inter alia*, in the Convention on the Prevention and Punishment of Genocide,[288] the Statutes of the ICTY and ICTR[289] as well as in the Rome Statute.[290] The *opinio juris sive necessitatis* is wide ranging, which is also confirmed by the legal opinion of the ILC.[291] The prohibition of genocide is recognized as an obligation *erga omnes* and its *jus cogens* status is extensively documented.[292]

4.5.1.2 War Crimes

The prohibition of war crimes is intended to maintain human dignity to the greatest extent possible, even in times of war. Every grave breach of the Geneva Conventions of 12 August 1949 constitutes a war crime.[293] The *jus cogens* status of the prohibition of war crimes has been broadly recognized since the International Military Tribunal at Nuremberg in 1946.[294] This view has since been supported by various judicial organs and codified in several laws.[295] On the basis of well-founded *opinio juris sive necessitatis* is, a corresponding *jus cogens* status is to be anticipated.[296]

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[287] *See* Trahan, *supra* note 2, at 148.
[288] *See* Genocide Convention, supra note 262, Art 1.
[289] United Nations, Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), 25 May 1993, Art 4; UN Security Council, Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, Art 2.
[290] *See* Rome Statute, *supra* note 100, Art 6; *See* Weatherall, *supra* note 274, at 230-231.
[291] *See* Weatherall, *supra* note 274, at 231.
[292] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice, 2007, 43, paras. 147, 162; Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Rwanda), International Court of Justice, 2006, 6, paras. 64, 125; Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, International Court of Justice, 1970, 3, paras. 33-34; *See* Weatherall, *supra* note 274, at 231; *See* Heieck, *supra* note 270, at 109-110; *See* Trahan, *supra* note 2, at 211.
[293] *See* Rome Statute, *supra* note 100, Art 8(2).
[294] Nazi Conspiracy and Aggression, Opinion and Judgment, International Military Tribunal at Nuremberg, 1946, 51-52.
[295] Prosecutor v. Nikolić, Decision on Interlocutory Appeal Concerning Legality of Arrest, ICTY, IT-94-2-AR73, 2003, paras. 24-25; *See* International Court of Justice, *supra* note 97, 14, para. 220; *See* United Nations, *supra* note 139, Art 6(b); International Military Tribunal for the Far East Charter, 19 January 1946, Art 5(b); *See* ICTY Statute, *supra* note 289, Art 2 and 3; *See* ICTR Statute, *supra* note 289, Art 4; *See* Rome Statute, *supra* note 100, Art 8.
[296] *See* Weatherall, *supra* note 274, at 213-219.

4.5.1.3 Crimes Against Humanity

Crimes against humanity are severe human rights violations committed by an authority against a civilian population. They are characterized by their widespread commission, their systematic nature, and the gravity of the human right breaches.[297] As this type of crime conflicts so strongly with the universal principle of human dignity, the *jus cogens status* of the prohibition of crimes against humanity is generally recognized.[298] The corresponding *opinio juris sive necessitatis* is proven without contradiction.[299]

4.5.2 The Prohibition of Aggression and Apartheid

Although the prohibition of aggression as well as the prohibition of apartheid are not directly falling under the definition of 'atrocity crimes' as employed in this study, they play a fundamental role to the conducted case studies and are therefore included as a relevant peremptory norm.

The prohibition of aggression originates from the prohibition of the use of force which in turn derives from the principle of state sovereignty.[300] It constitutes one of the oldest principles applied in inter-state relations.[301] In international law, aggression is defined as the unlawful aggravated use of force.[302] The only possible justification for the use of force is self-defense.[303] The corresponding *opinio juris sive necessitatis* was regularly evidenced by ICJ pronouncements.[304] The prohibition of unjustified interstate aggression is thus generally recognized as a principle with *jus cogens* status.[305]

The prohibition of apartheid arises from the right to equality and the universal principle of human dignity.[306] Its *jus cogens* status emerged during the international community's

[297] Id.
[298] Brownlie, I., *Principles of Public International Law*, Oxford University Press, Oxford, 2007, 515.
[299] *See* Weatherall, *supra* note 274, at 221; *See* Rome Statute, *supra* note 100, Art 7; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice, 2002, 3, paras. 56-60.
[300] *See supra* note 1, Art 2(4).
[301] *See* Weatherall, *supra* note 274, at 223.
[302] *See* International Court of Justice, *supra* note 97.
[303] *See supra* note, Art 152; *See* International Court of Justice, *supra* note 97, 14, paras. 191-192.
[304] *See* International Court of Justice, *supra* note 97; Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), International Court of Justice, 2003; Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), International Court of Justice, 2002.
[305] *See* Weatherall, *supra* note 274, at 224; *See* Orakhelashvili, *supra* note 276, at 216; *See* International Court of Justice, *supra* note 227, at 254.
[306] Universal Declaration of Human Rights, UNGA Res. 217 A (III), A/RES/217 (III), Art 1.

confrontation with South Africa's apartheid regime.[307] The *opinio juris sive necessitatis* was regularly expressed by the UN - although not effectively implemented by the UNSC - and is laid down in various codifications.[308] The crime of apartheid is listed in the Rome Statute as a crime against humanity, but its codification did only materialize after the end of the South African apartheid regime.[309] Thus, the *jus cogens status* of the apartheid prohibition with relevance to the case study cannot be deduced from its present classification as a crime against humanity but must be derived from its historical context. However, the *jus cogens* status of the apartheid prohibition was already evident at the time of the South African apartheid regime, particularly through the *codification of the International Convention on the Elimination of all Forms of Racial Discrimination (1965), and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1976).*[310]

4.5.3 The Relation between *Jus Cogens* and Art 27(3) UN Charter

The organs of the UN are bound by applicable international law.[311] Since the UNSC is bound by the Purposes and Principles of the UN, the following conclusion can be drawn: If primary international law in the form of the UN Charter has a binding effect on the UNSC, hierarchically superior *jus cogens* principles must unfold a binding effect *a fortiori*.[312] The examination of the relevant peremptory norms demonstrated that all of them are also codified in legal statutes. But due to their *jus cogens* status, their applicability is not affected by the exclusion clause of Art 103 UN Charter.[313] Since no international treaty may derogate from *jus cogens*, its regulatory effect extends to the entire scope of the UN Charter - hence both the UNSC's procedural and executive powers.[314]

[307] *See* Weatherall, *supra* note 274, at 236-237.
[308] *See* chapters 3.4.4 and 3.4.5; General Assembly Resolution, *The Declaration on the Elimination of All Forms of Racial Discrimination*, A/Res/1904 (XVIII), 20 November 1963; United Nations, International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention), 1974; *See* ICRC, *supra* note 139, Art 85(4)(c); *See supra* note 100, Art 7(1)(j).
[309] *See* chapter 4.5.1.3; *See supra* note 100, Art 7(1)(j).
[310] Cited from Weatherall, *supra* note 274, at 239-240; United Nations, International Convention on the Elimination of All Forms of Racial Discrimination, 1969, 660 UNTS 195; *See* Apartheid Convention, *supra* note 308.
[311] *See* Trahan, *supra* note 2, at 158; Bowett, D. W., *The Law of International Institutions*, 4th ed., Stevens, London, 1982, 30-40; Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, International Court of Justice, 1948, 57, 64.
[312] *See* chapter 4.3; *See supra* note 1, Art 24(2).
[313] *See* chapter 4.4.
[314] *See supra* note 1, Art 27 and Chapter VII; *See* Genser, *supra* note 263, at 73-74; *See* Heieck, *supra* note 270, at 106; *See* Vienna Convention, *supra* note 273, Art 53.

As a result, the UNSC may not pass resolutions that violate peremptory norms.[315] But what legal consequence can be drawn from this rule for the exercise of the veto power in specific situations? In other words, can a P-5 Member veto a draft resolution whose content is intended to enforce the scope of protection of a peremptory norm?

In order to maintain conformity with *jus cogens*, P-5 members may not use their veto power if applicable peremptory norms would be violated as a result.[316] A draft resolution intended, for example, to prevent an imminent genocide or to stop already ongoing crimes against humanity may not be blocked by the use of Art 27(3) UN Charter, since both crimes are prohibited by *jus cogens*. By exercising the veto in such a way, the blocking P-5 member would contribute to the causation of the pertinent crime - even if by omission - and thus conflict with *jus cogens*.

In practice, the described relationship between *jus cogens* and the veto exercise raises two problems. First, which due diligence standard is to be applied by each P-5 member in exercising a veto? And second, how can one determine in advance whether a draft resolution actually promotes the protection of relevant peremptory norms and thus is not subject to the veto?

To solve the first problem *Heieck* refers to the *Genocide Case.*[317] Accordingly, '*all states must do everything within their collective power to prevent genocide provided they have the requisite capacity to effectively influence the relevant genocidal actors and the knowledge of the existence of a serious risk that genocide might occur in a given territory*'.[318] This due diligence standard is applicable to other peremptory norms and should be followed by the P-5 without exception.

With regard to the second issue, the author is of the opinion that the mere probability of a positive effect by a draft resolution on a relevant peremptory norm's scope of protection is sufficient to exclude the veto exercise.[319] At the international level, a resolution can have an effect through the condemnation of state action - even without coercive measures being ordered under Chapter VII of the UN Charter. Accordingly, even the mere condemnation of an evident

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[315] *The legal consequence would be no binding effect of the resolution violating jus cogens*; *See* judge Lauterpacht's opinion in Bosnia and Herzegovina v. Serbia and Montenegro, *Further Request for the Indication of Provisional Measures, Order of 13 September 1993*, supra note 292.
[316] *See* Trahan, *supra* note 2, at 169.
[317] *See* Bosnia and Herzegovina v. Serbia and Montenegro, *supra* note 292; *See* Heieck, *supra* note 270, at 115-119.
[318] Cited from Heieck, *supra* note 270, at 118-119.
[319] *See* Trahan, *supra* note 2, at 170.

jus cogens violation should be sufficient to exempt a draft resolution from the exercise of Art 27(3) UN Charter. Needless to say, the P-5's veto power is significantly limited by this low threshold. In the author's opinion, this procedural limitation of Art 27(3) UN Charter is the only solution to establish consistency with threatened *jus cogens* norms and to assure the legality of the UNSC's mode of operation.[320]

4.5.4 Effects on the Case Study

This chapter examines how *jus cogens*, if properly applied, would have affected the veto exercises in the presented case studies.

4.5.4.1 Vetoes During the South African Apartheid Regime

The listed vetoes between 13 September 1963, and 8 March 1988, were all exercised with the knowledge that atrocity crimes were taking place under the apartheid regime during this period.[321] The blocked draft resolutions were directed against the illegitimate practice of the South African government. The corresponding breaches of law were specifically named in the respective drafts.[322] Through the draft resolutions, *jus cogens* principles, especially the prohibition of crimes against humanity and the prohibition of apartheid, were to be defended and enforced.[323] Nevertheless, the implementation of the resolutions was prevented - mainly by the P-3.

Such veto exercise directly conflicts with peremptory norms that were already established at that time. Art 27(3) UN Charter was effectively limited by the scope of *jus cogens*. According to the author's legal understanding, the breach of *jus cogens* should have resulted in the restriction of Art 27(3) UN Charter. Regarding the outlined draft resolutions between 1963 and 1988 the P-3 were thus not allowed to exercise their right of veto on the basis of conflicting international law.

[320] *This view is predominantly shared by Trahan*; *See supra* note 2, at 148.
[321] *See* chapter 3.4.2, 3.4.3, 3.4.4 and 3.4.5.
[322] *See* chapter 3.4.5.
[323] Id.

4.5.4.2 Vetoes During the Russo-Ukrainian War

The case study focused on Russia's vetoes since its invasion of Ukraine on 24 February 2022. Since the beginning of the war, mass atrocity crimes, especially war crimes, were committed.[324] It is also discussed whether cases of genocide on the part of Russian armed forces occurred.[325] Since Russia's war of aggression lacks any internationally recognized justification, it also constitutes an act of aggression against the Ukrainian state.[326] Even if the facts of genocide have not been sufficiently proven, massive violations of *jus cogens* - due to the extensive commission of war crimes - cannot be denied.[327]

The draft resolutions of 25 February 2022 and 29 July 2022 were directed against precisely these breaches of the law.[328] The draft resolutions called for an end to the war and thus the immediate enforcement of *jus cogens*. Nevertheless, Russia vetoed both draft resolutions. According to the author's understanding, under these circumstances the provision of Art 27(3) UN Charter is in direct conflict with applicable *jus cogens* - namely the prohibition of war crimes and the prohibition of aggression.[329] Accordingly, Art 27(3) UN Charter should be limited in the present case by the scope of *jus cogens*. Russia was not allowed to block the draft resolutions and thus violated applicable international law by exercising its veto power.

4.6 Conclusion

The examination of several legal instruments revealed that only two approaches to counter the veto-dilemma seem promising. These include, on the one hand, the limitation of the veto right on the basis of the UN Charter itself - namely its purposes and principles. On the other hand, Art 27(3) UN Charter is regulated by applicable peremptory norms, i.e., the content of *jus cogens*.

The regulation of Art 27(3) UN Charter via the gateway of Art 24(2) offers the advantage that Art 1 and 2 UN Charter contain a specified catalogue of legal standards to be complied with. This is accompanied by a high degree of legal certainty. However, the hierarchical relationship

[324] *See* chapter 3.5.3.
[325] *See supra* note 223; *See* Tchobo, *supra* note 200, 13-20; *See* Dudko, *supra* note 192, at 133-145.
[326] See chapter 3.5.2 and 3.5.3.
[327] *See* chapter 3.5.3.
[328] *See* chapter 3.5.4.
[329] *See* chapter 3.5.4, 4.5.1.2 and 4.5.2.

between Chapter I of the UN Charter and the procedural powers of the UNSC is not clearly defined. The judicial interpretation of Art 24(2) of the UN Charter poses a major hurdle to the actual restriction of the veto right and has no precedent to date.

In contrast, the hierarchical relationship between *jus cogens* and the UN Charter, respectively the competences of the UNSC, is unambiguous. *Jus cogens* enjoys a special hierarchical position *vis-à-vis* all other international legal regimes. Accordingly, the international judicial and political reaction to the exercise of the veto should be straightforward: If the use of Art 27(3) UN Charter violates *jus cogens*, the veto may not be exercised. Politically, this possibility of limiting the right of veto has often been problematized.[330] However, the legal relationship between *jus cogens* and Art 27(3) UN Charter still remains unaddressed by high international courts, although it would require this very attention to finally be reflected in the *modus operandi* of the UNSC.[331]

Last but not least, it can be stated that the functionality of the UNSC would be increased by establishing and acknowledging the presented regulatory mechanisms. The case studies showed that veto blockades occur particularly in connection with human rights-sensitive draft resolutions that are directed against atrocity crimes. Limiting the veto power in such cases would result in a much higher resolution output and allow for more effective peacekeeping.

5. Final Conclusion

The research conducted in this minor dissertation demonstrated that an effective regulation of Art 27(3) UN Charter is overdue, and that current international law offers legal instruments to resolve the UNSC veto-dilemma. The structure of the thesis was based on three main research questions and their gradual approach:

1. How did the UNSC veto right evolve and what problems arose during its evolution?
2. Does the use of the UNSC veto power demonstrably promote human rights violations and/or atrocity crimes?
3. Are there any promising approaches to solve the veto-dilemma?

[330] See chapter 2.4, 4.1 and 4.2.
[331] *See* Trahan, *supra* note 2, at 257-259.

Outlining the history and the legal functioning of the veto power revealed that the wording of Art 27(3) UN Charter was problematic ever since the founding of the UN. Art 27(3) UN Charter constituted a core element of the political disputes between the great powers at the time, i.e. the Eastern and Western Bloc. It is also deduced that the historical-political dispute between P-3 and P-2 runs like a thread through the UNSC's history of veto exercise and negatively influenced its functionality. The presentation of issues concerning the application and interpretation of Art 27(3) UN Charter made clear that the founding fathers of the UN were not aware of the veto's potentially devastating effects. The thesis highlights that a rigid adherence to the procedural law of the UNSC - codified shortly after the Second World War - is not comprehensible when measured in a contemporary legal context. The legal prerequisites of a veto reformation were analyzed and the most significant attempts to date were summarized. Through this historical and legal-theoretical introduction to the thesis, the veto-dilemma was clearly outlined and a solid foundation for the subsequent case-oriented approach was laid.

In a next step, the legal necessity of veto regulation was elaborated on the basis of two case studies. The commission of mass atrocity crimes and other human rights violations could be proven beyond doubt both during the apartheid period by the government of South Africa and by the parties to the Russo-Ukrainian war. With a functioning UNSC, the documented mass atrocity crimes could very likely have been prevented or at least countered far more effectively in both cases. In both cases, the UNSC's inability to act stems from the procedural design of Art 27(3) UN Charter and its arbitrary exercise. The link between veto use and human rights violations was demonstrated through an intensive analysis of the relevant UNSC veto history. Regarding to the examined veto blockades, the political divergence between P-3 and P-2 again plays a crucial role by fostering veto blockages. The thesis breaks new academic ground with the two case studies and thus provides an important contribution to the debate around the reformation of the Art 27(3) UN Charter.

The case studies demonstrated that Art 27(3) UN Charter prevents a countering of atrocity crimes or even promotes their commission in specific situations. However, the history of the veto-dilemma showed that reforming or even abolishing Art 27(3) UN Charter is not promising due to the power ambitions and internal political divergences of the P-5. In the last part of the thesis, alternative ways to regulate the exercise of Art 27(3) UN Charter in the face of atrocity crimes were explored. In this context, it was found that on the one hand, the exercise of the veto should be measured and regulated by the standard of the UN Charter itself - more precisely, its

principles and purposes contained in Art 1 and 2 UN Charter in conjunction with the general clause contained in Art 24(2) UN Charter. On the other hand, Art 27(3) UN Charter may also not exceed the scope of protection of applicable *jus cogens* norms and is - at least theoretically - limited by them. These legal insights were applied to the case studies, leading to the conclusion that both the P-3 during apartheid and Russia during the war against Ukraine violated international law by exercising the veto multiple times inappropriately. The legal consequence has to be the nullity of the vetoes under investigation.

The initial objective of the thesis was to find a clear solution to the veto-dilemma. This was not successful. However, it was possible to further enhance the academic and political discussion on the negative impact of Art 27(2) UN Charter on human rights and the functionality of the UNSC. The presented approaches to limit the veto power offer hope. It is now up to the international courts to integrate the presented legal regulatory mechanisms - such as the principles and purposes of the UN Charter and applicable *jus cogens* norms - in their jurisprudence. An examination of the practical regulation of the veto right by the relevant legal bodies would have complemented this minor dissertation but would have gone far beyond its scope.

The primary scientific merit of the thesis lies in the critical analysis of the veto right on the basis of two case studies that have never been conducted before. In particular, the current case study of the Russo-Ukrainian war contains immense human rights relevance and shows the failure of the UNSC at a time in which international peacekeeping is more important than ever. But it is not too late for the UNSC to finally act. Should the rescue of countless lives really depend on an antiquated procedural law? The answer seems obvious.

The right of veto constituted an essential condition for the successful creation of the UN and thus forms one of its cornerstones. Despite the current divergences between the P-5, it cannot be dismissed that they still reflect - albeit not as precisely as in 1945 - the balance of power in the world. The veto power thus still serves the important role of preserving a certain degree of unity in international executive decision-making. In its present, unregulated exercise, however, it costs lives. The responsibility now rests with the international community and the international courts to regulate and modernize the veto power according to the presented standards of this thesis. As great as the differences between individual nations may be, at the

international level the membership of the UN acts as a community by values. Even its most powerful organ - the UNSC - shall also be measured according to these values.

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