

A RIGHT TO IMPUNITY: VETO POWER IN THE UNITED NATIONS SECURITY COUNCIL

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LIST OF ABBREVIATIONS

ACT Group	Accountability, Coherence and Transparency Group
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907
ICC	International Criminal Court
ICJ	International Court of Justice
R2P	Responsibility to Protect
UN	United Nations
UNSC	United Nations Security Council
U.S.	United States of America

1. INTRODUCTION

1.1 BACKGROUND

The Charter of the United Nations harbours a fundamental contradiction. One of its foundational principles, the sovereign equality of states enshrined in Article 2(1) of the Charter, is subverted by a privilege conferred upon a select few. This principle posits that entities endowed with internal autonomy and external independence inherently share a profound and indisputable equality with one another. Emer de Vattel strengthened that point by domestic analogy: since individuals are inherently equal, possessing rights and obligations derived from nature, nations—composed of these individuals—are naturally equal, inheriting the same rights and obligations. According to Vattel, neither power nor weakness alters this fundamental principle. “A dwarf is as much as a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.”¹ Although Vattel did not distinguish between ‘civilised’ and ‘uncivilised’ nations, he employed ‘civilisation’ as a criterion for discriminatory treatment.² This idea of the right of civilisation (*droit de civilisation*) perpetuated the European colonial ideology upon which colonialism had been justified.³

In *How Nations Behave*, Louis Henkin asserted that states which had achieved independence from their European colonial rulers did not challenge international law but joined the liberal rules-based order without great protest because “[a]cceptance into that society as an independent equal was proof and crown of their successful struggle, and international law provided the indispensable framework for living in that society.”⁴ For Henkin and the majority of Western legal scholars, the acknowledgement of sovereign equality effectively resolved prior issues related to colonialism and the rhetoric of “civilisation.” With the perceived removal of substantial structural impediments to substantive equality, it became the responsibility of the former colonies to utilise the United Nations (UN) and other international institutions to achieve their policy objectives.⁵ However, it is doubtful that this is still a correct assessment,

¹ Emer de Vattel, *The Law of Nations* (Béla Kapossy and Richard Whatmore eds, Liberty Fund 2008) 75.

² Martti Koskeniemi and Ville Kari, ‘Sovereign Equality’ in Jorge E. Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press 2020) 4-5.

³ Jo-Anne Claire Pemberton, ‘The So-Called Right of Civilisation in European Colonial Ideology, 16th to 20th Centuries’ (2013) 15 *Journal of the History of International Law* 25.

⁴ Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, Columbia University Press 1979) 122.

⁵ Martti Koskeniemi and Ville Kari (n 2) 28.

as it almost certainly never was, but it also denies the ‘legalised hegemony’ ingrained in the Charter.

Institution-building required an attempt to reconcile the juridical commitment to equality and the political demands of hegemony.⁶ The architects of the Dumbarton Oaks proposals had awarded themselves a special status in the United Nations Security Council (UNSC) concerning their tenure and its voting procedures. The great powers ensured that no important action could be taken without their joint consent, and through their control over the amendment process, their unique position could not be altered unless they collectively agreed to such a change.⁷ The position of the five permanent members and the principle of weighted voting, the so-called right to veto, has been rejected as a violation of sovereign equality. This entrenched privilege erodes the Council’s legitimacy and effectiveness, as it is perceived to serve the interests of a few rather than the collective good. Thomas M. Franck captured this disillusionment in 1984, noting that “the members speak, vote and act in accordance with their perceived political self-interest rather than in accordance with the high principles they have themselves enunciated.”⁸ The United Nations, he argued, is less an impartial court “with its majestic concern for principle, but a bazaar, with its emphasis on price and trade.”⁹ The Charter essentially embedded a diluted form of legal equality to accommodate a mildly constrained constitutional hegemony.¹⁰ It affects all actions under Article 25 of the Charter and is most apparent in the amendment procedures stipulated in Articles 108 and 109. Consequently, the tension between “formal” and “substantive” equality challenges legal actors to bridge the gap between rhetoric and action, their persistent hypocrisy a relentless reminder of the virtue they so tirelessly profess.¹¹

1.2 PROBLEM STATEMENT

The Security Council is the linchpin of international peace and security, wielding unparalleled authority, including the power to impose sanctions, authorise military interventions, and mandate peacekeeping operations. However, its legitimacy is marred by

⁶ Gerry Simpson, ‘The Great Powers, Sovereign Equality and the Making of the United Nations Charter’ (2000) 21 *Australian Year Book of International Law* 133, 135.

⁷ Francis O. Wilcox, ‘The Yalta Voting Formula’ (1945) 39(5) *The American Political Review*, 943-44.

⁸ Thomas M. Franck, ‘Of Gnats and Camels: Is there a Double Standard at the United Nations?’ (1984) 78(4) *The American Journal of International Law* 811, 831.

⁹ *ibid* 833.

¹⁰ Gerry Simpson (n 5) 158.

¹¹ Martti Koskenniemi and Ville Kari (n 2) 3-4.

intense debate, primarily due to the contentious veto power held by its five permanent members: China, France, Russia, the United Kingdom, and the United States. This veto power, enshrined in Article 27(3) of the Charter, enables the great powers to block any substantive resolution unilaterally, profoundly shaping the Council's decision-making processes. The quest for reform has proven impossible, as any amendment to the Charter requires the consent of these very powers, creating a paradox where those who benefit the most from the *status quo* hold the keys to change.

1.3 RESEARCH QUESTION

In light of the problem presented above, this thesis aims to examine to what extent the right to veto undermines the legitimacy of the United Nations. By juxtaposing the veto power against the principle of sovereign equality and the subsequent right to self-determination, this thesis critically analyses how this power compromises the UNSC's credibility and effectiveness, ultimately calling into question the very foundations of its authority. The structure of the thesis observes three subquestions:

1. How did the five permanent members of the UNSC secure the right to veto?
2. What are the implications of the right to veto on the maintenance of international peace and security in the context of Israel's war on Gaza since 7 October 2023?
3. How does the right to veto alienate smaller states from decision-making processes? Does this alienation undermine the legitimacy of the United Nations?

1.4 METHODOLOGY

This thesis employs a qualitative research design anchored in doctrinal legal methodology to dissect the inherent contradictions within the United Nations Charter, focusing on the Security Council's veto power wielded by its permanent members. Through an analysis of the rules and principles of international law, including the Charter of the United Nations, relevant resolutions of the General Assembly and the Security Council, and official UN documents, alongside an extensive review of secondary sources such as scholarly articles, legal commentaries, and seminal works by distinguished legal scholars, this study seeks to examine the inherent tension between the principle of sovereign equality and the entrenched privilege of the veto. A detailed case study on the use of veto power in the context of Israel's war on

Gaza will assess the veto's impact on the Council's legitimacy and effectiveness. This research will navigate the complex interplay of power and principle by employing a rich tapestry of international legal theories and comparative analyses.

1.5 STRUCTURE

This thesis is structured to provide a comprehensive analysis of how the veto power undermines the legitimacy of the United Nations Security Council. The following chapter delves into the historical and legal foundation of the veto power, examining its origins, legal basis, and initial justifications that led to its inclusion in the Charter of the United Nations. In the third chapter, the focus shifts to a detailed case study which critically analyses instances where veto power has been exercised in the context of Israel's war on Gaza since 7 October 2023, highlighting its implications for maintaining international peace and security. The fourth chapter contrasts the right to veto with the principle of sovereign equality and the subsequent right to self-determination, providing a critical assessment of how these principles have been undermined by the veto and its impact on the UNSC's legitimacy, particularly focusing on how this privilege alienates smaller states from decision-making processes. Finally, the fifth chapter summarises the findings and offers a reflective conclusion. This structured approach ensures a comprehensive, critical, and compelling examination of the veto power and its implications for the UNSC's credibility and effectiveness.

2. SECURING THE RIGHT TO VETO

The ‘integration’ of the colonised into the society of nations through the acquisition of national sovereignty has fundamentally reshaped the membership of the United Nations, diverging significantly from the post-1945 Cold War *status quo*-orientated order that the Charter of the United Nations was designed to preserve.¹² At its inception, the United Nations oversaw a world where 750 million people, approximately a third of the world’s population, were under European colonial domination. Since then, over 80 of these former colonies have asserted their independence.¹³ Yet, national self-determination processes have not dismantled the colonial and imperial legacies embedded in international law. When the United Nations replaced the League of Nations, the great powers actualised their hegemonic aspirations through the formation of the Security Council as an executive body.¹⁴ Colonised nations were excluded from this process until they acquired self-determination and attained full recognition within the United Nations. Where the League was implicit, the United Nations was explicit in its commitment to the principle of sovereign equality. However, beneath the lofty ideals espoused by its advocates, the United Nations marked a deliberate retreat from the League’s relatively egalitarianism to the historical precedence of great power dominance. In essence, the United Nations was designed to be governed primarily by the great powers, with far less faith placed in international law as a set of norms independent from and standing above power politics.¹⁵ This chapter delves into the historical and legal foundation of the veto power, examining its origins, legal basis, and initial justifications to address how the five permanent members of the UN Security Council secured their exclusive right to veto.

The League of Nations, established in the aftermath of World War I, was conceived as a mechanism to avert future global conflicts. Nevertheless, it faltered in its core mission. The Japanese invasion of Manchuria and the subsequent establishment of the puppet state of Manchukuo precipitated a confrontation between Japan and the League. In a decisive vote of 42 to 1, the Assembly declared that Manchukuo was established not by the will of the Manchurian people but by the presence of Japanese troops. Eighteen months after the opening

¹² Nicola Perugini, ‘Decolonising the Civilian in Third World National Liberations Wars’ (2024) *Millenium: Journal of International Studies* 1, 6.

¹³ United Nations, ‘United Nations and decolonization’ <<https://www.un.org/dppa/decolonization/en/about>> accessed 26 July 2024.

¹⁴ Shiba N’Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996) 148.

¹⁵ Mark M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press 2009) 149-150.

volley, Japan announced its withdrawal from the organisation.¹⁶ Japan's departure from the League without consequence set a precedent for other powers, prompting Nazi Germany to withdraw shortly thereafter. Following Adolf Hitler's rise to power, Germany's rearmament efforts accelerated rapidly. By October 1933, Germany withdrew from the Disarmament Conference in Geneva and the League of Nations. Adolf Hitler contended that Germany's continued disarmament was untenable as long as other European states remained armed, thus justifying the nation's retreat from these international agreements.¹⁷ Similarly, Italy withdrew from the League of Nations in 1937 after its annexation of Abyssinia, modern-day Ethiopia, had been condemned by the League.¹⁸ By then, the League was but a shell. The organisation had failed to intervene against Italy in its war on Abyssinia and would demur again against the German annexation of Austria in 1938 and Czechoslovakia in 1939.¹⁹

The United Nations, however, "does not represent a break with the past, but rather the continued application of old ideas and methods with some changes deemed necessary in the light of past experience."²⁰ At the height of Japan's territorial conquest across Southeast Asia and the Western Pacific, while much of Europe had descended into fascist rule, U.S. President Franklin D. Roosevelt laid the foundation of the postwar order. Following the attack on Pearl Harbor, Roosevelt envisioned a policing mechanism as the cornerstone of the international organisation.²¹ According to his grand vision, the United States, Great Britain, the Soviet Union, and potentially China would possess exclusive enforcement capabilities while all other nations "should have nothing more dangerous than rifles."²² Roosevelt argued that compulsory disarmament was a key tenet of the Atlantic Charter.²³ He proposed period inspections to prevent the clandestine rearmament in which Germany had notoriously engaged in the pre-war

¹⁶ Thomas W. Burkman, *Crisis over Manchuria' in Japan and the League of Nations: Empire and World Order 1914-1938* (University of Hawai'i Press 2008) 165-172.

¹⁷ David M. Edelstein, *The Resurgence of Interwar Germany' in Over the Horizon: Time, Uncertainty, and the Rise of Great Power* (Cornell University Press 2017) 101.

¹⁸ Peter Krüger, 'From the Paris Peace Treaties to the End of the Second World War' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 693.

¹⁹ Thomas W. Burkman (n 15) 207.

²⁰ Leland M. Goodrich, 'From League of Nations to United Nations' (1947) 1(1) *International Organization* 3, 4.

²¹ Gerry Simpson (n 5) 137.

²² Anthony Eden, *The Reckoning: The Memories of Anthony Eden, Earl of Avon* (Houghton Mifflin 1965) 431.

²³ The eighth clause of the Atlantic Charter (1941) states that "all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside their frontiers, [U.S. President Franklin D. Roosevelt and British Prime Minister Winston Churchill] believe, pending the establishment of a wider and more permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments."

years. “If any nations menaced the peace, it could be blockaded and then, if still recalcitrant, bombed.”²⁴ Roosevelt harboured profound scepticism toward the balance of power theory, adamant that certain nations should be compelled to disarm. Roosevelt expressed his hope that, over time, the citizens of the former aggressor states would come to understand that the benefits of peace by dictation outweighed the costs of periodically recurrent wars. His primary objective was to forge a peace that could endure for at least twenty-five years. The focus on a finite period reflected a pragmatic approach, influenced by the belief that neither he, Churchill, nor Stalin would likely survive beyond the quarter-century.²⁵

Simultaneously, the sovereign equality of states was recognised as a founding principle of the United Nations system, consistently upheld from its conceptualisation during World War II through the final drafting process in 1945. At the Moscow Conference in 1943, the four allied powers began to lay the groundwork for a future international organisation.²⁶ The wartime alliance acknowledged the need to establish, at the earliest practicable date, “a general international organisation based on the principle of sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.”²⁷ This commitment served as a formal declaration and a reassurance to smaller states, who were apprehensive about Roosevelt’s proposed global police force. However, while the great powers paid lip service to the idea of equality, many smaller states feared that the future organisation would institutionalise a system of permanent dominance by the great powers, effectively marginalising the rights and aspirations of the smaller states.²⁸ For instance, the Dutch Minister of Foreign Affairs expressed scepticism about the prospect of placing exclusive control of post-war global affairs in the hands of the United States, Great Britain, China, the Soviet Union, and potentially France. He contended that this approach would likely fail to secure the support of smaller states, which have historically borne the brunt of war.²⁹

Ultimately, the ‘four policemen’ model became a central feature of the Dumbarton Oaks proposals. The idea of an exclusive, collective security regime was incorporated into a framework that, while emphasising the principles of sovereign equality and universality, was

²⁴ Office of the Historian, ‘Foreign Relations of the United States: Diplomatic Papers, 1942, Europe, Volume III, Document 468’ <<https://history.state.gov/historicaldocuments/frus1942v03/d468>> accessed 12 June 2024.

²⁵ *ibid.*

²⁶ Gerry Simpson (n 5) 142.

²⁷ Article 4 of the Declaration of the Four Nations on General Security.

²⁸ Gerry Simpson (n 5) 143.

²⁹ Office of the Historian, ‘Foreign Relations of the United States: Diplomatic Papers, 1944, General, Volume I, Document 389’ <<https://history.state.gov/historicaldocuments/frus1944v01/d389>> accessed 15 June 2024.

fundamentally structured around the dominance of the great powers.³⁰ There was some divergence of opinion among the United States, Great Britain, China, and the Soviet Union concerning the composition and voting procedures of the Security Council. The British advocated for a notably restricted Council size, suggesting a composition of only three or four great powers.³¹ The Soviets anticipated France joining the permanent members, though they did not specify the number of additional seats allocated to members with limited tenure.³² The Americans proposed a provision regarding France's potential continued tenure on the Council and recommended capping the total number of Council members at eleven.³³ This framework was intended to facilitate prompt and effective decision-making. Nevertheless, despite its limited representation, the Council of the League of Nations had been notoriously ineffective. Its composition varied as the number of non-permanent members increased and permanent members withdrew. Initially, the League's Council had four permanent members, later expanded to five, while the number of non-permanent members fluctuated from four at its inception to eleven by 1936.³⁴ Thus, the Security Council's structure mirrored that of its predecessor but with a different set of permanent members, raising concerns about whether the new organisation could overcome the deficiencies that had plagued the League of Nations.

Regarding voting procedures, the Soviets and Americans favoured a simple majority, whereas the British and the Chinese preferred a two-thirds majority. Both proposals, however, required the unanimity of the permanent members. A tentative proposal reconciled the differing positions, stipulating that "decisions should require the affirmative votes of seven members, rather than six members, as would be the case under a simply majority rule, or of eight members, as would be the case under a two-thirds rule."³⁵ Additionally, all substantive matters would require unanimity among the permanent members, except for matters related to the pacific settlement of disputes. The British and United States delegations concurred that Council members, including those with continued tenure, should abstain from voting on disputes to which they are party. They maintained that voluntary abstention by one of the permanent

³⁰ Gerry Simpson (n 5) 145.

³¹ Office of the Historian, 'Foreign Relations of the United States, Diplomatic Papers, 1944, General, Volume I, Document 404' <<https://history.state.gov/historicaldocuments/frus1944v01/d404>> accessed 16 June 2024.

³² Office of the Historian, 'Foreign Relations of the United States: Diplomatic Papers, 1944, General, Volume I, Document 415' <<https://history.state.gov/historicaldocuments/frus1944v01/d415>> accessed 16 June 2024.

³³ Office of the Historian, 'Foreign Relations of the United States: Diplomatic Papers, 1944, General, Volume I, Document 402' <<https://history.state.gov/historicaldocuments/frus1944v01/d402>> accessed 16 June 2024.

³⁴ United Nations Office at Geneva, 'Main Organs of the League of Nations' <<https://www.ungeneva.org/en/about/league-of-nations/organs>> accessed 16 June 2024.

³⁵ Office of the Historian, 'Foreign Relations of the United States: Diplomatic Papers, Conferences at Malta and Yalta, Document 74' <<https://history.state.gov/historicaldocuments/frus1945Malta/d74>> accessed 17 June 2024.

members would not compromise the unanimity requirement.³⁶ This voting arrangement, while pragmatic, prioritised short-term stability by consolidating power among a select few at the expense of a more representative and enduring framework. Although the Dumbarton Oaks proposals were not definitive, they formed a basis for discussion at the San Francisco Conference in 1945. The Chinese pre-approved the text on the voting procedures and co-sponsored the invitations to the conference.³⁷ In contrast, the French government declined to co-sponsor the invitations but indicated that it would attend the conference.³⁸

The United Nations Conference on International Organisation, commonly known as the San Francisco Conference, was attended by delegates from fifty states. Most of the debate concerning sovereign equality primarily revolved around how it would be compromised by or subordinated to the consolidation of authority among the great powers.³⁹ The provision that raised the most controversy and that epitomises the nature of the organisation, perhaps more than any other, is the so-called ‘Yalta formula’.⁴⁰ The architects of the Dumbarton Oaks proposals had awarded themselves a special status in the Security Council with respect to tenure and the voting procedure. The Yalta formula effectively cemented the special status of the great powers, ensuring that no important action could be taken without their joint consent, and through their control over the amendment process, their unique position cannot be altered unless they collectively agree to such a change.⁴¹ Smaller states made concerted efforts to redress the balance of power within the proposed United Nations framework. Seventeen delegations submitted amendments specifically targeting the structure, functions, and powers of the Security Council. Numerous other amendments sought modifications to the voting procedures in various sections of the Charter.⁴² For example, Ecuador and Iran proposed increasing the number of affirmative votes required from seven to eight or nine, respectively. Egypt preferred eight, with the concurring vote of four permanent members on all matters where the latter are not involved.⁴³ Cuba argued that the great powers should be subject to the

³⁶ Office of the Historian, ‘Foreign Relations of the United States: Diplomatic Papers, 1944, General, Volume I, Document 490’ <<https://history.state.gov/historicaldocuments/frus1944v01/d490>> accessed 17 June 2024.

³⁷ Office of the Historian, ‘Foreign Relations of the United States: Diplomatic Papers, 1945, General: The United Nations, Volume I, Document 37’ <<https://history.state.gov/historicaldocuments/frus1945v01/d37>> accessed 17 June 2024.

³⁸ Office of the Historian, ‘Foreign Relations of the United States: Diplomatic Papers, 1945, General: The United Nations, Volume I, Document 54’ <<https://history.state.gov/historicaldocuments/frus1945v01/d54>> accessed 17 June 2024.

³⁹ Gerry Simpson (n 5) 146.

⁴⁰ Francis O. Wilcox (n 6) 943.

⁴¹ *ibid* 944.

⁴² *ibid* 946.

⁴³ *ibid* 947.

same majority rules they had imposed on the smaller states, insisting that decisions concerning international peace and security should require a two-thirds majority, including two-thirds of the permanent members.⁴⁴ El Salvador advanced the idea that matters lacking unanimous approval from the permanent members should be referred to the General Assembly for a final decision.⁴⁵

The great powers contended that the Yalta voting formula represented a step forward in the development of international relations.⁴⁶ Traditionally, decisions which had substantial political implications or imposed new obligations upon member states required unanimity.⁴⁷ The new voting procedure substitutes the principle of unanimity with a system of weighted voting. The Yalta formula retains the veto power for permanent members while eliminating it for non-permanent members. This formula aimed to mitigate the obstructionism that had plagued the League's decision-making process.⁴⁸ The United States acknowledged that if any of the permanent members were to become an aggressor, the Security Council would have no power to prevent war.⁴⁹ Smaller states vigorously criticised the unanimity requirement as a violation of sovereign equality and contrary to the basic principles of democracy.⁵⁰ Venezuela highlighted numerous proposals aimed at curtailing the veto power, which many regarded as a privilege for the great powers and a fundamental weakness of the organisation. They argued that the opposition of a single permanent member could paralyse the Council on matters so critical that their resolution may determine the fate between peace and war.⁵¹ Peru underscored that the *liberum veto* has historically led to great difficulties, with the League of Nations providing the most recent example of its detrimental effects.⁵² In response, the sponsoring governments reassured smaller states that the veto would not be used arbitrarily.⁵³ China dismissed opposing arguments, asserting that it was assumed too readily that the Council's permanent members "would be at odds with the rest of the nations."⁵⁴

⁴⁴ United Nations, 'Documents of the United Nations Conference on International Organisation, San Francisco, 1945' volume 11, 351-52.

⁴⁵ Francis O. Wilcox (n 6) 947.

⁴⁶ *ibid* 949.

⁴⁷ Anne Peters and Simone Peter, 'International Organizations: Between Technocracy and Democracy' in Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 190-191.

⁴⁸ United Nations (n 43) volume 11, 713.

⁴⁹ *ibid*, 513-14.

⁵⁰ Francis O. Wilcox (n 6) 947.

⁵¹ United Nations (n 47) 609.

⁵² *ibid* 337.

⁵³ *ibid* 434.

⁵⁴ *ibid* volume 7, 224.

In the end, the smaller states were unsuccessful in eliminating the veto. The five permanent members secured the right to veto because it was a non-negotiable condition for the establishment of the organisation. The smaller states were confronted with a choice between a Charter with great power privilege or no Charter at all.⁵⁵ New Zealand warned that the veto, if retained and exercised, may not only compromise the primary objectives of the United Nations but also affect the organisation itself.⁵⁶ Lebanon noted that the veto could precipitate inaction and lead to the organisation's downfall.⁵⁷ New Zealand further articulated the risks involved if a great power were to break out in aggression, suggesting that such matters would need to be resolved outside the framework of the organisation, thereby threatening its very existence.⁵⁸ Smaller states had rejected the principle of weighted voting as a violation of sovereign equality. Conversely, the veto power enshrined in Article 27 of the Charter of the United Nations, combined with the stringent amendment procedures prescribed in Articles 108 and 109, has entrenched a form of sovereign *inequality*. The collective security provisions, particularly those in Chapter VII of the Charter, solidified a graded system of sovereignty based on degrees of immunity. As a result, the five permanent members and their allies are effectively shielded from enforcement actions. While the great powers justified this arrangement as a continuation of the unanimity requirement observed in a number of international bodies prior to the Charter, it has introduced a legalised hegemony. Where the unmodified principle of unanimity was a rule of equality, weighted voting was now the accepted procedure in international organisations.⁵⁹ Thus, the Charter has institutionalised historical colonial dynamics into immutable constitutional certainties.⁶⁰

⁵⁵ *ibid* volume 11, 166.

⁵⁶ *ibid* volume 1, 510-11.

⁵⁷ *ibid* volume 11, 486.

⁵⁸ *ibid*, 171.

⁵⁹ Gerry Simpson (n 5)153.

⁶⁰ *ibid* 136.

3. THE QUESTION OF PALESTINE: IMPLICATIONS OF VETO POWER

In 1960, in line with the principle of self-determination enshrined in Articles 2(1) and 55 of the Charter of the United Nations, the General Assembly adopted the ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’, expressing that “[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human right, is contrary to the Charter of the United Nations and impedes the promotion of world peace and co-operation.”⁶¹ The traditional excuses for maintaining colonial structures as transitional arrangements aimed at achieving ‘civilisation progress’ were firmly rejected. Instead, the resolution underscored the ‘right to self-determination’ for all peoples, emphasising their inherent right to freely determine their political status. During the 1960s and 1970s, the General Assembly adopted numerous resolutions reiterating its commitment to decolonisation, culminating in the ‘Friendly Relations Declaration’ on 24 October 1970.⁶² In its preamble, the declaration emphasised that colonialism “constitutes a major obstacle to the promotion of international peace and security” and, subsequently, “the principle of equal rights and self-determination constitutes a significant contribution to contemporary international law, and that effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality.”⁶³ The operative part of the declaration further notes that all peoples have the right to freely determine their political status and to pursue their economic, social and cultural development “[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter” and, subsequently, “every state has the duty to respect this right in accordance with the provision of the Charter.”

The Security Council’s responsibility for the maintenance of international peace and security enshrined in Article 24 of the Charter includes the so-called ‘responsibility to protect’ (R2P). Following the atrocities in the Balkans and Rwanda, which the international community failed to prevent, the Heads of State and Government adopted the World Summit Outcome Document of 2005, extending the United Nations’ responsibility “to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁶⁴ This resolution,

⁶¹ Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960) (adopted by 89 votes to none; 9 abstentions).

⁶² Bruno Simma et al., *The Charter of the United Nations: A Commentary, Volume 1* (3rd edn, Oxford University Press 2012) 320-321.

⁶³ Declaration on Principle of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

⁶⁴ 2005 World Summit Outcome, UNGA Res 60/1 (16 September 2005) UN Doc A/RES/60/1.

and a subsequent report of the Secretary-General, formulated a three-pillar strategy consisting of the protection responsibilities of states, international assistance and capacity-building, and timely and decisive response. With regard to the third pillar, states committed “to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁶⁵ Thus, while the responsibility to protect resides primarily with the territorial state, the international community bears a ‘residual responsibility’.⁶⁶ Moreover, the Secretary-General stated that “[w]ithin the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power” and urged them “to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect.”⁶⁷

Since the Hamas-led attack on 7 October 2023, the Security Council has charted a treacherous course, grappling to uphold its mandate of maintaining international peace and security amidst a series of contentious vetoes. A little over a month into Israel’s retaliation on Gaza, forty-one human rights experts warned that the “[g]rave violations committed by Israel against Palestinians in the aftermath of 7 October” indicate the potential of an unfolding genocide. The experts expressed their concern about “the support of certain governments for Israel’s strategy of warfare against the besieged population of Gaza and the failure of the international system to mobilise to prevent genocide.”⁶⁸ The United States exercised its veto

⁶⁵ *ibid.*

⁶⁶ Bruno Simma et al. (n 61) 766-767.

⁶⁷ UNGA ‘Report of the Secretary-General: Implementing the Responsibility to Protect’ (12 January 2009) UN Doc A/63/677.

⁶⁸ OHCHR, ‘Gaza: UN experts call international community to prevent genocide against the Palestinian people’ (16 November 2023) <<https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>> accessed 28 June 2024. The statement was made by Francesca Albanese, Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967; Margaret Satterthwaite, Special Rapporteur on the Independence of Judges and Lawyers; Dorothy Estrada Tanck (Chair), Claudia Flores, Ivana Krstić, Haina Lu, and Laura Nyirinkindi, Working group on discrimination against women and girls; Surya Deva, Special Rapporteur on the right to development; Ravindran Daniel (Chair-Rapporteur), Sorcha MacLeod, Chris Kwaja, Jovana Jezdimirovic Ranito, Carlos Salazar Couto, Working Group on the use of mercenaries; Barbara G. Reynolds (Chair), Bina D’Costa, Dominique Day, Catherine Namakula, Working Group of Experts on People of African Descent; Pedro Arrojo-Agudo, Special Rapporteur on the human rights to safe drinking water and sanitation; Olivier De Schutter, Special Rapporteur on extreme poverty and human rights; Farida Shaheed, Special Rapporteur on the right to education; Damilola Olawuyi (Chairperson), Robert McCorquodale (Vice-Chairperson), Elżbieta Karska, Fernanda Hopenhaym, and Pichamon Yeophantong, Working Group on the issue of human rights and transnational corporations and other business enterprises; Siobhán Mullally, Special Rapporteur on trafficking in persons, especially women and children; Livingstone

power to block resolutions aimed at holding Israel accountable or calling for a ceasefire. This action exemplifies how the veto can shield permanent members and their allies from international scrutiny, impeding efforts to achieve sustainable peace. Such recurrent use of the veto perpetuates existing colonial dynamics and undermines the legitimacy of the Security Council and the United Nations as a whole. By allowing powerful states to prioritise their strategic interests over international justice and human rights, the veto power erodes trust in the UN's capacity to serve as an impartial and effective guardian of international peace and security. Consequently, the question of Palestine is sustained not only by historical colonial practices but also by contemporary political mechanisms like the veto, which obstruct meaningful international intervention and conflict resolution. This chapter critically analyses instances where veto power has been exercised in the context of Israel's war on Gaza since 7 October 2023, highlighting its implications on the maintenance of international peace and security.

3.1 THE UNITED NATIONS SECURITY COUNCIL

The United Nations Security Council (UNSC) is often idealised as the pinnacle of global governance in safeguarding international peace and security. Article 24 of the UN Charter confers upon the UNSC the “primary responsibility for the maintenance of international peace and security” and mandates that it conducts its activities in accordance with the purposes and principles of the organisation. The term ‘responsibility’ underscores the position of trust given to the Council, including the responsibility to protect.⁶⁹ In the *Wall Advisory Opinion*, the International Court of Justice emphasised that “Article 24 refers to a primary, but not necessarily exclusive, competence.”⁷⁰ Hans Kelsen understood the objective

Sewanyana, Independent Expert on the promotion of a democratic and equitable international order; Balakrishnan Rajagopal, Special Rapporteur on the right to adequate housing; Ashwini K.P. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Paula Gaviria Betancur, Special Rapporteur on the human rights of internally displaced persons; Mary Lawlor, Special Rapporteur on the situation of human rights defenders; Claudia Mahler, Independent Expert on the enjoyment of all human rights by older persons; Ben Saul, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Irene Khan Special Rapporteur for Freedom of Opinion and Expression; Ms Reem Alsalem, Special Rapporteur on violence against women and girls, its causes and consequences; Tomoya Obokata, Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Damilola Olawuyi (Chairperson), Robert McCorquodale (Vice-Chairperson), Elżbieta Karska, Fernanda Hopenhaym, and Pichamon Yeophantong, Working Group on the issue of human rights and transnational corporations and other business enterprises.

⁶⁹ Bruno Simma et al. (n 61) 766.

⁷⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paragraph 26.

of ‘maintenance of international peace and security’ to mean nothing else but to confer on the Security Council the primary responsibility “for the achievement of the general purpose of the United Nations.”⁷¹ The Council must act “in accordance with the Purposes and Principles of the United Nations,” which are enshrined in Articles 1 and 2 of the Charter and include, *inter alia*, the principle of sovereign equality and right to self-determination.⁷² Under Article 39, the UNSC has the authority to determine whether a threat to the peace, a breach of the peace, or an act of aggression exists. The Council enjoys considerable discretion in making this determination.⁷³ When the UNSC has found a threat to the peace, breach of the peace, or act of aggression, it has the prerogative to deploy measures, ranging from economic and diplomatic to military intervention, as specified in Articles 41 and 42 of the Charter. These provisions equip the Council with a comprehensive toolkit, including the imposition of economic sanctions, the severance of diplomatic relations, and, when deemed necessary, the deployment of armed forces.

When the Security Council adopts a decision under Article 25 of the Charter, members of the United Nations must accept and implement its decisions. Throughout the Charter, the prevailing terms used to describe Council actions are ‘decision’ and ‘recommendation’. The distinction between these terms underscores their fundamental dichotomy, emphasising their distinct legal implications. It suggests that ‘decision’ has been positioned in direct opposition to ‘recommendation’. Moreover, there was a consensus at the San Francisco Conference that ‘recommendations’ would not be considered binding. Consequently, the Charter’s systemic and historical interpretations affirm that Council decisions are legally binding, whereas Council recommendations are not.⁷⁴ In practice, however, the adoption and implementation of these decisions are characterised by inconsistency, often contingent upon the strategic interests of the five permanent members. This dynamic frequently results in paralysis or selective application of the Council’s authority. “While the world organisation is supposedly a bastion of high ideals, it is also a venue for low politics.”⁷⁵ Its actions—or inactions—often reflect the power dynamics and national interests of its most influential members as opposed to the collective will of the international community. Consequently, the UNSC’s ability to effectively

⁷¹ Hans Kelsen, *The Law of the United Nations: a Critical Analysis of its Fundamental Problems* (Stevens and Sons 1950) 283.

⁷² Bruno Simma et al. (n 61) 780.

⁷³ *ibid* 1275.

⁷⁴ *ibid* 792.

⁷⁵ Richard Gowan, ‘The Double Standards Debate at the UN’ (*International Crisis Group*, 7 March 2017) <<https://www.crisisgroup.org/middle-east-north-africa/east-mediterranean-mena/israelpalestine/double-standards-debate-un>> accessed 28 June 2024.

discharge its noble mandate remains subject to intense scrutiny and debate, underscoring the persistent tension between idealised principles of international law and the pragmatic realities of global power dynamics. This dissonance is particularly evident with regard to the question of Palestine, where the UNSC's role, or lack thereof, serves as a poignant illustration of broader systemic failures of international mechanisms designed to promote peace and justice. The Council's inefficacy in addressing this matter underscores the urgent need for reform within international governance structures, lest they continue to falter under the weight of their own contradictions.

3.2 THE QUESTION OF PALESTINE

“The tale of Palestine from the beginning until today is a simple story of colonialism and dispossession, yet the world treats it as a multifaceted and complex story—hard to understand and even harder to solve. Indeed, the story of Palestine has been told before: European settlers coming to a foreign land, settling there, and either committing genocide against or expelling the indigenous people. The Zionists have not invented anything new in this respect. But Israel succeeded nonetheless, with the help of its allies everywhere, in building a multilayer explanation that is so complex that only Israel can understand it. Any interference from the outside world is immediately castigated as naïve at best or anti-Semitic at worst.”⁷⁶ Despite the straightforward nature of this narrative, it is frequently obscured by convoluted explanations devised to protect particular interests. Geopolitical dynamics and the strategic priorities of influential states within the United Nations further exacerbate this obfuscation. The veto power wielded by the five permanent members of the UN Security Council is particularly significant in this context, profoundly affecting the maintenance of international peace and security. In the exercise of its authority, the Council has adopted four resolutions on the question of Palestine in the nine months following 7 October. These resolutions, ostensibly aimed at de-escalating violence and providing humanitarian relief, are often riddled with underlying political motivations and have been criticised for their ineffectiveness and perceived lack of impartiality. Consequently, the UNSC's efforts to fulfil its mandate are continuously challenged, undermining its legitimacy and highlighting the urgent need for comprehensive reforms.

⁷⁶ Naom Chomsky & Ilan Pappé, *On Palestine* (Haymarket Books 2015) 13.

Resolution 2712, passed on 15 November 2023, aimed to address the humanitarian crisis in Gaza by advocating for urgent and extended humanitarian pauses and the establishment of aid corridors to facilitate the provision of essential goods and services to civilians.⁷⁷ The representative of Brazil welcomed the resolution but noted that “more comprehensive and timely resolutions had been attempted.” These efforts, however, were obstructed by “[s]uccessive vetoes, the spectre of pocket vetoes, or the lack of a real negotiating process prevented them,” thereby highlighting the deep-rooted political gridlock within the Council.⁷⁸ Subsequently, Resolution 2720, adopted on 22 December, established the role of a Senior Humanitarian and Reconstruction Coordinator to oversee and coordinate international humanitarian efforts. It also called for “urgent steps [...] to create the conditions for a sustainable cessation of hostilities.”⁷⁹ Nonetheless, the resolution fell short of broader ambitions. The French representative remarked that his country “would have preferred if the Council could have expressed itself in a more ambitious manner on the subject,” underscoring the UNSC’s inability to enact more decisive and impactful measures due to political concession and impediments.⁸⁰

On 25 March 2024, the Council adopted Resolution 2728, demanding an immediate ceasefire for the month of Ramadan, the immediate and conditional release of all hostages held by Hamas, and unimpeded humanitarian access.⁸¹ The United States attempted to undermine the resolution by falsely claiming it was non-binding.⁸² The International Court of Justice explicitly rejects this view, affirming that the obligation of member states to carry out Security Council decisions is not limited to enforcement measures adopted under Chapter VII of the Charter.⁸³ The Court has declared that the language of a resolution “should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”⁸⁴ The legal consequence is that “when the Security Council adopts a decision under Article 25

⁷⁷ UNSC Res 2712 (15 November 2023) UN Doc S/RES/2712.

⁷⁸ UNSC Verbatim Record (15 November 2023) UN Doc S/PV/9479.

⁷⁹ UNSC Res 2720 (22 December 2023) UN Doc S/RES/2720.

⁸⁰ UNSC Verbatim Record (22 December 2023) UN Doc S/PV/9520.

⁸¹ UNSC Res 2728 (25 March 2024) UN Doc S/RES/2728.

⁸² UNSC Verbatim Record (25 March 2024) UN Doc S/PV/9586.

⁸³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 176* [1971] ICJ Rep 16, paragraph 113.

⁸⁴ *ibid* paragraph 114.

in accordance with the Charter, it is for member states to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.”⁸⁵

On 10 June 2024, the Security Council adopted Resolution 2735, which proposed a three-phase ceasefire initiative and urged Hamas to accept its terms. These terms included the release of hostages and the establishment of a framework to conclude the ongoing hostilities.⁸⁶ This initiative resolution followed U.S. President Joseph Biden’s announcement of a three-phase peace plan, which he claimed had been proposed by Israel, aimed at achieving lasting peace in the Middle East.⁸⁷ However, despite these efforts, Israeli Prime Minister Benjamin Netanyahu indicated his willingness to implement only the first phase of the deal, thereby circumventing phase two, which requires Israel to permanently withdraw from Gaza in exchange for the release of the remaining hostages.⁸⁸ On 31 July 2024, Ismail Haniyeh, the political chief of Hamas, was assassinated in Iran’s capital, Tehran. Haniyeh had been leading ceasefire negotiations on behalf of the Islamic Resistance Movement.⁸⁹ While Israel has not claimed responsibility for the assassination, the death of Haniyeh may further derail ongoing negotiations and prolong Israel’s war on Gaza.⁹⁰ The UNSC’s resolutions have thus yielded limited tangible results, exacerbating the deep divisions within the Council. Israel’s retaliation and the humanitarian crisis in Gaza remain at the forefront of international concern, with member states divided over the appropriate course of action. Efforts to pass comprehensive ceasefire resolutions have been repeatedly thwarted by vetoes and political disagreements among the five permanent members. The United States has frequently used its veto power to block resolutions it deems excessively critical of Israel. At the same time, Russia and China have called for more balanced language that also addresses Palestinian suffering.

⁸⁵ *ibid* paragrah 116.

⁸⁶ UNSC Res 2725 (10 June 2024) UN Doc S/RES/2735.

⁸⁷ The White House, ‘Remarks by President Biden on the Middle East’ (31 May 2024) <<https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/05/31/remarks-by-president-biden-on-the-middle-east-2/>> accessed 18 July 2024.

⁸⁸ Jacob Magid and Toi Staff, ‘Israeli, Arab officials say Netanyahu support for ‘partial’ deal harms hostage talks’ (*The Times of Israel*, 24 June 2024) <<https://www.timesofisrael.com/israeli-arab-officials-say-netanyahu-support-for-partial-deal-harms-hostage-talks/>> accessed 18 July 2024.

⁸⁹ Khushbu Shah, ‘How Hamas and Iran will respond to the assassinations of top Hamas leaders’ (*Politico Europe*, 1 August 2024) <<https://www.politico.eu/article/assassination-hamas-chief-ismail-haniyeh-iran-israel-war-in-gaza/>> accessed 7 August 2024.

⁹⁰ Al Jazeera, ‘Ismail Haniyeh’s assassination aimed to prolong Israel’s war on Gaza: Abbas’ (6 August 2024) <<https://www.aljazeera.com/news/2024/8/6/ismail-haniyehs-assassination-aims-to-prolong-israels-war-on-gaza-abbas>> accessed 7 August 2024.

This deadlock has resulted in a series of diluted resolutions, highlighting the Council's inability to take decisive action in the face of severe humanitarian crises.

3.3 IMPLICATIONS OF THE VETO POWER

By 10 July 2024, 38,295 people had been killed in Gaza since the attack by Hamas and the subsequent Israeli invasion in October 2023.⁹¹ However, the number of reported deaths is likely an understatement. Conservative estimates suggest that the death toll may surpass 186,000 people, wiping out approximately 7.9% of Gaza's entire population.⁹² The Security Council's failure to take decisive action underscores its impotence as the purported guardian of international peace and security. On 18 October 2023, the Council was unable to adopt a resolution that would have called for humanitarian pauses to allow full, rapid, safe and unhindered humanitarian access.⁹³ The United States vetoed the draft resolution because it "made no mention of Israel's right of self-defence."⁹⁴ A week later, the UNSC found itself at an impasse again, unable to pass either of two competing draft resolutions highlighting the deep divisions within its ranks. The first draft resolution, brought forth by the United States, was a stern condemnation of the attacks by Hamas and other terrorist groups and reaffirmed the inherent right of individual and collective self-defence. It also demanded the immediate and unconditional release of all remaining hostages and called for humanitarian pauses to allow full, rapid, safe, and unhindered humanitarian access.⁹⁵ Despite support from ten Council members, the resolution was vetoed by China and Russia, with the United Arab Emirates, Brazil, and Mozambique abstaining.

Conversely, the Russian draft resolution called for an immediate, durable and fully respected ceasefire, firmly condemned all forms of violence and hostilities against civilians and unequivocally denounced both the attacks by Hamas and the taking of hostages, as well as the indiscriminate Israeli attacks against civilians and civilian infrastructure in Gaza.⁹⁶ However, this resolution failed to pass due to opposition from the United States and the United

⁹¹ OCHA, 'Reported impact snapshot | Gaza Strip' (10 July 2024) <<https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-10-july-2024>> accessed 18 July 2024.

⁹² Rasha Khatib, Martin McKee and Salim Yusuf, 'Counting the dead in Gaza: difficult but essential' (2024) 404 *The Lancet* 237 <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(24\)01169-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(24)01169-3/fulltext)> accessed 18 July 2024.

⁹³ UNSC Brazil: draft resolution (18 October 2023) UN Doc S/2023/773.

⁹⁴ UNSC Verbatim Record (18 October 2023) UN Doc S/PV/9442.

⁹⁵ UNSC United States of America: draft resolution (25 October 2023) UN Doc S/2023/792.

⁹⁶ UNSC Russian Federation, Sudan, and Bolivian Republic of Venezuela: draft resolution (25 October 2023) UN Doc S/2023/795.

Kingdom, receiving only four affirmative votes from China, Gabon, Russia, and the United Arab Emirates. The frustration and disappointment within the Council was palpable. U.S. representative Linda Thomas-Greenfield lambasted the Russian draft as a hastily drafted document without proper consultation. At the same time, Russia's Vasily Nebenzya sharply criticised the U.S. draft for its overt politicisation and omission to include a crucial call for a ceasefire. The representative of Ecuador stressed that the Council must not remain silent in the face of clear threats to international peace and security, particularly given the ever-worsening humanitarian consequences. He deplored the repeated failure to adopt a majority decision, attributing this to the paralysing effect of the veto. Similarly, the Swiss representative emphasised the special and heightened responsibility of the Council's permanent members to lead a constructive and inclusive process. The Ghanaian representative expressed regret over the use of vetoes "to prevent the Council from shouldering its responsibilities in a critical situation that demands decisive action."⁹⁷

On 8 December 2023, the Security Council convened for its 9498th meeting. For the first time since 1989, the Secretary-General invoked Article 99 of the United Nations Charter, which grants him the authority to bring to the Council's attention any matter that, in his opinion, may threaten the maintenance of international peace and security. Secretary-General António Guterres echoed his appeal for a humanitarian ceasefire, warning that "the situation is fast deteriorating into a catastrophe with potentially irreversible implications for Palestinians as a whole and for peace and security in the region."⁹⁸ Ahead of the Security Council vote, fifty UN human rights experts reiterated their previous call for an immediate ceasefire, stating that "UN Member States must mobilise now and act collectively to preserve the *raison d'être* of the United Nations."⁹⁹ The draft resolution, co-sponsored by 102 Member States, demanded an

⁹⁷ UNSC Verbatim Record (25 October 2023) UN Doc S/PV/9453.

⁹⁸ The Secretary-General, 'Letter by the Secretary-General to the President of Security Council invoking Article 99 of the United Nations Charter' (*United Nations*, 6 December 2023), <<https://www.un.org/en/situation-in-occupied-palestine-and-israel/sg-sc-article99-06-dec-2023#:~:text=Dear%20Mr.,of%20international%20peace%20and%20security.>> accessed 19 July 2024.

⁹⁹ OHCHR, 'UN Experts urge States to unite for peace and push for ceasefire in Gaza' (8 December 2023), <<https://www.ohchr.org/en/press-releases/2023/12/un-experts-urge-states-unite-peace-and-push-ceasefire-gaza>> accessed 19 July 2024. The statement was made by Francesca Albanese, Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967; Reem Alsalem, Special Rapporteur on violence against women and girls, its causes and consequences; Pedro Arrojo Agudo, Special Rapporteur on the human rights to safe drinking water and sanitation; Cecilia Baillet, Independent Expert on human rights and international solidarity; Balakrishnan Rajagopal, Special Rapporteur on the right to adequate housing; Aua Baldé (Chair-Rapporteur), Gabriella Citroni (Vice-Chair), Angkhana Neelapaijit, Grażyna Baranowska, Ana Lorena Delgadillo Perez, Working Group on enforced or involuntary disappearances; David Boyd, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Beatriz Miranda Galarza, Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members; Surya Deva, Special Rapporteur on the right to development; Barbara G. Reynolds (Chair), Bina D'Costa, Dominique Day, Catherine Namakula, Working

immediate humanitarian ceasefire, the unconditional release of all hostages, and unimpeded humanitarian access.¹⁰⁰ However, despite broad support, the resolution was vetoed by the United States. The representative of the United Arab Emirates, Mohamed Abushahab, expressed his disappointment with the outcome of the vote, stating that “against a backdrop of the Secretary-General’s grave warnings, the appeals by humanitarian actors and the world’s public opinion, the Council is growing isolated. It appears to be untethered from its own founding document.”¹⁰¹ Conversely, U.S. representative Robert A. Wood defended the veto, arguing that the draft resolution failed to condemn the attacks by Hamas and neglected Israel’s right to self-defence. He contended that an unconditional ceasefire would be unrealistic and dangerous, asserting that “[a]s long as Hamas clings to its ideology of destruction, any ceasefire

Group of Experts on People of African Descent; Dorothy Estrada Tanck (Chair), Claudia Flores, Ivana Krstić, Haina Lu, and Laura Nyirinkindi, Working group on discrimination against women and girls; Michael Fakhri, Special Rapporteur on the right to food; Paula Gaviria Betancur, Special Rapporteur on the human rights of internally displaced persons; Ms Ashwini K.P. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Irene Khan, Special Rapporteur on the protection and promotion of freedom of opinion and expression; Mary Lawlor, Special Rapporteur on the situation of human rights defenders; Claudia Mahler, Independent Expert on the enjoyment of all human rights by older persons; Clément Nyaletsossi Voule, Special rapporteur on the rights to freedom of peaceful assembly and of association; Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Siobhán Mullally, Special Rapporteur on trafficking in persons, especially women and children; Tomoya Obokata, Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Margaret Satterthwaite, Special Rapporteur on the Independence of Judges and Lawyers; Ben Saul, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Farida Shaheed, Special Rapporteur on the right to education; Alexandra Xanthaki, Special Rapporteur in the field of cultural rights; Carlos Salazar Couto (Chair-Rapporteur), SORCHA MacLeod, Jovana Jezdimirovic Ranito, Chris M. A. Kwaja, Ravindran Daniel, Working Group on the use of mercenaries; Ms Attiya Waris, Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; Mr Olivier De Schutter, Special Rapporteur on extreme poverty and human rights; Mr Graeme Reid, Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity; Francisco Cali Tzay, Special Rapporteur on the rights of indigenous peoples; Damilola Olawuyi (Chairperson), Robert McCorquodale (Vice-Chairperson), Elżbieta Karska, Fernanda Hopenhaym, and Pichamon Yeophantong, Working Group on the issue of human rights and transnational corporations and other business enterprises.

¹⁰⁰ UNSC draft resolution (8 December 2023) UN Doc S/2023/970. The draft resolution was co-sponsored by Afghanistan, Andorra, Angola, Antigua and Barbuda, Argentina, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Brazil, Cambodia, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Cuba, Democratic Republic of the Congo, Djibouti, Dominican Republic, Egypt, El Salvador, Eritrea, Ethiopia, Fiji, Finland, Gambia, Grenada, Guyana, Iceland, Indonesia, Iraq, Ireland, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Lebanon, Lesotho, Libya, Luxembourg, Malaysia, Maldives, Malta, Mauritania, Mexico, Morocco, Namibia, New Zealand, Nicaragua, Nigeria, Norway, Oman, Pakistan, Peru, Philippines, Poland, Portugal, Qatar, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Tajikistan, Thailand, Timor-Leste, Trinidad and Tobago, Türkiye, Uganda, United Arab Emirates, Uzbekistan, Venezuela (Bolivarian Republic of), Vietnam, Yemen and Zimbabwe.

¹⁰¹ UNSC Verbatim Record (8 December 2023) UN Doc S/PV.9499.

is, at best, temporary and is certainly not peace. Any ceasefire that leaves Hamas in control of Gaza would deny Palestinian civilians the chance to build something better for themselves.”¹⁰²

However, the assertion that Israel has a right to self-defence has been heavily contested. Article 51 of the Charter of the United Nations recognises “the inherent right of individual or collective self-defence” in the case of an armed attack. Upon its unilateral disengagement in 2005, Israel claimed that it no longer occupied the Gaza Strip. Nevertheless, Israel retained control over Gaza’s airspace and territorial waters, as well as its border crossings with the coastal enclave.¹⁰³ In essence, “Israel equated the presence of its armed forces in Gaza to effective control, threshold analysis for determining the existence of a military occupation, and the redeployment of those forces as that occupation’s cessation.”¹⁰⁴ However, Article 42 of the Hague Regulations of 1907 articulates that a belligerent exercises effective control over a territory as long as it has established its authority and possesses the capacity to enforce it, regardless of the continuous presence of ground troops. The International Criminal Tribunal for the former Yugoslavia (ICTY) has affirmed that a territory remains under occupation so long as an army can reassert physical control at any time.¹⁰⁵ In the *Wall* Advisory Opinion, the International Court of Justice concluded that Article 51 has no relevance if the attacks are not imputable to a foreign state but originate from within the territory Israel itself occupies.¹⁰⁶ Consequently, the laws of occupation remain applicable, obliging Israel to use its law enforcement authority to restore order and precluding it from declaring war upon the territory it occupies.¹⁰⁷

In addition, UN Security Council Resolution 1860, adopted on 6 January 2009, four years after Israel’s 2005 disengagement plan, which Israel claims ended Gaza’s status as occupied territory, affirms that “the Gaza Strip constitutes an integral part of the territory occupied in 1967.”¹⁰⁸ This resolution, adopted with the United States abstaining, implies that Israel exhausted its right to self-defence when it preemptively seized Gaza and the West Bank during the 1967 Arab-Israeli war. Consequently, the governance of the occupied Palestinian territories has since been subject to the customary and treaty-based norms of international

¹⁰² *ibid.*

¹⁰³ Ministry of Foreign Affairs of Israel, ‘The Disengagement Plan-General Outline’ (*Government of Israel*, 18 April 2004) <https://www.gov.il/en/pages/disengagement_plan_general_outline> accessed 20 July 2024.

¹⁰⁴ Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford University Press 2019) 195.

¹⁰⁵ *Prosecutor v Mladen Naletilic and Vinko Martinović* (Judgment) ICTY-98-34 (31 March 2003), paragraph 217.

¹⁰⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 69) paragraph 139.

¹⁰⁷ Noura Erakat (n 102), 196.

¹⁰⁸ UNSC Res 1860 (8 January 2009) UN Doc S/RES/1860.

humanitarian law applicable to occupation. Under these laws, Israel is not only prohibited from inflicting harm upon the inhabitants of these territories but also bears a fundamental responsibility to ensure their safety and security, as mandated by Article 43 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (the “Hague Regulations”). Furthermore, Israel is obligated to protect private property under Articles 46 and 47 of the Hague Regulations and maintain the integrity of “public buildings, real estate, forests, and agricultural estates” per Article 55. A joint report by the United Nations and the World Bank, dated 29 March 2024, reveals the devastating impact of Israel’s actions in Gaza. The report indicates that approximately 62% of all homes in Gaza have been damaged or destroyed, leaving over one million people homeless and 75% of the population internally displaced. Moreover, nearly 84% of all healthcare facilities have sustained damage or destruction, severely impeding the provision of health services. These conditions have precipitated a humanitarian crisis, with more than half of Gaza’s population on the brink of famine and the entire population experiencing acute food insecurity and malnutrition.¹⁰⁹

In an effort to circumvent the deadlock within the Security Council, South Africa initiated proceedings against Israel before the International Court of Justice (ICJ) for alleged violations of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (the ‘Genocide Convention’) with respect to its treatment of Palestinians in Gaza. On 26 January 2024, the ICJ issued an order mandating Israel to take all necessary steps to prevent acts of genocide, to prevent and punish the direct and public incitement to commit genocide, to take immediate and effective measures to enable the provision of humanitarian aid and to prevent the destruction and ensure the preservation of evidence related to South Africa’s allegations.¹¹⁰ Despite these provisional measures, conditions in Gaza remained dire, showing no signs of improvement nearly a month later. On 20 February, Algeria submitted a draft resolution to the Security Council, demanding an immediate humanitarian ceasefire and the unconditional release of all hostages.¹¹¹ The resolution was vetoed by the United States, which argued that its adoption would jeopardise ongoing negotiations. Tunisia, speaking on behalf of the Arab Group, condemned the veto, denouncing the persistent double standards that

¹⁰⁹ The World Bank, the European Union and the United Nations, ‘Gaza Strip – Interim Damage Assessment: Summary Note – March 29, 2024’ (*World Bank Group*, 2 April 2024) 1, 11-16.

¹¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Request for the Indication of Provisional Measures: Order of 26 January 2024) General List No 192 [2024] ICJ 1.

¹¹¹ UNSC Algeria: draft resolution (20 February 2024) UN Doc S/2024/173.

have prolonged the Palestinian question. Tunisia's representative warned that such actions erode the Council's credibility and effectively grant the occupying power a *carte blanche* to continue its crimes with impunity, disregarding international legitimacy and placing itself above the law and beyond accountability. China joined the criticism, dismissing claims that the resolution would disrupt diplomatic efforts. "Given the situation on the ground," China asserted, "the continued passive avoidance of an immediate ceasefire is tantamount to giving a green light to continued slaughter."¹¹²

A month later, the United States set out to steer global public opinion by introducing a resolution that would have *determined* "the imperative of an immediate and sustained ceasefire," contingent on the release of all remaining hostages.¹¹³ Contrary to Western media reports, the draft resolution did not call for an immediate ceasefire.¹¹⁴ The U.S. argued that the resolution would help to make a ceasefire possible rather than merely call for one, but Russia accused Washington of hypocrisy. The Russian representative criticised the draft's vague language and unusual wording, noting that the United States had thwarted four previous attempts to demand a ceasefire. "Such philosophical passages about moral imperatives," he stated, are "not the mandate of the Council, which has the unique mechanism for demanding a ceasefire and, if necessary, enforcing it."¹¹⁵ The Algerian delegate, representing the Arab world, reminded the Council that his delegation proposed a draft resolution for an immediate humanitarian ceasefire the previous month, which the United States had vetoed. Algeria opposed the U.S. resolution, arguing that resolutions 2712 and 2720 had failed due to the absence of a clear and definitive ceasefire demand. China and Russia vetoed the draft proposal.

On 25 March 2024, just three days after the geopolitical spectacle, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 presented a critical report. This report, authored by Francesca Albanese, concluded that "there are reasonable grounds to believe that the threshold indicating Israel's commission of the crime of genocide [against Palestinians in Gaza] has been met."¹¹⁶ Simultaneously, the International Court of Justice issued two additional orders indicating provisional measures. In its order of 28 March, the Court recognised that Palestinians in Gaza were not merely at risk of famine, but

¹¹² UNSC Verbatim Record (20 February 2024) UN Doc S/PV/9552.

¹¹³ UNSC United States of America: draft resolution (22 March 2024) UN Doc S/2024/239.

¹¹⁴ Edith M. Lederer, 'Russia and China veto US resolution calling for immediate cease-fire in Gaza' (*Associated Press*, 2 March 2024) <<https://apnews.com/article/united-nations-us-vote-gaza-ceasefire-resolution-f6453803b3eacc9fbba2ce5a025e2a94>> accessed 22 July 2024.

¹¹⁵ UNSC Verbatim Record (22 March 2024) UN Doc S/PV/9584.

¹¹⁶ OHCHR, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese' (25 March 2024) UN Doc A/HRC/55/73.

that famine was already setting in, with at least 31 people, including 27 children, having already died of malnutrition and dehydration. The ICJ ordered Israel to take all necessary and effective measures to ensure the delivery of essential humanitarian aid to Palestinians in Gaza without obstruction and to refrain from hindering the provision of this urgently needed humanitarian assistance.¹¹⁷ By 24 May, the ICJ observed a further alarming deterioration in Gaza's humanitarian crisis. Consequently, the Court ordered Israel to cease its military offensive in Rafah immediately and to keep the Rafah crossing open to facilitate unhindered humanitarian assistance.¹¹⁸ Furthermore, the Prosecutor of the International Criminal Court (ICC), Karim A. A. Khan KC submitted applications for arrest warrants against Israeli Prime Minister Benjamin Netanyahu, Israeli Minister of Defence Yoav Gallant and three Hamas officials. The Office of the Prosecutor asserted that Netanyahu and Gallant bear criminal responsibility for war crimes and crimes against humanity, including the use of starvation as a method of warfare, intentionally causing death, great suffering, serious injury to body or health, or cruel treatment, as well as extermination, murder, persecution, and other inhuman acts directed against the civilian population in Gaza.¹¹⁹

Despite clear indications of a humanitarian catastrophe and widespread international condemnation, the global response remains woefully inadequate, confined to calls for a ceasefire and the reduction of military actions. In October 2023, the Global Centre for the Responsibility to Protect and European Centre for the Responsibility to Protect urged world leaders and the UN Security Council to take immediate action to enforce a ceasefire and uphold their collective responsibility to protect.”¹²⁰ Under the principle of the Responsibility to Protect (R2P), the international community is obligated to take appropriate measures to safeguard Palestinians from genocide, war crimes, ethnic cleansing and crimes against humanity.¹²¹ However, political intricacies and strategic interests severely hinder the consensus necessary for R2P intervention. The UN Security Council, the primary body for authorising collective

¹¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Request for the Indication of Provisional Measures: Order of 28 March 2024) General List No 192 [2024] ICJ 1.

¹¹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Request for the Indication of Provisional Measures: Order of 24 May 2024) General List No 192 [2024] ICJ 1.

¹¹⁹ International Criminal Court, ‘Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine’ (ICC, 20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>> accessed 22 July 2024).

¹²⁰ Global Centre for the Responsibility to Protect, ‘Open Call by for an Immediate Ceasefire in the Gaza Strip and Israel to Prevent a Humanitarian Catastrophe and Further Loss of Innocent Lives’ (18 October 2023) <<https://www.globalr2p.org/publications/crasefirenow-in-gaza-strip-and-isreal-290-orgs/>> accessed 23 July 2024.

¹²¹ 2005 World Summit Outcome (n 63).

action under R2P, often finds itself divided, with the veto power of its five permanent members posing a significant obstacle to decisive action.¹²² Moreover, the question of Palestine is further complicated by disparities in international recognition: Israel has been recognised as a state by the United Nations since 1948, whereas Palestine has yet to be granted full UN membership due to objections from the United States.¹²³ Considering the implications of the right to veto, this chapter has exemplified that the persistent use of veto power undermines the Council's mandate to maintain international peace and security and raises questions about the institution's legitimacy. The right to veto is inherently incompatible with the principle of sovereign equality because it marginalises smaller states and obstructs their call for more decisive measures. In this context, the veto has consistently thwarted the right to self-determination of the Palestinian people. The United States' staunch opposition to resolutions critical of Israel's policies and actions in occupied Palestinian territories effectively grants Israel a right to impunity.

¹²²Kristian Alexander, 'The limits of international law: the Responsibility to Protect (R2P), Israel and the International Court of Justice' (*Elcano Royal Institute*, 1 March 2024) <<https://www.realinstitutoelcano.org/en/commentaries/the-limits-of-international-law-the-responsibility-to-protect-r2p-israel-and-the-international-court-of-justice/>> accessed 23 July 2024.

¹²³ UNSC Verbatim Record (18 April 2024) UN Doc S/PV/9609.

4. A RIGHT TO IMPUNITY

On 8 December 2023, the United States defied the will of the overwhelming majority of the United Nations membership after Washington vetoed a resolution demanding an immediate humanitarian ceasefire in Gaza.¹²⁴ This resolution, co-sponsored by 102 Member States, was introduced in the context of the Secretary-General's unprecedented invocation of Article 99 of the Charter of the United Nations.¹²⁵ The Security Council had previously called for increased provision of humanitarian aid to address the needs of the civilian population in Gaza.¹²⁶ However, the Secretary-General articulated grave concerns before the Council, noting that "under the current conditions on the ground, the fulfilment of that mandate has become impossible" and that "[t]he conditions for the effective delivery of humanitarian aid no longer exist."¹²⁷ The General Assembly reconvened its tenth emergency special session to address the "unjust use of the veto power."¹²⁸ The Assembly resoundingly passed a resolution identical to the one rejected by the Security Council, with 153 members voting in favour of an immediate humanitarian ceasefire. The United States and Israel were among the ten states that opposed the resolution.

During the emergency special session, several Member States sharply criticised the United States' use of the veto. The representative of Pakistan characterised Israel's actions as an attempt to "erase not only a people, but also the entire idea of Palestine," drawing parallels to historical instances of racial extermination perpetrated by other settler-colonial regimes.¹²⁹ The South African representative underscored the evident inadequacy of the Security Council in fulfilling its mandate. The Council's inability to call for a humanitarian ceasefire "due to aggravated politicisation once again demonstrates the urgent need for a reform of this body."¹³⁰ Similarly, the Tunisian representative condemned the U.S. veto, asserting that the Security Council "is being held hostage to political calculations" and thus failing in its moral and legal responsibilities.¹³¹ This failure, the Tunisian delegate contended, severely undermines the Council's legitimacy.

¹²⁴ UNSC (n 98).

¹²⁵ The Secretary-General (n 96).

¹²⁶ UNSC (n 76).

¹²⁷ UNSC Verbatim Record (8 December 2023) UN Doc S/PV/9498.

¹²⁸ UNGA Verbatim Record (12 December 2023) UN Doc A/ES-10/PV.45.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ *ibid.*

This chapter contrasts the right to veto with the principle of sovereign equality and the subsequent right to self-determination, providing a critical assessment of how these principles have been undermined by the veto and its impact on the the Council's legitimacy, particularly focusing on how this privilege alienates smaller states from decision-making processes. An institution experiences a crisis of legitimacy when the level of social recognition that its identity, interests, practices, norms, or procedures are rightful declines to a degree where the institution must either reform or face a loss of authority.¹³² The Assembly's overwhelming support for a humanitarian ceasefire signifies a broad consensus among member states. While legally permissible, the United States veto is perceived as inconsistent with internationally recognised norms, principles, and obligations. By disregarding the collective will of the majority and the humanitarian imperatives championed by the Secretary-General, the United States erodes the very foundation of the Council's mandate. This persistent use of veto power and the resulting inertia of the Security Council foster a growing sense of alienation among member states. Criticism from states such as Pakistan, South Africa, and Tunisia underlines a broader sense of estrangement from the decision-making processes, exacerbated by the permanent members' control over the amendment process, thereby obstructing necessary reform.

4.1 LEGITIMACY

Legitimacy is "a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."¹³³ This definition underscores that legitimacy is not an inherent quality but a socially construed and context-dependent perception. It involves accepting and recognising an entity's authority, actions, or existence based on shared norms and beliefs within a particular social setting or institution. While legitimacy is anchored in objective norms and principles, its essence is fundamentally subjective. Therefore, asserting that a particular pattern of behaviour is legitimate is to affirm that a group of observers collectively accept or support what they perceive to be the behavioural pattern, notwithstanding any individual reservations about specific actions or potential criticisms that might arise from further scrutiny.

¹³² Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44 *International Politics* 157, 158.

¹³³ Mark C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) *The Academy of Management Review* 571, 574.

Allegations of illegitimacy emerge when “there is too great a discrepancy between what the organisation promises and what it delivers.”¹³⁴ In the case of the Security Council, such discrepancies are embedded in its design. The Council was established to be an effective mechanism for maintaining international peace and security. Accordingly, it was vested with substantial authority, including legislative and legitimating powers. The Council’s legislative function is evident in the binding nature of its decisions. In contrast, its capacity to confer legitimacy is demonstrated through its authorisation of actions undertaken by others on behalf of the United Nations or its inaction in condemning violations of the Charter and refraining from necessary interventions. Simultaneously, principles such as sovereign equality and the right to self-determination inform the proper exercise of this authority. The abuse of power and the failure to use authority effectively challenges the Council’s legitimacy. Therefore, the pursuit of an institution capable of exercising its authority with effectiveness and having its actions broadly recognised as legitimate remains a critical objective.¹³⁵

4.2 ALIENATION

The veto power constitutes a flagrant violation of the principle of sovereign equality and effectively marginalises smaller states from the decision-making processes. This disparity has had profound and adverse effects on the right to self-determination for those subjected to perpetual settler-colonial occupation. In its Advisory Opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the International Court of Justice affirmed that the right to self-determination is “one of the essential principles of contemporary international law,” recognised as an obligation *erga omnes*.¹³⁶ The Court unequivocally stated that Israel’s unlawful policies and practices violate its obligation to respect the right of the Palestinian people to self-determination.¹³⁷ It further indicated that it is for the Security Council and the General Assembly to determine what measures are required to end Israel’s illegal occupation and to fully realise the right to self-determination of the Palestinian people.¹³⁸ However, further actions remain unattainable due to obstruction by the United States. The General Assembly

¹³⁴ David D. Caron, ‘The Legitimacy of the Collective Authority of the Security Council’ (1993) 87(4) *The American Journal of International Law* 522, 560.

¹³⁵ *ibid* 561-562.

¹³⁶ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) General List No 186 [2024] ICJ 1, paragraph 232.

¹³⁷ *ibid* paragraph 43.

¹³⁸ *ibid* paragraphs 275 and 281.

lacks the power to enforce such measures unilaterally. Under Article 6 of the Charter of the United Nations, the Assembly can expel a member state from the organisation for persistent violations of Charter principles, but only upon Security Council recommendation. Additionally, Article 5 provides for the suspension of a member state's rights and privileges.

In 1974, the General Assembly decided to suspend South Africa from participation in its work in response to widespread international condemnation of its apartheid policy.¹³⁹ This action, however, did not conform to Article 5 of the Charter, which stipulates that a recommendation from the Security Council must precede such a suspension. A triple veto from by France, the United Kingdom, and the United States thwarted an attempt to expel South Africa under Article 6.¹⁴⁰ Earlier, the Credentials Committee had rejected the credentials of the South African delegation, which the Assembly subsequently approved.¹⁴¹ Nevertheless, this endorsement did not resolve the issue of South Africa's status as a Member of the United Nations, which remained unresolved pending a Security Council recommendation. The Assembly's refusal to accept the credentials did not constitute a formal expulsion, a prerogative reserved exclusively for the Security Council. The sole consequence was that South Africa's representatives were barred from participating in the Assembly's proceedings. In a notable intervention, the representative of Tanzania condemned the vetoes against the expulsion of South Africa, asserting that such persistent frustration of Security Council decisions impedes the international community's capacity to enforce the Charter. It was inconceivable that a regime representing a white minority could continue to embody the interests of a black majority, thereby subverting their fundamental right to self-determination.¹⁴²

In November 1977, the Security Council, for the first time in its 32-year history, imposed a mandatory arms embargo against South Africa in response to demands for action under Chapter VII of the Charter.¹⁴³ However, despite persistent advocacy for the extension of the embargo to include general trade sanctions and the imposition of an oil embargo, these initiatives were consistently obstructed by vetoes.¹⁴⁴ Until October 1977, the three Western

¹³⁹ United Nations, 'General Assembly Decides to Suspend South Africa from Participation in Its Work' (*UN Photo*, 12 November 1974) <<https://media.un.org/photo/en/asset/oun7/oun7593912>> accessed 25 July 2024.

¹⁴⁰ UNSC Kenya, Mauritania and the United Republic of Cameroon: draft resolution (24 October 1974) UN Doc S/11543.

¹⁴¹ UNGA 'Credentials of representatives to the 29th session of the General Assembly: 1st report of the Credentials Committee' (28 September 1974) UN Doc A/9779.

¹⁴² UNGA Verbatim Record (12 November 1974) UN Doc A/PV.2281.

¹⁴³ Isaak I. Dore, 'Self-determination of Namibia and the United Nations: Paradigm of a Paradox' (1986) 27(1) *Harvard International Law Journal* 159, 167.

¹⁴⁴ *ibid* 169.

powers frequently opposed the arms embargo.¹⁴⁵ Efforts to impose more comprehensive measures, including the severance of diplomatic relations, an oil embargo, and broader economic and political sanctions, were similarly blocked by a triple veto from France, the United Kingdom, and the United States.¹⁴⁶ The protracted involvement of the United Nations not only revealed the socio-economic impact of South Africa's presence in Namibia but also exposed the economic interests of foreign powers, notably the United Kingdom, the United States, France, and WestGermany, in both South Africa and Namibia.¹⁴⁷ Although France revised its position on sanctions in July 1985, the United Kingdom and the United States vetoed a draft resolution advocating for additional enforcement measures.¹⁴⁸ Subsequent attempts to impose sanctions were also vetoed until the eventual collapse of the apartheid regime and the end of South Africa's illegal occupation of Namibia between 1990 and 1994.¹⁴⁹

The Security Council holds exclusive authority to enact binding decisions and to take enforcement action, yet any such action is invariably subject to the approval of its veto-wielding members. Resolutions, even those that are merely declarative or condemnatory, have been frequently obstructed by vetoes. The resultant ineffectiveness, compounded by the persistent conflict between the General Assembly and the Security Council, fundamentally undermines the organisation's legitimacy. The illegal occupation of Namibia by South Africa's apartheid regime and Israel's prolonged occupation of Palestine illustrate the paradox of the indispensability of the United Nations in championing human rights, sovereign equality and self-determination and its ineffectiveness in enforcing these principles. Historically, the veto has enabled South Africa's denial of Namibia's right to self-determination and continues to allow Israel to obstruct the right to self-determination of the Palestinian people. The persistent use of veto power has effectively narrowed the scope of self-determination in favour of colonial settlers. As a result, the right to veto perpetuates a system where certain states operate with impunity while others remain powerless to effectuate decisive action and meaningful change.

¹⁴⁵ UNSC Guyana, Iraw, Mauritania, the United Republic of Cameroon and the United Republic of Tanzania: draft resolution (6 June 1975) UN Doc S/11713. UNSC Benin, Libyan Arab Jamahiriya and Mauritius: revised draft resolution (26 October 1977) UN Docs S/12311/Rev.1 and S/12312/Rev.1.

¹⁴⁶ UNSC Mexico, Niger, Panama, Tunisia and Uganda: draft resolution (27 April 1981) UN Doc S/14459. UNSC Niger, Tunisia and Uganda: revised draft resolution (27 April 1981) UN Doc S/14460/Rev.1. UNSC Niger, Tunisia and Uganda: draft resolution (27 April 1981) UN Doc S/14461.

¹⁴⁷ Isaak I. Dore (n 141) 197-198.

¹⁴⁸ UNSC Burkina Faso, Egypt, India, Madagascar, Peru and Trinidad and Tobago: draft resolution (15 November 1985) UN Doc S/17633.

¹⁴⁹ UNSC Congo, Ghana, Madagascar, Trinidad and Tobago and United Arab Emirates: revised draft resolution (23 May 1986) UN Doc S/18087/Rev.1. UNSC Argentina, Congo, Ghana, United Arab Emirates and Zambia: draft resolution (19 February 1987) UN Doc S/18705. UNSC Argentina, Congo, Ghana, United Arab Emirates and Zambia: draft resolution (7 April 1987) UN Doc S/18785. UNSC Algeria, Argentina, Nepal, Senegal, Yugoslavia and Zambia: draft resolution (7 March 1988) UN Doc S/19585.

4.3 THE AMENDMENT PROCESS

In a striking move, Saudi Arabia declined to sit on the Council after it had been elected as a non-permanent member in 2013. In a statement issued by the Ministry of Foreign Affairs, Saudi Arabia contended that “the manner, mechanisms of action and double standards existing in the Security Council prevent it from performing its duties and assuming its responsibilities towards preserving international peace and security as required, leading to the continued disruption of peace and security, the expansion of the injustices against peoples, the violation of rights and the spread of conflicts and wars around the world.”¹⁵⁰ Saudi Arabia explicitly referred to the Palestinian cause as “irrefutable evidence and proof” of the Council’s failure to fulfil its duties and responsibilities. The kingdom asserted that it would not accept a seat on the Security Council until it has been reformed and enabled to effectively execute its mandate in accordance with the Charter of the United Nations. Nonetheless, given the entrenched power of the permanent members and their control over the amendment process, such reform remains a distant prospect.

Any modification to the size and composition of the Security Council necessitates an amendment to the Charter. According to Article 108 of the Charter, such amendments require the approval of two-thirds of the General Assembly, including all five permanent members of the Council. The tension between formal equality and voting inequality has prompted many reform proposals. However, there has not been any substantial reform since the establishment of the United Nations, except for the expansion of non-permanent membership in the Council in 1963.¹⁵¹ Over the years, several attempts were made to reform the Security Council. Most reform proposals concerned the expansion of the Council’s membership, either with or without veto power extended to new permanent members.¹⁵² A notable development has been the growing support among member states for voluntary and collective restraint on the use of the veto in cases of mass atrocities. Initiatives such as the ‘Political statement on the suspension of the veto in case of mass atrocities’ introduced by France and Mexico during the 70th session of the General Assembly, and the ‘Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes’ proposed by the Accountability, Coherence and Transparency (ACT) Group, have received endorsements from 106 and 107 states,

¹⁵⁰ UNGA ‘Letter dated 12 November 2013 from the Permanent Representative of Saudi Arabia to the United Nations addressed to the Secretary-General’ (14 November 2013) UN Doc A/68/599.

¹⁵¹ UNGA Res 1991 (17 December 1963) UN Doc A/RES/1991 (XVIII).

¹⁵² Tridib Chakraborti, ‘United Nations Security Council Reform: A Shattered Illusion’ (2021) 13(1) *Politico* 106.

respectively.¹⁵³ Nevertheless, China, Russia, and the United States have not supported these initiatives.

Since then, the veto power has remained central to discussions on Security Council reform. Various groups, including the African Group, the L.69 coalition, and individual states such as Ireland and Ukraine, have argued for the abolition of the veto.¹⁵⁴ The representatives of Peru and Malaysia have emphasised that the veto contravenes the principle of sovereign equality and should be progressively eliminated. In contrast, Russia has unequivocally opposed the abolition of the veto in any proposed variant of Security Council reform.¹⁵⁵ In terms of expanding the Council's membership, France is amenable to extending the veto to new permanent members if the prospective members seek such an extension. Conversely, the United Kingdom opposes extending the right to veto to new permanent members.¹⁵⁶ Both China and Russia support a general expansion of the Council's membership.¹⁵⁷ France and the United Kingdom endorse the inclusion of permanent seats for Brazil, Germany, India, and Japan, as well as a permanent African representation, along with a moderate increase in the number of non-permanent seats.¹⁵⁸ However, they oppose proposals for regional representation, which would likely necessitate the relinquishment of their own permanent seats for shared European representation.¹⁵⁹ The United States has been notably absent from the ongoing reform negotiations.

At San Francisco, it was agreed that exceptional circumstances might warrant a withdrawal from the United Nations. Although the Charter of the United Nations does not provide for a right of withdrawal, member states cannot be forced to remain in the organisation “if an amendment duly accepted by the necessary majority in the Assembly or a general conference fails to secure the ratification necessary to bring such amendment into effect.”¹⁶⁰ This grants reform-oriented states the right of withdrawal following the unsuccessful ratification of an accepted amendment, thereby providing a means to exert political pressure.

¹⁵³ Global Centre for the Responsibility to Protect, ‘Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities’ (1 August 2015) <<https://www.globalr2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities/>> accessed 26 July 2024.

¹⁵⁴ The L.69 is a group of developing countries from Africa, Latin America, the Caribbean, Asia, and the Pacific.

¹⁵⁵ The President of the General Assembly, ‘Intergovernmental Negotiations on the question of equitable representation on and increase in the membership of the Security Council and related matters’ (*United Nations*, 31 July 2015) 110.

¹⁵⁶ *ibid* 16, 67.

¹⁵⁷ *ibid* 105-106, 109-110.

¹⁵⁸ *ibid* 35, 67

¹⁵⁹ *ibid* 5.

¹⁶⁰ United Nations (n 43) volume 6, 164-165.

This strategy primarily targets the elimination of veto power, a goal ardently pursued by numerous smaller states.¹⁶¹ Regardless of the outcomes of ongoing debates concerning the expansion of the Security Council's membership and the use of the veto, it is clear that failure to align the Council with contemporary realities will inevitably result in a significant estrangement from the larger part of its membership. This estrangement could precipitate a broader legitimacy crisis for the United Nations. Current reform proposals may achieve partial success but are unlikely to resolve the underlying grievances as long as the veto power of the five permanent members remains intact. Given that the right to veto fundamentally conflicts with the principle of sovereign equality—particularly in cases that undermine the right to self-determination—this discrepancy continues to undermine the legitimacy of both the Security Council and the United Nations as a whole.

Non-permanent members of the Security Council are constrained to persuasion rather than enforcement, lacking the authority to impose their will on matters of international concern.¹⁶² Since the establishment of the United Nations, permanent members have consistently employed their veto power to further their national interests rather than in pursuit of international peace and security or the common good.¹⁶³ This practice has often disregarded the wishes of the vast majority of the international community. For instance, during South Africa's illegal occupation of Namibia and its policy of apartheid, the three Western powers exercised their veto power against measures aimed at addressing these violations. Similarly, the United States has continued to support Israel's annexation of Palestine, using its veto power to shield Israel from international condemnation and accountability, thereby contravening international consensus and breaching their *erga omnes* obligation to respect the right to self-determination. In 1986, Isaak I. Dore cautioned that *realpolitik* might dictate the recognition of South Africa's economic and geopolitical presence in Namibia, even if it curtailed Namibia's right to self-determination. He attributed this foreboding trend to the UN's organisational, structural, and practical limitations.¹⁶⁴ Four decades later, this pattern persists as the United States continues to protect Israel from international scrutiny. This stance not only defies the overwhelming consensus of the international community but also exacerbates the legitimacy crisis afflicting the United Nations.

¹⁶¹ Bruno Simma et al. (n 61) 2217.

¹⁶² Tridib Chakraborti (n 105) 107.

¹⁶³ *ibid* 110.

¹⁶⁴ Isaak I. Dore (n 141) 160.

The discrepancy between the Security Council's primary responsibility for maintaining international peace and security and its permanent members' recurrent use of veto power, often in defiance of broad international consensus, has precipitated a crisis of legitimacy within the United Nations. Smaller states are effectively constrained from exerting influence over the great powers, whose control over the amendment process reinforces their dominance. The veto power may contravene the principle of sovereign equality and be used to fetter peoples' right to self-determination. This structural imbalance has facilitated repeated abuses of power, with economic and political considerations frequently overshadowing the Council's mandate. Matters involving any of its permanent members or their allies, as illustrated by the cases of Namibia and Palestine, face an organisation that is inadequately equipped to address such matters. Consequently, smaller states are increasingly alienated from decision-making processes, and efforts to amend the framework from within are systematically thwarted. The great powers have indicated that any attempt to abolish the veto will be rejected. As a result, those disillusioned with the veto power confront the harsh reality that their only viable option is to withdraw from the United Nations and establish a new organisation with a restructured Security Council.

5. CONCLUSION

The United Nations was established to prevent the outbreak of another world war. At a time when large swaths of the earth were under European colonial rule, the architects of the post-war international order were only concerned about a peace that would last twenty-five years. President Roosevelt initiated a dialogue with Churchill and Stalin to create a general international organisation for the maintenance of international peace and security. The Security Council, which derives its mandate from the Charter of the United Nations, has historical colonial dynamics embedded in its structure. During the Second World War, the United States, Russia, and the United Kingdom had agreed to an arrangement that would grant them special status with respect to tenure and the voting procedure of the Council, as well as control over the amendment process of the Charter. This great power privilege was subsequently extended to China and France. The right to veto, combined with continued tenure, has institutionalised a legalised hegemony. The Security Council's five permanent members have complete discretion to veto any draft resolution that would interfere with their economic and strategic interests. When other states were invited to the negotiation table, the great power privilege was ironclad. The majority of those present at the San Francisco Conference opposed the veto. Several states contended that a privilege conferred upon a select few violates their sovereign equality and is contrary to the basic principles of democracy. Ultimately, these states were coerced into accepting a framework based on sovereign *inequality*. The five great powers had made it explicitly clear that it was either a Charter with the veto or no Charter at all.

The veto power has had irreversible implications for the maintenance of international peace and security. The United Nations, nine months after the attacks by Hamas on 7 October 2023, has been unable to constrain Israel's retaliation on Gaza amid allegations of war crimes, crimes against humanity, and genocide. Vetoes have thwarted multiple resolutions that would have demanded an immediate humanitarian ceasefire. Despite the general international consensus that Israel's prolonged illegal occupation and annexation of occupied Palestinian territory violate the right of the Palestinian people to self-determination, the United States has effectively blocked any measures aimed at bringing an end to Israel's apartheid policy. Washington thereby violates its duty to respect the right to self-determination, which the International Court of Justice has recognised as an obligation *erga omnes*. The persistent use of veto power paralyses the body that is vested with the primary responsibility for the maintenance of international peace and security. While legally permissible, the recurrent use of veto power is perceived as inconsistent with internationally recognised norms, principles,

and obligations. By disregarding the general international consensus, veto-wielding members erode the very foundation of the Council's mandate. To put it another way, the atrocities in, *inter alia*, Palestine, Sudan, and Ukraine are stark reminders of the Council's inadequacy to address the most pressing peace and security issues of our time.

In essence, the great powers established a regime in which no important action can be taken without their joint consent. The discrepancy between the Council's primary responsibility to preserve international peace and security and the recurrent use of veto power has precipitated a crisis of legitimacy within the United Nations. The organisation is inadequately equipped to address conflicts that involve any of the great powers or at least one of their allies, as illustrated by the cases of Namibia and Palestine. Broad international consensus does not suffice to effectuate decisive action because the larger part of its membership lacks the authority to impose its will on matters of international concern. The veto effectively marginalises the rights and aspirations of smaller states and alienates them from decision-making processes. This framework perpetuates historical colonial dynamics where great powers can pursue economic and strategic interests at the expense of the UN's global standing. Unsurprisingly, efforts to abolish the veto have been systematically thwarted. Through their control over the amendment process, the five permanent members are guaranteed their unique position cannot be altered unless they collectively agree to such a change. Consequently, the tension between formal equality and voting inequality undermines the organisation's legitimacy. The Charter has institutionalised a system where certain states have a right to impunity, and others remain powerless to accomplish meaningful change. Those who reap the greatest rewards from the *status quo* are simultaneously endowed with the authority to reshape it. The only available recourse for smaller states is to withdraw from the organisation.

To conclude, the right to veto undermines the legitimacy of the United Nations in two significant ways. First, the right to veto has been frequently invoked to serve the interests of its veto-wielding members. In doing so, the great powers have defied the will of the international community and effectively constrained their influence over the decision-making process. Second, while most of its members do not perceive the veto as a legitimate mechanism to prevent decisive action, the five permanent members oppose any attempt to eliminate the veto. Ever since the inception of the United Nations in 1945, the veto power has been rejected as a flagrant violation of sovereign equality, and it has subsequently been used to narrow the scope of the right to self-determination in favour of settler-colonial regimes. The lack of recourse within the organisation to enforce Charter principles reinforces a generalised perception that

the abuse of power in the form of the veto and the failure of the Security Council to fulfil its mandate undermines the legitimacy of the organisation. In May 1954, less than a decade after the founding of the United Nations, then-Secretary-General Dag Hammarskjöld concluded his address to the University of California, Berkeley, by asserting that the organisation “was not created in order to bring us to heaven, but in order to save us from hell.”¹⁶⁵ Under its current configuration, however, the organisation is destined to meet the same fate as its predecessor. If the permanent members do not relinquish their great power privilege, the United Nations will meet its inevitable demise. It thus remains imperative to pursue an organisation based on *true* sovereign equality and in line with the basic principles of democracy, even if that would spell the end of the United Nations.

¹⁶⁵ United Nations Department of Public Information, ‘Address by Secretary-General Dag Hammarskjöld at University of California Convocation, Berkeley, California, Thursday, May 13, 1954, at 10:00 a.m. (Pacific Coast Time)’ (1954) UN Doc SG/382.

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