

Making Effective Use of Existing Legal Obligations in the Face of Atrocity Crimes

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On October 22, Professor Jennifer Trahan gave a speech at the UN in the Trusteeship Council as part of the Program of the 29th Informal Meeting of Legal Advisers on a panel entitled "Preventing and Punishing Atrocity Crimes – Reflections 70 Years after the Adoption of the UN Convention on Genocide."

Legal limits

Therefore, I would like to propose three arguments for your consideration. Whereas the veto is often treated as a *carte blanche*, above all law, to be utilized for any reason or no reason, it actually sits within a system of international law. When the veto was first created, as mentioned, there was not as much international law as exists today. But there is much more law now, and the veto (read into Article 27(3) of the UN Charter) sits within this system of international law. We might ask how the veto interacts with other aspects of this system of international law.

1) Jus cogens

First, we might consider that the prohibition of genocide, crimes against humanity, and war crimes are *jus cogens* norms. That means they are the highest-level norms from which no derogation is ever permitted. No state could avoid treating these as *jus cogens*; no state could opt out of this approach.

Jus cogens sits hierarchically above the veto, which is found, implicitly, as mentioned, in Article 27(3) of the UN Charter. The UN is a body under international law, and subject to it. Thus, the European Court of First Instance has held that *jus cogens* constitute "a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations." As an organ of the UN, the Security Council's powers cannot exceed the powers of the UN. This was recognized in the foundational *Tadić* case of the ICTY. Thus, the Security Council is also constrained by *jus cogens*.

Thus, the Security Council in its resolutions cannot violate *jus cogens*. Professor Dapo Akande, who has written extensively on limitations on the Security Council's powers, concludes: "[a]ny Security Council decision in conflict with a norm of *jus cogens* must necessarily be without effect."