FEATURE

# Reforming the Security Council through a Code of Conduct: A Sisyphean Task?

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As early as 1945, when the UN Charter was first signed in San Francisco, the makeup of the Security Council and the special privilege of the veto had generated considerable controversy and frequent calls for reform. Starting in the early 1990s that criticism began to gather particular momentum, to the point that then Secretary-General Boutros Boutros-Ghali declared that he hoped to realize significant Security Council reform by the organization's fiftieth anniversary in 1995—a date long passed. In more recent years the political complexity of formal Security Council reform has ignited interest in a more informal reform process via the working methods of the Council. Critics argue that although expanding the Security Council to accommodate the Global South and reflect new centers of power could enhance the legitimacy of the Council and improve the effectiveness of its response to mass atrocity crimes, the difficulties associated with amending the Charter make formal reform an unlikely proposition. As an alternative, some have argued, opening up the Council to more deliberative consultations during humanitarian situations and reining in the use of the veto by the five permanent Council members (P-5) would improve the international response to atrocity crimes.[1] Toward this end, the idea of a code of conduct[2] (CoC) to regulate the actions of Security Council members during the consideration of mass atrocity situations has gathered momentum. As of June 2018, 119 out of 193 UN member states have expressed support for at least one of the two most feasible CoC initiatives urging the P-5 to suspend the veto vote during a humanitarian crisis.[3]

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This paper disputes the utility of a CoC and argues that, if adopted, it would make little if any significant difference to the way mass atrocity crimes are addressed, and would also be normatively problematic. In addition, it runs the risk of distracting the international community from other possible courses of action, such as utilizing the authority of regional organizations. The argument is developed as follows. First, I briefly review the existing scholarly literature on CoCs. Next, I chronicle the history of the attempt to curtail the veto, highlighting efforts made as the UN Charter was crafted at the San Francisco Conference and then over the years by the General Assembly. I then examine the two most feasible initiatives to date, both of which have garnered considerable international support: the proposal from the Accountability, Coherence, and Transparency group, and the declaration from France and Mexico. Both initiatives go beyond earlier advocacy for these ideas by detailing how a CoC could be triggered or implemented. I critically engage three of the core arguments often used to justify the merit and the utility of a CoC: the circumvention argument, the naming and shaming argument, and the Charter reform argument. After showing how these three arguments are misguided, I draw on interviews conducted with diplomats in the UN system to lend further evidence to the political infeasibility of a CoC. Finally, I dispute the normative appeal of a CoC, in part because it would stifle democratic discourse about the nature of atrocity crimes and the appropriate action to be undertaken, since it advocates and demands the commitment of states to a specific course of action.

## Code of Conduct: Some Academic Background

Despite considerable policy and diplomatic attention, there has been limited academic engagement on the merits or prospects of a CoC. That said, there are a few scholarly contributions that are important for framing this discussion and situating my own argument.

Some scholars have been somewhat optimistic about the potential impact of a CoC. As early as 2011, Ariela Blätter and Paul D. Williams discussed the emergence of the idea of a responsibility not to veto resolutions drafted to address mass atrocity crimes, laying out the rationale behind the veto privilege and highlighting the role the veto power has historically played in international relations. The authors acknowledged that the idea of showing voluntary restraint in the exercise of the veto is problematic because it exclusively relies on states being

trustworthy, but they curiously remained optimistic that the norm could occupy a "niche role" in the implementation of RtoP, arguing that there is evidence to suggest that the United States is well placed to provide leadership on the issue.[4] I dispute this claim, arguing that the United States signifies perhaps the strongest diplomatic challenge to a CoC in that it is not only unwilling to bind itself to the demands of the norm but also cannot be expected to provide leadership or make substantive contributions to the idea.

Also writing in 2011, Daniel Levine, responding to Blätter and Williams, critiqued the idea of a CoC on the basis that it implicitly privileges military action and lowers the threshold for questionable interventions. In spite of the seemingly strong criticisms, however, Levine did not completely dismiss the concept. Rather he suggested that a CoC does not go far enough. According to him, there is a need for additional institutional reforms if the norm is to ensure a regime of *better* interventions and not just *more* interventions, but he provides scant detail on how this could be achieved other than a passing reference to the fact that part of the solution may lie with such institutions as the Department of Peacekeeping Operations and the expansion of the powers of the Peacebuilding Commission.[5] Importantly, too, since Levine's publication in 2011 the discourse has advanced, and significant amendments have been made to the concept of a CoC. For instance, the 2015 Accountability, Coherence, and Transparency (ACT) proposal only requires that "credible" draft resolutions should not be vetoed. Accordingly, this article offers a more detailed and comprehensive analysis of two proposed CoCs, taking into account recent changes and current diplomatic negotiations on the proposed norm.

Others have strongly critiqued the concept of a CoC. Justin Morris and Nicholas J. Wheeler's chapter in *The Oxford Handbook of the Responsibility to Protect* provides a good discussion of the efforts to restrain the veto and examines the pros and cons of the initiative.[6] Wheeler and Morris question the utility of a CoC and highlight the diplomatic hurdles it faces, particularly with some permanent members of the Council. While there is a rightful focus on the P-5, academic discussions, such as that of Morris and Wheeler, tend to neglect the voice of subaltern states whose opposition or reticence constitute a different, but no less significant, challenge to a CoC. This article tries to check that imbalance by drawing on interviews with representatives from a wider range of states, including diplomats of small and medium powers.

More recently, Theresa Reinold's 2014 article on the CoC initiative engages with the proposed norm as an example of a secondary rule.[7] According to Reinold,

secondary rules open up opportunities not only to regularize the application of primary rules within a legal system but also to bolster the legitimacy of the system and induce compliance.[8] In particular, a secondary rule can be used to reconcile perceived dissonance between two primary rules. In our case, then, the utility of a CoC lies in its percieved capacity to reconcile the demand to respond to egregious atrocity crimes and the oppositive nature of the veto. We can see the attempt to reconcile these norms in the different CoC proposals, including caveats such as the ACT provision that only "credible" draft resolutions would not be subject to the veto, or the French proposal that the norm would not be applicable where a permanent member's national interest is threatened.

Highly relevant to this article, Reinold notes that tensions *reemerge* in the negotiations over secondary rules. Indeed, she notes that "secondary rules are often sites of intense struggles between weaker actors seeking to impose restraints on the more powerful through restrictively crafted secondary rules, and powerful actors resisting such hedging."[9] While diplomatic negotiations and the texts of some of the CoC proposals support Reinold's arguments, what she does not accommodate, and what became evident in my interviews, is the possibility of the reverse dynamic. That is, weaker actors are reticent to support a CoC because it would impose restraint that would further undermine their own limited power and influence in the Council. The principle of collective restraint, which is central to the ACT proposal, elicits intense diplomatic contestations. I will return to this issue below.

## Curtailing the Veto: A History

The veto privilege has always been contentious, as has been the long history of attempts to curtail it. At the founding of the United Nations in 1945, several states argued that the idea of a veto negated the principle of sovereign equality of states. However, it was also clear that the great powers considered the veto integral to the founding of the organization. So uncompromising was their stance on the veto that U.S. Senator Tom Connally, who was part of the U.S. delegation, famously tore up his draft copy of the Charter after remarking to other delegates, "You may go home from San Francisco . . . and report that you have defeated the veto . . . but you can also say, 'We tore up the Charter!'"[10] Although ultimately many states at the conference came around to the idea of the veto, there were still efforts to restrain its use. Herbert Vere Evatt, who was part of the Australian delegation, argued for the need to limit the veto to decisions taken



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under Chapter VII (a position that both the United States and the United Kingdom initially held at the earlier Dumbarton Oaks conference). To Evatt it was unconscionable that "one great power should be able to veto an attempt to settle a dispute through negotiation and arbitration, particularly when that dispute might be in an area outside the power's sphere of influence."[11] Similarly, he argued against the extensive powers of the permanent members to veto Charter amendments. Evatt was, of course, unsuccessful, and the only concession granted by the great powers was that the veto could not prevent the free discussion of issues.

In addition, there was a common acceptance that an abstention by a permanent member does not effectively constitute a veto. During the Council's consideration of the "Spanish Question" in 1946, for example, the Security Council determined that the abstention of a permanent member (in that case, the USSR) did not negate Article 27(3), which demands that decisions on substantive issues include the concurring votes of the permanent members.[12] The Council's flexibility on what concurring votes should mean was one of the first successful attempts at curtailing the reach of the veto.

The General Assembly also made an early intervention in the veto debate. In Resolution 267(III) (1949) the Assembly, noting its authority under Article 10 of the Charter to "discuss any question within the scope of the Charter or relating to the functions of any organ of the United Nations," recommended that permanent members of the Council find an agreement among themselves as to when to restrain their use of the veto when seven affirmative votes have been cast in the Council on a resolution.[13] (At that time the Security Council had only eleven members.) Clearly, the intent of the Assembly resolution was to instigate a more efficient Council that was less vulnerable to the paralyzing powers of the veto; but more importantly, the resolution signaled a concern that the veto could be used to prevent actions on specific issues even when there was broad support among Council members. This recommendation did not, however, have any discernable impact.

In 1950 the U.S. Secretary of State, Dean Acheson, initiated the Uniting for Peace resolution (General Assembly Resolution 377) to counter what L. H. Woolsey described as the "organic imbecility of the Security Council whereby the Soviets obtained a strangle-hold on the proceedings through the veto and other tactics."[14] The resolution empowered the General Assembly to consider any issue that might be a threat to international peace and security and to

make recommendations to member states if the Security Council, as a result of lack of unanimity, fails to act. Resolution 377 has been invoked eleven times, notably during the 1956 Suez Canal crisis and the 1960 Congo conflict. Not surprisingly, after the United States and its Western allies lost their influence in the General Assembly following the post-1950s expansion of UN membership, they once again became the strongest defenders of the exclusive powers of the Council, and consequently the usefulness of Resolution 377 as a circumventory tool to curtail the veto privilege has diminished.[15] Dominik Zaum has aptly summarized the current state of the Uniting for Peace resolution by noting that "what started as an attempt to shift power from the Council to the Assembly has turned into a symbol of the powerlessness of the latter."[16]

## Proposals for a Code of Conduct

Calls to restrain the use of the veto reemerged with the formal proposals for reforming the Security Council. The 2001 report of the International Commission on Intervention and State Sovereignty (ICISS) called on the permanent members not to apply their veto in matters where their vital state interests are not involved and where resolutions authorizing military intervention have majority support.[17] Then in the 2004 High-Level Panel report titled "A More Secure World: Our Shared Responsibility," Secretary-General Kofi Annan admonished the P-5 to refrain from using the veto in cases of genocide and human rights abuses and also introduced his Model A reform proposal (which suggested six new permanent seats) and Model B (which proposed eight additional but renewable nonpermanent seats). The report also innovatively called for an "indicative voting" system intended to bring transparency to the use of the veto by mandating permanent members to publicly indicate their position on a proposed resolution.[18] In subsequent years, other reports—such as the 2008 *Genocide Prevention Taskforce* report by Madeleine Albright and William Cohen, and the *Responsibility Not to Veto* report by Citizens for Global Solutions—have made similar recommendations.

A more robust and sustained discussion on the veto was initiated by the Small Five Group (S-5) consisting of Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland, which in March 2012 presented draft Resolution A/66/L.42 to the General Assembly. While acknowledging the past efforts of the Security Council to improve its working methods, the resolution noted the need for the Council

to be more inclusive and accountable to the wider membership.[19] The S-5 made twenty-one recommendations that they argued would help "institutionalize" current Council practices.[20] The suggestions addressed the Council's relationship with the General Assembly and subsidiary bodies, the effectiveness of its decisions, operations mandated by the Council, governance and accountability, the appointment of the secretary-general, and the use of the veto. Importantly, the S-5 recommended that the Security Council establish a practice of indicating that a negative vote cast is not necessarily intended as a veto,[21] noting that this practice would be of considerable benefit to both the Council and the general membership since it would ensure that even if a permanent member casts a negative vote to register its displeasure at an intended course of action, the United Nations could still act. The flexibility to cast a negative vote without paralyzing Council proceedings should, therefore, insulate such a permanent member from the usual criticisms that accompany a veto.

The S-5 report generated a great deal of controversy. The P-5 vehemently opposed some of the recommendations, arguing that the UN Charter explicitly makes it clear in Article 30 that the Council will adopt its own rules and procedures, and, as such, efforts to reform the working methods of the Council impede the institution's rights and prerogatives. The S-5, confident of the wide support the proposal had garnered, pushed for a vote on the resolution at the General Assembly. Demonstrating both adroit political tradecraft and also an intense desire to resist any externally imposed changes to the Council's working methods, the permanent members prompted the UN legal adviser, Patricia O'Brien, to provide a legal opinion on the voting threshold required for the draft resolution. O'Brien argued that the draft resolution would have to be considered under the aspect of comprehensive reform of the Council, which required a mandatory two-thirds vote rather than the simple majority anticipated by the S-5.[22] Realizing that its proposal was facing imminent defeat, the S-5 withdrew the draft resolution.

Despite these setbacks, in more recent years two proposals have generated broader support from states and are currently the subject of intense diplomatic engagement. These are the respective initiatives of the Accountability, Coherence, and Transparency group and of France/Mexico, which I consider below.

### *The ACT Initiative*

Following the defeat of the S-5 proposal, Switzerland (a key member of the S-5) along with twenty other states formed the Accountability, Coherence, and

Transparency group. ACT indicated its interest in building a more consultative, inclusive, and transparent platform than the S-5, and the new group has adopted a less confrontational approach to the debate. According to a group statement, the strategy is to focus on the Council in its present composition, improving its "working methods here and now through concrete and pragmatic measures."[23] In addition to concerns such as more public and open consultations and increased use of the Arria formula (which allows Council members to hold informal meetings to receive briefings from NGOs and other experts), ACT advocates for the "voluntary suspension of the use of the veto in cases of atrocity crimes . . . when the Council's actions aim at preventing or ending genocide, war crimes, or crimes against humanity."[24]

In its explanatory note, ACT provides more details on the proposal for the suspension of the veto in cases of mass atrocities. It suggests that a CoC should apply not only to permanent members of the Security Council but to other current and future Council members, noting that its proposal is not "just about the veto but a broader pledge to support timely and decisive Security Council action in such situations."[25] Thus, under the present Council configuration, this would also apply to the ten nonpermanent members, five of which are elected each year for a two-year term. In that regard, the group requests member states to pledge not to vote against a "credible" draft resolution that seeks to end the commission of genocide, crimes against humanity, or war crimes whenever they are serving on the Council. Although ACT does not outline specific procedural triggers for a CoC, only insisting that "facts on the ground" should instigate Security Council action, it allows for a state committed to a CoC to make an assessment of an atrocity situation and call for the application of the code.[26] Finally, ACT makes particular reference to the role of the secretary-general in serving as an "important authority" on atrocity crimes and in bringing such situations to the attention of the Security Council.[27] It is noteworthy that as of June 2018, 115 member states have expressed support and pledged to bind themselves by the principles of a CoC.[28]

*The France/Mexico Initiative*

At the same time, the France/Mexico initiative has generated comparable interest. Indeed France, which has not invoked its veto privilege since 1989, has a long history of advocating for restraint in the use of the veto during mass atrocity situations. It was French Foreign Minister Hubert Védrine who proposed, during the



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consultation on the responsibility to protect, that where national interest is not involved, the permanent members should commit to a code of conduct barring them from using the veto to obstruct resolutions drafted to address atrocity crimes.[29] More recently, France's advocacy for a CoC reemerged in President François Hollande's address to the 68th General Assembly in September 2013, and was restated in more detail in an opinion piece by Foreign Minister Laurent Fabius in *The New York Times* on October 4, 2013. In his op-ed, Fabius forcefully argued for the code of conduct:

> For a long time, the Security Council, constrained by vetoes, was powerless in the face of the Syrian tragedy. Populations were massacred and the worst scenario unfolded as the regime implemented the large-scale use of chemical weapons against children, women, and other civilians. For all those who expect the United Nations to shoulder its responsibilities in order to protect populations, this situation is reprehensible.[30]

Fabius also noted that while France was in favor of expanding the Security Council in order to make it more representative, the difficulties associated with reform necessitate an alternative approach if the Council is to retain its legitimacy. Consequently, France was proposing that where the Security Council was "required to make a decision with regard to a mass crime, the permanent members would agree to suspend their right to veto." In contrast to the ACT proposal, which does not outline any procedural trigger, the France/Mexico initiative would be initiated when at least fifty UN member states request the secretary-general to determine the nature of the crimes being committed in a conflict. Once the commission of atrocity crimes is established, the code of conduct would immediately apply as long as the "vital national interest" of any of the permanent members is not at stake.[31] Following two ministerial meetings with France on the CoC, Mexico issued a joint political declaration at the 70th General Assembly calling for the suspension of the veto in atrocity situations. The France/Mexico initiative has garnered considerable support, with ninety-six member states publicly endorsing the principles of the proposal to date.

## Prospects and Challenges

The lack of decisive action on the Syrian conflict as a result of the use of the veto reenergized the call for a code of conduct to regulate the Council's response to atrocity crimes.[32] Although China, Russia, and the United States have been averse to any proposal that limits the capacity of the permanent members to use their



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veto privilege, arguing that it is the "exclusive competence of the Security Council" and that there should be no need for an explanation of its use,[33] there seems to be increasing confidence among stakeholders that the global advocacy for a code is putting considerable diplomatic pressure on these countries, as evidenced by their reaction to the S-5 proposal in 2012. Indeed, advocacy for a CoC is strengthened by the perception that since the proposed norm does not require any Charter amendment, it remains the best hope in the quest to substantively change the Security Council's response to mass atrocity crimes.

To some degree, advocacy for a CoC has borne fruit. France now champions its own version of the CoC; and the United Kingdom, which alongside the four other permanent members exacted pressure on the S-5 group in 2012, endorsed the ACT proposal in 2015, arguing that "permanent members that use the veto to block credible united action . . . bear a heavy moral responsibility for the chaos and the situation that follows."[34]

Yet there is a sense that these diplomatic successes exaggerate the realities regarding a CoC. The United Kingdom and France are easy converts who have long been reticent about exercising their veto privilege. The challenge remains convincing China, Russia, and the United States to accept a restraint on a policy instrument that has been central to the conduct of their diplomacy and has regulated their relationship with the rest of the Council. Indeed, if one believes that membership of the Council ought to reflect the distribution of material capacity in the international system, the willingness of France and the United Kingdom to break ranks and endorse the restriction on the veto may also reflect a tacit acknowledgment by both states that, perhaps more than the other three P-5, their legitimacy as permanent members with access to all of its privileges is in doubt.

That said, given the growing support for the two initiatives, it is important to examine the merits of a CoC and to what extent the proposals could contribute to an effective and more consistent implementation of the responsibility to protect. I explain three important merits often extended by advocates, but I also outline the corresponding challenges to each of these arguments.

### *The Circumvention Argument*

Proponents argue that a CoC is a positive step toward implementing RtoP since it aims to address the Council's inconsistent record on responding to atrocity crimes by demanding that members should not vote against draft resolutions aimed at



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preventing or ending the commission of these crimes. It is well known that the veto has been used several times in the past to obstruct international efforts designed to address such crimes, for example, the Soviet veto of a draft resolution calling for a cease-fire during the 1971 East Pakistan crisis.[35]

Moreover, the effects of the veto are not limited to such overt cases as East Pakistan and Syria, where it was used to impede international action; indeed, just the threat of its use has had equally obstructive consequences. For example, a common understanding of events is that the threat of veto had an extensive impact on the Council's response to the Rwandan crisis in 1994 and to Kosovo in 1999, preventing the Council from taking robust action in response to the atrocity crimes.[36] The Clinton administration issued a discreet directive to its officials preventing them from acknowledging or using the word "genocide" to describe the unfolding situation in Rwanda;[37] and there was a perceived threat of a U.S. veto if the Council strayed too far from the U.S. assessment of the crisis. Eric A. Heinze has noted that the United States was among those likely—if not the most likely—to veto Security Council action over Rwanda.[38] In the case of Kosovo, China and Russia threatened to veto draft resolutions that would authorize action against Belgrade. Indeed, when NATO eventually embarked on its unilateral military action against Serbian forces, Russia introduced a draft resolution condemning NATO's action. Thus, the argument for a CoC is that the acceptance of an international norm that regulates the exercise of the veto—considered a major impediment in implementing the responsibility to protect—would inevitably lead to a more consistent and effective response to atrocity crimes.

Yet there is a clear problem with this argument. Although the extensive overall impact of the veto should not be underestimated, its contribution to RtoP's inefficiency is somewhat overstated. As Hitoshi Nasu rightly notes, "Even if the fetters of the veto were removed, the responsibility to protect will continue to be constrained by other issues."[39] The suggestion therefore that a CoC could improve the responsibility to protect misses a crucial point, which is that responses to mass atrocity crimes have been hindered mostly by the lack of political will and not institutional impediments such as the veto. Indeed, such prominent RtoP scholars as Alex Bellamy and Aidan Hehir have argued that without political will, RtoP falters.[40]

The absence of political will to "do something" was palpably evident in the months leading up to the Rwanda genocide. In February 1994, Secretary-General

Boutros Boutros-Ghali warned President Habyarimana of Rwanda of the international community's unwillingness to take responsibility should the political situation worsen.[41] Thus, the straightforward narrative that it was the threat of the veto that limited the United Nation's range of options in Rwanda overlooks that the lack of desire to engage in that country had been clearly stated months before the genocide began. In some respects, it should not be surprising therefore that when the crisis did boil over, the Security Council—rather than respond robustly—passed Resolution 912, reducing the peacekeeping force from 2,548 to a mere 270.[42]

Similarly, lack of political will was central to the way international actors responded to atrocity crimes in Darfur. Whereas there was a general reluctance to identify the crimes in Rwanda as a case of genocide, partly because Article 1 of the 1948 Genocide Convention requires contracting parties to prevent and punish acts of genocide, no such reluctance existed with Darfur. In September 2004, U.S. Secretary of State Colin Powell testified before Congress and admitted that genocide had been committed in Darfur; yet, he added, "no new action is dictated by this determination."[43] In essence, both cases witnessed the same lack of priority and interest.[44] Thus we must concede that while efforts to curtail the veto are admirable, in the absence of a willingness to undertake humanitarian actions where national interests are absent, the contributions of a CoC to the consistent and effective implementation of the responsibility to protect will be limited.

Still, proponents of a CoC might argue that there will be cases where a powerful state or coalition does have the political will to undertake a military intervention, yet one of the permanent members would nonetheless veto a resolution authorizing such action. In such a case, were a CoC in play, it may have some marginal effect. However, in many such cases the state casting the veto could simply claim a "vital national interest" (under the France/Mexico initiative) or claim that the draft resolution was not "credible" (under the ACT initiative), allowing it to continue obstructing timely action.

*The Naming and Shaming Argument*

A second argument is that a CoC could improve the response to mass atrocity crimes by allowing for the public naming and shaming of states that vote against credible draft resolutions intended to address such crimes. A key element in the ACT proposal is the requirement that members who vote against a credible draft resolution should publicly explain the rationale behind their vote.



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Advocates of a CoC rely on the fundamental assumption that states, like individuals, are not positively disposed to public shaming.[45] The claim is that the P-5 could be discouraged from the capricious use of the veto by increasing the diplomatic cost of actions that undermine the collective will of international society. This reflects strong constructivist sentiments, emphasizing the power of social pressure and downplaying the material forces that, rationalists argue, determine state interests and actions.

That customs and norms can normatively guide the actions of states is widely accepted by liberal scholars as well. It could even be argued that the fact that 119 countries have signed one or both of the two CoC declarations reveals a normative commitment by these states to this liberal objective. But the naming and shaming argument assumes, wrongly, that public disavowal (or the threat of it) of a state's action is a sufficiently compelling reason for a state to alter its behavior. In practice, however, states only alter their behavior when they perceive that the consequences of pursuing a course of action are prohibitively high. In other words, the foreseen consequences of acting contrary to the norm must significantly outweigh the rewards that a state perceives would result from acting outside of what is considered acceptable behavior. We know from history that mass atrocity crimes are often highly contentious. Perpetrators of atrocity crimes do not openly admit their crimes, which leaves room for counterclaims and narratives that obfuscate the truth. The point here is that in such a politically charged atmosphere, where the truth gets muddled, the potential for default on a norm such as a CoC increases. Thus, while constructivists argue that the reputational cost of violating norms can serve as a deterrent, the reality is something quite different. For example, at great reputational risk, and often under morally dubious claims, the United States has employed its veto to protect Israel from international condemnation on forty-three occasions since 1972.[46] This is not surprising. As Justin Esarey and Jacqueline H. R. DeMeritt have shown in detail, in certain conditions, particularly when strategic interests of a state are involved, naming and shaming has limited normative force.[47]

A proponent of a CoC could insist that this criticism does not completely undermine the proposed code, since the France/Mexico proposal, for instance, acknowledges that it would not regulate the P-5's actions when their national interest is at stake. Again, I contend that this caveat is problematic. As noted in the previous section, what constitutes national interest is not immediately self-evident, and as such a permanent member can avoid a code by consistently invoking the



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existence of a vital national interest. As Cesáreo Gutiérrez Espada argues, the national interest clause is unhelpful for a CoC's overall goals and it takes away with one hand what it has given with the other.[48]

*The Charter Reform Argument*

Third, it is said that a CoC provides an opportunity to curtail the use of the veto while getting around the cumbersome UN Charter amendment procedure. In Article 108, the Charter outlines the conditions for amending the Charter, one of which is the concurring vote of all permanent members of the Security Council.[49] Many analysts agree, and history has proven, that this provision makes reform difficult, if not impossible. A CoC is thus particularly appealing because it does not require any such formal reform. Advocates assert that an informal amendment to the powers of the Council is more likely to win at least tacit approval and thus has a better potential to ensure that the Security Council responds to mass atrocity crimes in a consistent and effective manner.

Again, the assumptions here are problematic. I argue that a CoC does not really offer better prospects than would formal reform. After all, a CoC, just like Article 108, requires the acquiescence of all permanent members. In effect, they hold what could be termed an "informal veto" since the CoC proposal would require their compliance if it is to be a meaningful and effective norm. Though at the margins a CoC may be easier to enact, it is not immediately clear how it considerably differs from the cumbersome demands of the Charter regarding Council reform.[50]

## Further Diplomatic Challenges

In this section and the next, I draw heavily on in-person interviews at UN headquarters to reveal some of the further diplomatic and normative challenges to a CoC. Somewhat unsurprisingly, given the discussion above, within diplomatic circles there is an acceptance that China, Russia, and the United States will continually resist any change to the way the veto is wielded—a point driven home by Mogens Lykketoft, President of the 70th General Assembly, when I interviewed him in June 2016. The U.S. position on the subject is clear and unequivocal. In an interview with Carl Watson and Kevin Lynch, political advisers on Security Council reform and the responsibility to protect to the U.S. Ambassador to the United Nations, both reiterated that while the United States does not reject

calls for concerted international action during the commission of atrocity crimes, it does not "support any restrictions or changes to the use of the veto."[51]

What is more disconcerting is that while it appears that the two CoC proposals are increasingly garnering support from states, as reflected by other interviews with diplomats at the United Nations, there is simultaneously evident skepticism and even cynicism among some states, particularly regarding the utility of the idea of a CoC. For instance, a diplomat from India, which has not signed either CoC initiative, contemptuously dismissed the proposals, saying "there is no meaning to signing the code of conduct, it is only for the sake of taking a moral high ground."[52] He expressed particular skepticism of the ACT proposal, which requires all permanent and nonpermanent members of the Council to pledge not to vote against credible draft resolutions aimed at addressing mass atrocity situations. According to him, this proposal can be likened to an unpleasant situation where "you have a gun, and I do not have a gun, but you expect me to trust that you will act with integrity and not put the gun against my head. The problem in the first place is that you have a gun, and I do not."[53] For this diplomat, the idea of collective restraint that is central to the ACT proposal flies in the face of prudence.

But skepticism about the concept of a CoC among states goes even further, including concerns that it would undermine the influence of the nonpermanent members of the Council. Permanent members are known to discuss and agree on the content of resolutions in private closed-door meetings and often dismiss the contributions of the ten nonpermanent members. In the words of a Brazilian diplomat in a personal interview, "the dynamics of the Council are cruel; permanent members agree on the content of a resolution and circulate the draft resolution sometimes just forty minutes before votes are taken. When we raise concerns or objections, we are often told that this is not one of the resolutions you can contribute to, this has been agreed to, just vote."[54] According to this diplomat, one of the few diplomatic strengths the nonpermanent members possess is that they do not have to give an indication of how they are going to vote beforehand. This, at least, provides them with some degree of leverage. The objection, therefore, is that with a CoC permanent members are even more likely to dismiss the contributions and concerns of the nonpermanent members since they can say, "I know how you are going to vote because you are part of the ACT code of conduct."[55] As noted earlier, the dynamic here appears to be the reverse of the assumption that weaker actors readily embrace secondary rules while powerful actors resist them. The diplomatic challenges faced by the

CoC idea also come from subaltern states that are reticent to see their power and influence further undermined in the Council.

## Normative Challenges

Along with the political challenges, I dispute the normative desirability of a CoC on the basis that it could unwittingly stifle critical debates surrounding both the nature of atrocity crimes and the appropriate action to be undertaken, since it advocates for the commitment of states to a specific course of action. For example, the Council has been criticized for not fully exploring the diplomatic options available before passing Resolution 1973 on military force against Libya, such as the African Union's attempt to broker a diplomatic solution to the crisis. Similarly, it is possible to imagine a scenario under a CoC in which the permanent members, particularly the trio of France, the United States, and the United Kingdom, could muscle their way through without allowing for genuine debate about the most appropriate reaction to a humanitarian crisis.

At the same time, with regard to resolutions aimed at ending atrocity crimes, by asking permanent members to commit to refrain from vetoing, and asking nonpermanent members to refrain from voting against, a CoC would remove the ability of states to prevent the Council from taking actions that they are convinced may exacerbate the crisis. As an example, during the vote on Resolution 1973, Brazil abstained because, according to Ambassador Maria Votti, the "use of force as provided for in operative paragraph 4 of the . . . resolution will [not] lead to the realization of our common objective—the immediate end of violence and the protection of civilians."[56] She further argued that Brazil was convinced that the measures proposed by the resolution might cause more harm than good, leading to a further destabilization of the international order. Resolution 1973 arguably met the threshold of what is considered a credible draft resolution as stipulated by the CoC proposal, given the widespread support for military action within the international community. Although Brazil only abstained from Resolution 1973, one can easily imagine a scenario in which a state had a clearer conviction about the dangers of a resolution and wished to cast a vote against. In such a case, it would be irresponsible of the state not to do so, and it would be ethically problematic to stop them. In essence, in the absence of the flexibility to actively dissent, even on supposed "credible" draft resolutions, there is a real risk, as Daniel Levine notes, that the CoC would "make inappropriate intervention too easy to authorize."[57]



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A related additional problem is that it is unclear what constitutes a draft resolution that is "credible"—a term clearly open to debate. If one argues that the test of credibility should be that a resolution ameliorates rather than exacerbates a humanitarian crisis, how can this be determined ex ante? Ultimately, these are political questions and are subject to political interpretations. This was evident in the 2014 Security Council debate on whether the Syrian regime should be referred to the International Criminal Court. Russia's Ambassador to the United Nations, Vitaly Churkin, denounced the draft resolution as a "publicity stunt" and justified the use of the veto on the grounds that the resolution would hinder peace negotiations and the efforts to end the civil war.[58] Though one might disagree with this assessment, such a claim can neither be truly proven nor disproven ahead of action actually being taken.

Another important normative issue specific to the ACT proposal concerns its procedural trigger. Although it does not formally outline a procedural trigger as the France/Mexico initiative does, it nevertheless expects that Security Council action would be prompted by "facts on the ground." It notes that it expects concerned states to make an assessment of an atrocity situation and call for the application of the CoC. At the same time, it outlines a role for the secretary-general as an "important authority" on atrocity crimes whose opinion is expected to carry weight. These suggestions are clearly problematic as it appears that the group treats "facts" on atrocity crimes as issues that are not subject to contestations or sites of intense political struggle. In recent years, however, we have seen that issues that ought to reflect international consensus both in assessment of the facts and in remedial measures to be taken are hugely politicized and contested. One recent example is the use of chemical weapons in Syria and Russia's efforts to shield the Assad regime by contesting the basic facts of the case. More troubling still is the rejection of and attempt to delegitimize the independent international investigations. It is therefore not as immediately obvious as the ACT group seems to suggest that the facts on the ground, the assessment of concerned states, or the esteemed opinion of the secretary-general would depoliticize the reaction and response to a mass atrocity situation.

## Conclusion

Although I have outlined some clear challenges and shown the grim prospects of a CoC, a critic may still insist that while it might not guarantee compliance, in the



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absence of alternatives, a CoC holds the best potential, and that even marginal benefits will be worth the effort. However, as noted in the introduction, efforts to encourage states to accept the principles of a CoC distract attention from bolder, possibly more effective solutions, such as the use of regional institutions as legitimate authorizing mechanisms in place of the Security Council.[59] Thus, I conclude that while a piecemeal, placatory approach such as the CoC to solving the problem of responding to mass atrocities might be exciting to proponents, it would ultimately be unhelpful.

NOTES

[1] Ariela Blätter and Paul D. Williams, "The Responsibility Not to Veto," *Global Responsibility to Protect* 3, no. 3 (2011), pp. 301–22; see also Justin Morris and Nicholas J. Wheeler, "The Responsibility Not to Veto: A Responsibility Too Far?" in Alex J. Bellamy and Tim Dunne, eds., *The Oxford Handbook of the Responsibility to Protect* (New York: Oxford University Press, 2016).

[2] In this article I refer to all proposals to restrain the use of the veto during mass atrocity crimes as proposals for a code of conduct, though some publications use the term "responsibility not to veto."

[3] For details on signatories, see "List of Signatories to the ACT Code of Conduct," Global Centre for the Responsibility to Protect, www.globalr2p.org/resources/893; and "UN Security Council Code of Conduct," Global Centre for the Responsibility to Protect, www.globalr2p.org/our_work/un_security_council_code_of_conduct.

[4] Blätter and Williams, "The Responsibility Not to Veto," p. 321.

[5] Daniel H. Levine, "Some Concerns about 'The Responsibility Not to Veto,'" *Global Responsibility to Protect* 3, no. 3 (2011), pp. 323–45.

[6] Morris and Wheeler, "The Responsibility Not to Veto: A Responsibility Too Far?"

[7] Theresa Reinold, "The 'Responsibility Not to Veto,' Secondary Rules, and the Rule of Law," *Global Responsibility to Protect* 6, no. 3 (2014), pp. 269–94.

[8] Ibid.

[9] Ibid., p. 275.

[10] David L. Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (New York: Oxford University Press, 2009), p. 36.

[11] *Californian News*, May 5, 1945, quoted in Moreen Dee, "Dr H. V. Evatt and the Negotiation of the United Nations Charter," p. 5, www.diplomatie.gouv.fr/IMG/pdf/ONU_moreen_dee.pdf.

[12] United Nations Charter Article 27(3). The adjoining part of Article 27(3) notes that "in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting." This is often referred to as obligatory abstention. Originally designed to limit the reach of the veto, in the early years of the Council there was some compliance with this provision, at least by the United Kingdom and France. However, as contestations emerged over the interpretation of Chapter VI, instances of obligatory abstention have declined and there has been no reference to it since April 2000. The practice of voluntary abstention, however, has continued.

[13] United Nations General Assembly, Resolutions Adopted on the Reports of the *Ad Hoc* Political Committee, Res. 267(III), "The Problem of Voting in the Security Council," 159th Plenary Meeting, April 14, 1949.

[14] L. H. Woolsey, "The 'Uniting for Peace' Resolution of the United Nations," *American Journal of International Law* 45, no. 1 (1951), pp. 129–37.

[15] Eric Voeten, "Why No UN Security Council Reform? Lessons For and From Institutionalist Theory," in Dimitris Bourantonis, Kostas Ifantis, and Panayotis Tsakonas, eds., *Multilateralism and Security Institutions in an Era of Globalization* (Abingdon, U.K.: Routledge, 2007), p. 296, faculty.georgetown.edu/ev42/index_files/Multilateralism_and_Institutions_chapter.pdf.

[16] Dominik Zaum, "The Security Council, the General Assembly, and War: The Uniting for Peace Resolution," in Vaughan Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum, eds., *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (New York: Oxford University Press, 2008), p. 174.

[17] International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), responsibilitytoprotect.org/ICISS%20Report.pdf.
[18] See UN Document A/59/565, December 2, 2004, p. 68.
[19] The Security Council has endeavored to be more transparent in its working methods. For instance, it has adopted the Arria formula, where experts on an issue of interest could be invited to an informal meeting to provide a briefing to Council members on a specific subject.
[20] See Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland, "Improving the Working Methods of the Security Council" (2012), www.centerforunreform.org/sites/default/files/S-5%20resolution%20SC%20working%20methods%20April%202012.pdf.
[21] Ibid.
[22] Rita Emch, "Swiss Withdraw UN Draft Resolution," *Swissinfo.ch*, May 18, 2012, www.swissinfo.ch/eng/security-council-reform_swiss-withdraw-un-draft-resolution/32719648.
[23] Center for UN Reform, "Fact Sheet: The Accountability, Coherence, and Transparency Group—Better Working Methods for Today's UN Security Council" (2015), centerforunreform.org/sites/default/files/FACT%20SHEET%20ACT%20June%202015.pdf.
[24] Ibid.
[25] Center for UN Reform, "Explanatory Note on a Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity, or War Crimes" (2015), www.centerforunreform.org/sites/default/files/Final%202015-09-01%20SC%20Code%20of%20Conduct%20Atrocity.pdf.
[26] Ibid.
[27] Ibid.
[28] The ACT proposal currently attracts more support than the France/Mexico initiative. This is because it demands that all current and future Security Council members should be bound by the Conduct of Conduct. See details at www.globalr2p.org/our_work/un_security_council_code_of_conduct.
[29] Alex J. Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (Abingdon, U.K.: Routledge, 2011), p. 18; see also Blätter and Williams, "The Responsibility Not to Veto," p. 314.
[30] Laurent Fabius, "A Call for Self-Restraint at the U.N.," *New York Times*, October 4, 2013, www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html.
[31] Ibid.
[32] Aidan Hehir, "Assessing the Influence of the Responsibility to Protect on the UN Security Council during the Arab Spring," *Cooperation and Conflict* 51, no. 2 (2016), p. 174.
[33] Lydia Swart, "Reform of the Security Council: 2007–2013," in Lydia Swart and Estelle Perry, eds., *Governing and Managing Change at the United Nations: Reform of the Security Council 1945–September 2013*, Center for UN Reform Education, New York (2013), p. 53.
[34] Matthew Rycroft, "Statement by Ambassador Matthew Rycroft of the U.K. Mission to the UN at the ACT Group Event on the Code of Conduct," October 1, 2015, www.gov.uk/government/speeches/im-proud-to-say-that-the-united-kingdom-is-signing-up-to-the-act-code-of-conduct/.
[35] Jussi Hanhimäki, *The United Nations: A Very Short Introduction* (New York: Oxford University Press, 2008).
[36] See Lieutenant-General Roméo Dallaire and Brent Beardsley, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Random House Canada, 2003); see also Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca, N.Y.: Cornell University Press, 2002). Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (New York: Oxford University Press, 2000), p. 225.
[37] Ibid., p. 225.
[38] Eric A. Heinze, "The Rhetoric of Genocide in U.S. Foreign Policy: Rwanda and Darfur Compared," *Political Science Quarterly* 122, no. 3 (2007), p. 382.
[39] Hitoshi Nasu, "The UN Security Council's Responsibility and the 'Responsibility to Protect,'" *Max Planck Yearbook of United Nations Law* 15 (2011), p. 384.
[40] Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge, U.K.: Polity Press, 2009), p. 119; Aidan Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (Basingstoke, U.K.: Palgrave Macmillan, 2012), p. 120; and Richard H. Solomon and Lawrence Woocher, "Confronting the Challenge of 'Political Will,'" United States Institute of Peace (2010), www.usip.org/publications/2010/03/confronting-challenge-political-will.
[41] See Fred Grünfeld and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2007), p. 115.
[42] Ibid.
[43] Colin L. Powell, "The Crisis in Darfur: Testimony before the Senate Foreign Relations Committee," Washington, D.C., September 9, 2004, in U.S. Department of State Archive, 2001-2009.state.gov/secretary/former/powell/remarks/36042.htm.

[44] Roméo Dallaire, "Looking at Darfur, Seeing Rwanda," *New York Times*, October 4, 2004, www.nytimes.com/2004/10/04/opinion/looking-at-darfur-seeing-rwanda.html?_r=0.
[45] James Pattison, "The Ethics of Diplomatic Criticism: The Responsibility to Protect, Just War Theory and Presumptive Last Resort," *European Journal of International Relations* 21, no. 4 (2015), p. 938.
[46] See the "Security Council - Veto List," at the *Dag Hammarskjold Library* online, research.un.org/en/docs/sc/quick.
[47] Justin Esarey and Jacqueline H. R. DeMeritt, "Political Context and the Consequences of Naming and Shaming for Human Rights Abuse," *International Interactions* 43, no. 4 (2017), pp. 589–618.
[48] Cesáreo Gutiérrez Espada, "The Responsibility to Protect and the Right of Veto in the Security Council: Some Recent Examples," *Journal of the Spanish Institute of Strategic Studies* 3 (2014), p. 17.
[49] United Nations Charter, Article 108.
[50] Proponents of a CoC might point to the fact that formal UN reform requires states to ratify Charter amendments "in accordance with their respective constitutional processes." In the United States, for example, that would require gaining approval in the Senate. Adopting a CoC, however, would simply require the support of the current administration to adopt the practice. So, it would indeed seem easier than formal reform. Another argument for a CoC that is often extended is that it gets around the intractable debate among member states on the different reform proposals. The proposed CoCs focus only on curtailing the veto during atrocity crimes. No contribution is made to the more difficult issues of formal reform, which include the composition, structure, rights, and privileges of an expanded Council.
[51] Carl Watson and Kevin Lynch, Political Advisers on Security Council Reform and the Responsibility to Protect to the U.S. Ambassador to the United Nations, in New York, June 16, 2016.
[52] Personal interview conducted with a diplomat who wishes to be anonymous at India's permanent mission to the United Nations in New York on June 14, 2016.
[53] Ibid.
[54] Personal interview conducted with a diplomat who wishes to be anonymous at Brazil's permanent mission to the United Nations in New York on June 8, 2016.
[55] Ibid.
[56] See statement made by Ambassador Maria Luiza Riberio Votti (Brazil) at the Security Council meeting of March 17, 2011, www.un.org/press/en/2011/sc10200.doc.htm.
[57] Levine, "Some Concerns about 'The Responsibility Not to Veto,'" p. 324.
[58] Ian Black, "Russia and China Veto UN Move to Refer Syria to International Criminal Court," *Guardian*, May 22, 2014, www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court.
[59] Bolarinwa Adediran, "Implementing R2P: Towards a Regional Solution?" *Global Responsibility to Protect* 9, no. 4 (2017), pp. 459–87.

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Abstract: The failure of the UN Security Council to adequately and effectively address the Syrian crisis has brought renewed scrutiny to the veto and its capricious use during mass atrocity situations. In response to these concerns, the idea of a code of conduct to regulate the exercise of the veto during humanitarian situations is now being increasingly advanced by several states, including France and the United Kingdom. This paper disputes the utility of such a code and argues that it would not make any significant difference to the way mass atrocity crimes are addressed. I examine three core arguments often extended to justify the merit and the utility of the norm: the circumvention argument, the naming and shaming argument, and the Charter reform argument. I show how each of these arguments is undermined by mistaken notions about the norm's procedural effectiveness, and the role the veto plays in cases of what Simon Chesterman calls "inhumanitarian noninterventions." Additionally, drawing on interviews conducted with diplomats at the United Nations in New York, I present evidence that resistance to a code of conduct comes not only from the permanent five members of the Council but also from the nonpermanent members, further imperiling the idea's capacity to effect change. Ultimately, I contend that the current global effort to curtail the influence of the veto is nothing more than a journey down the rabbit hole: exciting, but ultimately distracting.

Keywords: Security Council, code of conduct, veto, UN reform, Responsibility to Protect