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The UN Security Council's Responsibility to Act

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Background paper for "Peace as a Global Public Good" Experts Roundtable
March 11, 2022

With power comes responsibility. The UN Security Council's five permanent members (P5) possess power. Have they exercised that power responsibly? The question can be broken into two. Have they demonstrated responsibility in *acting* to maintain international peace and security? Have they demonstrated irresponsibility when they *fail to act*? Policymakers and scholars have been relatively attentive to the first question. This brief paper focuses on the second.

Article 24(2) of the Charter stipulates that the Council must discharge its duties "in accordance with the purposes and principles of the United Nations." In other words, when the Council *exercises its discretion to act*, it must do so responsibly – bearing in mind Articles 1 and 2 of the Charter. As written, the "purposes and principles" leave plenty of room for interpretation and so converting the broad prescription in 24(2) into an actionable legal obligation is difficult.[1] Nevertheless, if the Council acts in a manner that is widely seen to be illegitimate then its decisions are not likely to be respected. A pattern of such behavior would damage the Council's credibility, rendering it an ineffective institution that serves neither the cause of international peace and security, nor the interests of the P5.

The same logic applies when the Council *fails to act.* Clearly it is not *legally* obliged to respond to every threat to peace. Yet it does have an institutional responsibility to act on behalf of the membership of the UN as whole (Article 24(1)), which suggests its discretion to do nothing is not absolute. That responsibility is a political imperative felt by the P5, not least in order to preserve the credibility of the institution -- and the extraordinary power it gives them.

[1] The *Kadi* case in the European Court of Justice and other cases in national and regional courts on targeted sanctions illustrate that imposing constraints on the Council through judicial proceedings is difficult but not impossible.

Chapters VI and VII confer wide latitude on the Council to decide whether and how to respond to a threat to the peace. There are many examples of Council inaction of course, and one rarely hears the argument that members of the Council have violated a *legal obligation* by failing to act. The rare exception concerns genocide. Louise Arbour wrote in a 2008 article "one has to wonder why the exercise of a veto blocking an initiative designed to reduce the risk of, or put an end to, genocide would not constitute a violation of the vetoing States' obligations under the Genocide Convention."[2] However that logic did not find its way into the World Summit Outcome document, even in the case of genocide. An early draft of the paragraphs on the "responsibility to protect" seemed to imply a legal duty to respond to mass atrocities, but the language was amended to avoid any such connotation.

To say there is no legal duty to act beyond the broad entreaty in Article 24 does not mean there is no political, institutional or – for that matter – ethical responsibility. That responsibility, moreover, impacts the real world of great power politics, at least to the extent that those politics play out in the Security Council. The effectiveness of the Council depends in part on its perceived legitimacy. The term 'legitimacy', as a sociological concept, refers to the belief of those subject to an institution's authority that it has the right to exercise that authority. Thus, the legitimacy of the Council depends at least in part on the extent to which other states (and their citizens) perceive it to be acting on behalf of the membership as a whole and not entirely on the basis of the narrow interests of its five permanent members. Understandably, the P5 do not like to have their hands tied. But just as action that is widely perceived to be illegitimate can undermine the effectiveness of the Council, so can inaction. Unless the P5 accept some constraints on their freedom not to act, the Council will cease to be an effective instrument for the maintenance of peace and security, which would serve none of their interests.

What mechanisms can be put in place to nudge the Council into more fully living up to this responsibility? Below is a list of suggestions for consideration by the High-Level Advisory Board on Global Public Goods. Some are new; most are not. What they have in common is that, among the many proposals for Security Council reform advanced over the years, these are directed most squarely at addressing the Council's failure to act in response to threats to peace.

1) Structural:

- Establish as "Friends of the Security Council" a group of 15 states, in effect a shadow Council designed to serve as the functional equivalent the "loyal opposition" in a parliament.[3] This group, whose membership would rotate on a regular basis, would be dedicated to systematic monitoring of and engagement with the SC.
- Establish an Advisory Committee of non-state actors dedicated to systematic monitoring of the Council and limited engagement through informal mechanisms. While direct

[2] Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008), *Review of International Studies*, Vol. 34, pp. 445-58, at 454.

[3] Ian Johnstone, "Legislation and Adjudication in the United Nations Security Council: Bringing Down the Deliberative Deficit" (2008), *American Journal of International Law* Vol. 102, pp. 275-308, at 307

participation in Council meetings would necessarily be limited, this Committee would also impact Council deliberations through the "audience effect."
- Establish channels for the Advisory Group of Local and Regional Governments proposed by the Secretary-General to engage with the Council.[4]

2) Working methods:[5]

- Increasing use of informal interactive dialogues, including to consider matters that are not on the Council's agenda
- Increasing use of Arria-formula meetings
- Increasing use of "Toledo-style" wrap-up meetings at the end of Council presidencies to allow for more interaction.

3) Public commitments on the part of the P5 to:

- Exercise restraint in the exercise of the veto, including not to use it to block action against mass atrocities[6]
- Provide written public justification for use of the veto
- Support the initiative calling for automatic convening of the General Assembly when a proposal in the Security Council is blocked due to the veto.[7]

The Security Council is facing an existential crisis. It risks fading into irrelevance. Tinkering with structures, working methods, and public commitments will do little to prevent it from withering away should the P5 choose that path. But if there is any will among the P5 and broader UN membership to preserve the Council as a forum for the maintenance of peace and security, then these and other reforms can help to channel that will into meaningful action.

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[4] Our Common Agenda, para. 119

[5] Versions of these proposals appear in ACT Group, "Factsheet - The Accountability, Coherence and Transparency (ACT) Group – Better Working Methods for today's UN Security Council", May 2019; Permanent Mission of Japan to the United Nations, *Handbook on the Working Methods of the Security Council*, January 2021.

[6] For links to the ACT "Code of Conduct Regarding Security Council Action Against Genocide, War Crimes and Crimes Against Humanity", the France-Mexico "Political Declaration on Suspension of Powers" (2015), and other appeals for restraint in the exercise of the veto, see http://cdilaw.org/unsc-code-of-conduct#:~:text=In%20July%202015%2C%20the%20Accountability,vote%20against%20any%20credible%20draft.

[7] See Christian Wassaner and Sina Alvi, "Innovating to Restrain the Use of the Veto in the United Nations Security Council", 52 *Case Western Reserve Journal of International Law* 65 (2020), pp. 69-71.