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## Code of Conduct for the use of the Veto

Workshop, 31 March 2014

### Summary

#### Background

On March 31<sup>st</sup> 2014, the International Peace Institute (IPI) and the Permanent Missions of France and Liechtenstein to the United Nations organized a high-level workshop to discuss and promote a voluntary code of conduct for the permanent members of the Security Council on the use of the veto in cases of action aimed at ending or preventing genocide, crimes against humanity, and war crimes. The workshop was attended by 45 representatives of States, civil society and academia.

At the general debate of the 68<sup>th</sup> session of the UN General Assembly, French President François Hollande proposed that the permanent members should voluntarily refrain from using the veto when the Security Council is required to make a decision in regards to atrocity crimes. France suggested the adoption of a code of conduct that would be a voluntary and a collective agreement by the five permanent members of the Security Council.

A similar proposal was, in the past, put forward by the S-5 group (Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland) and is currently being discussed within the ACT subgroup on veto and accountability.<sup>1</sup> The proposal was first put forward by the High-Level Panel on Threats, Challenges and Change in 2004.<sup>2</sup>

The workshop was organized to discuss possible substantive elements of a code (Session 1), and to explore ways the initiative can be carried forward, both in the context of the Security Council and outside, in particular in the General Assembly (Session 2).

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<sup>1</sup> ACT is a cross-regional group of 23 small and mid-sized countries aiming at enhancing the Accountability, Coherence and Transparency of the work of the UN Security Council. ACT aims at achieving improvements through concrete and pragmatic steps in dialogue with Security Council members as well as through building political momentum outside of the Council.

<sup>2</sup> A/59/565.

## Session 1: Drafting a Code of Conduct

In introducing the discussion of a possible Code of Conduct for the use of the veto, France explained that the idea of a commitment of the Permanent Members of the Security Council (“P5”) to refrain from the use of the veto in situations involving genocide, crimes against humanity and war crimes was inspired by the 2004 report of the High-Level Panel on Threats, Challenges and Change. In the same vein, an invitation to the P5 to consider such a commitment had also been included in the draft resolutions of the S-5 Group.<sup>3</sup> Such a Code of Conduct should be voluntary and ideally collectively agreed by the P5. Discussions were conducted on the basis of an article by the French Foreign Minister, Laurent Fabius, published on 4 October 2013.<sup>4</sup> Participants also drew on documents that emerged out of discussions on this issue by the ACT Group’s subgroup on accountability and the veto, which included both a general paper on the veto and a collation of comments on the proposal of the French Foreign Minister made by States and civil society.

### Definition of the scope of the Code of Conduct: what crimes?

The French proposal stated that a Code of Conduct should apply when the Council was “required to make a decision with regard to a mass crime.” As for which crimes specifically should fall under the purview of the Code, wide support was expressed for the inclusion of **genocide, war crimes and crimes against humanity**, the three core crimes under the Rome Statute of the International Criminal Court, as defined in the Statute. Support was also expressed for the additional inclusion of **ethnic cleansing**, which was contained in the Responsibility to Protect (R2P) doctrine, while some participants considered this to be included under the Rome Statute’s definition of crimes against humanity.

The view was expressed that the word “crime” could cause problems, as it implied the requirement of a criminal conviction and a high burden of proof – the word “**mass atrocities**” might more accurately capture the sort of event that should trigger the application of the Code. In order to give the code a greater preventive effect, **gross human rights abuses**, which are often a bellwether for mass crimes, could also be included, as they had been in the 2004 report.<sup>5</sup>

### External trigger for the application of the Code of Conduct

The French proposal suggested that a group of at least **50 States** could request the **Secretary-General** to determine the nature of the crime in question and thereby trigger the application of the Code of Conduct. It was pointed out, however, that this could lead to politicization of the issue – also because the number required was quite low. Subsequent discussions focused on the question of the determining

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<sup>3</sup> See A/60/L.49 and A/66/L.42/Rev.2.

<sup>4</sup> See <http://www.diplomatie.gouv.fr/en/french-foreign-policy-1/united-nations/events-2136/events-2013/article/suspending-the-right-to-veto-in>

<sup>5</sup> See A/59/565.

authority, which would in the absence of an additional procedural trigger (such as a request by Member States) itself become the trigger for the Code of Conduct.

### **Authority to determine the nature of the crime**

Participants discussed the question of who should have the authority to determine whether crimes were committed that would lead to the application of the Code of Conduct. A strong determination mechanism was thought to have intrinsic value, irrespective of the other provisions of the Code, as it would raise the political price of casting a veto. In any case, such a determination would have to be made swiftly.

The French proposal suggested that the **Secretary-General** would determine the nature of the crime in question. It was pointed out that the Secretary-General could do this without a request by Member States, since he already had the power, under Article 99 of the Charter, to bring matters to the attention of the Council. Though this power was rarely used in the past, the new “Rights up Front” policy could reinvigorate the respective practice, which could hopefully instill an “Article 99 attitude” in the organization as a whole. It was also noted that the Secretary-General only tended to act when he had the political cover of the General Assembly, which would not be entirely undesirable.

It was further highlighted that the Secretary-General was at the head of a system that encompasses many of the capacities necessary for a determining authority – the factual (Commissions of Inquiry, Special Adviser on the Prevention of Genocide), the legal (Office of Legal Affairs, High Commissioner for Human Rights) and moral. Giving the Secretary-General a central role could also provide some succor to skeptical P5. Though not controlled by the P5, the Secretary-General was selected by them and they had some influence over his actions.

A further option was the establishment of a dedicated entity with the sole task of making such a determination. This could be an **independent commissioner**, possibly appointed by the Council or by the P5 themselves. The opinion was expressed that this commissioner would be free of all the constraints of the other options. It would, however, be difficult to find someone of appropriate standing on whose appointment the P5 agreed.

The opinion was expressed that since the determination of whether a crime had occurred was a legal question, a legal instance should make the determination. One option in this regard was the **International Criminal Court (ICC)**. Caution was expressed, however, that the Court was not universal and could not pronounce itself on situations outside its jurisdiction. In addition, the Court may not be able to express itself on the issue in a timely matter.

A role for the **International Court of Justice (ICJ)** was also considered: the Court has in the past pronounced itself on whether certain acts constituted atrocity crimes.<sup>6</sup> This court was part of the UN system, and Article 96 of the Charter would allow both the Security Council and the General Assembly to

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<sup>6</sup> See e.g. the *Bosnian Genocide Case* (Bosnia and Herzegovina v. Serbia and Montenegro).

request advisory opinions. It was queried whether the Court would be able to make a determination within the time required, in particular in cases where urgent and perhaps preventive action was needed. A further disadvantage would be that the ICJ could not be asked for an advisory opinion by the Secretary-General.

Other possible determining authorities were discussed, such as the UN High Commissioner for Human Rights, Commissions of Inquiry, as well as regional organizations. In this context, it was suggested that providing for a single determining authority may not be necessary and indeed not the best option. Rather, a **cumulative approach** may be preferable, since it was impossible to foresee whether or not any of the mentioned organs would become active in a particular future situation. Accordingly, a determination by any of these organs should suffice.

Given that the Code of Conduct would be voluntary, it was suggested that **an external determining authority might not be necessary**. Instead, the P5 would decide themselves when it applied. This would, however, make it easier for any permanent member to block the application of the Code in a specific situation.

### **National Interests**

The inclusion of an exemption for “vital national interests” in the French proposal was explained as being the result of the nuclear power context, in which such language is commonly employed. However, reservations were expressed that an exemption clause on the basis of national interest could render the Code of Conduct meaningless. If national interest were to be included in the Code at all, it should be explicitly defined, for example by reference to Article 51 of the Charter.

It was also posited that, since the Code of Conduct was voluntary, there was no need to refer to national interests; the P5 would in any case not be legally bound by the Code.

The type of resolution in question could make an important difference, it was noted. For example, a resolution containing an authorization of the use of force could be treated differently than a Chapter VI decision. Given that some P5 are wary that authorization of the use of force has, in the past been interpreted in a manner going beyond the intended purpose, a Code might require an ancillary agreement to stay within the bounds of partial authorizations of the use of force. Another option would be to agree that the exemption would only apply to Chapter VII resolutions, but not to Chapter VI resolutions.

### **Prevention**

There was broad support for the inclusion of a preventative element in the code of conduct, while it was also noted that it would pose difficulties in practice, in particular with respect to the question of the determination of a crime. However, it was also noted that statements to the effect that a crime was

about to be committed, unless the SC acted to prevent this, had on occasion been issued in the past. The idea was put forward that the Code of Conduct should take into account lessons learnt from existing organs that practice early-warning, such as the High Commissioner for Human Rights, the Secretary-General's various special advisers, as well as special procedures and treaty bodies. The "Rights Up Front" initiative was also mentioned in this context.

## **Session 2: Strategies for Promoting a Code of Conduct**

It was generally agreed that different efforts toward a Code of Conduct could be pursued at the same time. While the Code was in the first instance a voluntary initiative for and by the P5, the wider membership of the UN also had a significant role, as had civil society.

### **France's leadership role**

It was pointed out that any question involving the veto was very sensitive for the P5, as these decisions were always taken at the highest level and involved in-depth political analysis. The details of a Code would be agreed upon following a debate among the P5, while other States and civil society could contribute ideas to the substance of a Code. A ministerial side-event was planned at the margins of the high-level week of the 69<sup>th</sup> Session of the General Assembly. The idea of an Arria-formula meeting within the SC to discuss the issue was put forward, while others advocated for a more informal process among the P5.

### **Minimum number of P5 to subscribe to a Code of Conduct**

While there was general agreement that the final goal was adherence to the Code of Conduct by all P5, different opinions were expressed regarding the added value of a Code subscribed to by only some P5. Many stated that any efforts leading to a Code of Conduct were positive and would raise the cost of casting a veto. A determination mechanism alone could help to stop or prevent crimes. Cementing support for a code of conduct could be a gradual process, where early commitment by one or two of the P5 would have positive effects. The view was also expressed that a commitment by a minimum number of three of the P5 would be necessary to make the Code meaningful.

### **Role of the wider membership**

It was generally agreed that efforts from the wider membership toward a Code of Conduct could be very beneficial, including with respect to the drafting of a Code. States should continue raising the issue whenever the option presents itself. A group of States actively supporting the initiative was considered to be very important, as it could help advance the discussion and lend weight to the initiative. One such group mentioned was the subgroup on veto and accountability of the ACT Group, which had already worked on the issue for a considerable time; other interested States could also be involved. The elected Members of the Council could also play a significant role, for instance by referring to the possibility of a Code in their explanations of vote when a relevant veto is cast. States could ask those running for elected seats on the Council in particular to commit to the initiative.

## **Timing**

The opinion was expressed that the current political climate presented an ideal and perhaps unique window of opportunity to advance the Code. Concerns were raised with regard to the risk of losing momentum and the ongoing, high-level political support should domestic politics change. Others argued that it would be useful to have a product prepared so as to be ready to act when the next veto was cast and to increase public awareness of the initiative in the meantime.

Many participants stated that they would prefer to see a Code of Conduct finalized by the end of the year. The 70<sup>th</sup> anniversary of the United Nations in September 2015 was also suggested as a good opportunity to adopt or formalize the Code.

## **Role of the General Assembly**

The idea of a General Assembly involvement was well received in principle. Some thought that it could be through a resolution but it was generally agreed that now would not be the right time for action by the General Assembly and that special attention should be given to the timing of such a move. A situation should be avoided that prompted the P5 to take a position of doctrine, which was a risk if the General Assembly were to be involved too early. France made it clear that only a voluntary code of conduct, by which the permanent members would declare their intention to refrain themselves from using the veto, would be consistent with the Charter and that this initiative was not meant to be adopted by the General Assembly.

Reference was made to decisions of the General Assembly on the use of the veto in the early years of the organization. Specifically, the recommendations contained in the resolution “Voting Procedure of the Security Council” of 1946,<sup>7</sup> were supported by a large majority of the membership but not implemented by the Security Council.

The view was expressed that the Assembly should acknowledge or take note of the Code of Conduct, once finalized. The hope was expressed that this could happen before the end of the year. Such a resolution could also invite the P5 to consider joining the Code. The possibility of having two separate resolutions adopted by the Assembly, the first one inviting and the second welcoming the Code, was also mentioned.

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<sup>7</sup> A/RES/40 (I).

### **The role of civil society**

The initiative was considered to be broadly supported by civil society and it was explained that more could be done to inform and involve different organizations. The impact of civil society was deemed to be very valuable as it raised general awareness of the issue, helped to increase pressure in various capitals and increases the costs of opposing the process.

### **A Code of Conduct in light of other UN processes**

It was emphasized that the Code of Conduct ought to be kept separate from the intergovernmental negotiations (IGN) on Security Council reform, as the code of conduct had no relation to the question of enlargement of the Council.

### **Formalizing the initiative**

The following possibilities to formalize the Code of Conduct were mentioned: a declaration by (some of) the P5 (similar to the Four Nations Declaration of 1943);<sup>8</sup> a Security Council decision, resolution or note by the President; a letter to the President of the Council signed by the P5 (similar to the letter on the humanitarian impact of sanctions);<sup>9</sup> or amending the provisional rules of procedure. The question of formalization would be independent of any action by the General Assembly.

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<sup>8</sup> Formally known as the “Declaration of the Four Nations on General Security”, signed by the China, the Soviet Union, the United Kingdom and the United States on 30 October 1943.

<sup>9</sup> S/1995/300.