

# The San Francisco Conference and the Evitable UN Vetoes

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Some rules of all kinds seem to us today as if they could not be anything else. Take, for example, the familiar baseball chant, “For it’s one, two, three strikes you’re out at the old ball game”; this triad is so deeply embedded in the American consciousness that it has even influenced the realm of mandatory life sentencing under the criminal law of 24 states.<sup>1</sup> Similarly, the requirement that a U.S. president must be native-born is widely accepted as an unalterable condition.<sup>2</sup> More relevant to readers of this *Journal*, there have always been five permanent members with veto rights on the United Nations Security Council.<sup>3</sup>

However, many of the rules we now consider steadfast were not always so. The products of the human imagination were often otherwise. Until 1889, a National League batter could see four or more strikes. And things that always have been “so” might well have been otherwise. One pivotal example is the nativity requirement for U.S. presidents. This job condition was intensely debated through the summer of 1787 during the Philadelphia convention and, despite the fervent discussion, it ultimately found acceptance and became a part of the nation’s governance by September.<sup>4</sup>

This article explores the origins of the Security Council veto from the precedent treaties and drafts through the United Nations Charter adopted at the San Francisco Conference in 1945. The existence and scope of this right, and the number and identity of the states entitled to it, were debated extensively over the years and were unresolved up to the last few days. Where does the number five come from? In an organization like the United Nations (UN) or its predecessor the League of Nations, why are there not three, four, or six vetoes, or 15 or 58 for that matter? (Each of these integers is either a historic fact or a near miss, as we will see.) The veto does not apply to a limited but nonetheless significant set of actions: which ones, and why? These were contingent developments, features that might have come out of San Francisco very differently.

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1. See OFFICIAL RULES OF BASEBALL § 5.09(a), 40–44 (2021 ed., Office of the Commissioner of Baseball, 2021).

2. See John L. Worrall, *The Effect of Three-Strikes Legislation on Serious Crime in California*, 32 J. CRIM. JUST. 2 83, 283–96 (2004).

3. See U.S. CONST. art. II, § 1, cl. 5; U.N. Charter art. 23, cl. 1.

4. See ERIC MIKLICH, *THE RULES OF THE GAME: A COMPILATION OF THE RULES OF BASEBALL 1845-1900* (2016); John M. Yinger, *Origins and Interpretation of the Presidential Eligibility Clause in the U.S. Constitution* (April 6, 2000), <https://perma.cc/2XDY-QFFG>.

To the present, the UN Charter's veto rights constrain how, and whether, the organization can respond to conditions of interest to (or self-interest of) the permanent member states. The enforcement of humanitarian law, in particular, is often thwarted. As Jennifer Trahan forcefully demonstrates, "the lack of responsiveness to the commission of mass atrocity crimes (genocide, crimes against humanity, and/or war crimes) . . . [m]uch of the time . . . can be specifically traced to the use of the veto, or the threat of the veto."<sup>5</sup>

The existence of the vetoes also factored into whether there ever was, and is, a UN at all. The rights are commonly presented as a *fait accompli*. Thus Richard Goldstone: "There is no question that without permanent membership and the veto power, China, the Soviet Union, the UK, and the United States would not have joined the newly forming organization."<sup>6</sup>

The reader of most UN histories may come away with the impression that the veto could not have come out any differently. This article demonstrates that the number, the holders, and the scope of the UN vetoes were anything but inevitable; hence my unusual title.<sup>7</sup>

The veto cannot be studied in isolation. It was only one of the issues resolved in San Francisco, along with recognition of a government and elections in Poland; admission of Argentina and what are now Belarus and Ukraine; the role of the General Assembly; trusteeships for some (but not all) colonies; the jurisdiction of a new world court; and even the conference presidency. Diplomats balanced their position on the veto with their stances on these matters, so perhaps not a single participant desired the actual totality of resulting provisions. One cannot understand the conception, gestation, and delivery of the veto without knowing something of the debates on other points.

The mighty veto is nonetheless a constrained power. The San Francisco compromise incorporated the veto, but significantly limited its reach in ways that facilitated the UN's role as a forum for discussion and ultimately for persuasion. It has been the catalyst for the enactment of the powerful postwar conventions on humanitarian law. These instruments are playing outsized roles in the concerted response to atrocity crimes. Both sides of that compromise—the veto and its limitations—deserve to be remembered.

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5. JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES, 9-10 (2020) (citing Rwanda, Darfur, Syria, Sri Lanka, Myanmar, and Yemen as recent examples); see also THOMAS G. WEISS, *The Humanitarian Impulse*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY, 37, 38 (David M. Malone ed., 2004) ("The Security Council was largely missing in action regarding humanitarian matters during the Cold War").

6. Richard J. Goldstone, *Foreword* to TRAHAN, *supra* note 5, at xiii; see also MALCOLM N. SHAW, INTERNATIONAL LAW 1072 (9th ed. 2021); MARK W. JANIS, INTRODUCTION TO INTERNATIONAL LAW 198 (2d ed. 1993).

7. See ISAAC ASIMOV, *The Evitable Conflict*, in I, ROBOT 135 (1950).

## I. VETOES THROUGH THE LEAGUE OF NATIONS, 1919

### A. Background

Treaty obligations may be terminated under the language of the instrument, with the consent of the affected parties, or through a limited number of background legal doctrines.<sup>8</sup> If there is a governance scheme with a veto right of some party or parties, it will be found in the treaty's terms. It may not be called a "veto," as anyone looking for that word in the UN Charter or League of Nations Covenant (or the U.S. Constitution, for that matter) will soon notice.

The nineteenth century witnessed a variety of multinational treaties. In the humanitarian law realm, the early Geneva Conventions of 1864, 1909, 1928, and 1929 governed treatment of captives, neutral status of medical personnel, and conduct on the battlefield. During the Hague Conferences of 1899 and 1907, first 26 and then 44 countries convened to regulate the means of warfare and establish the Permanent Court of Arbitration. Notably, these associations did not involve vetoes, although the principal Hague Convention allowed a signatory to "denounce" its obligations with one year's notice.<sup>9</sup>

### B. The League of Nations

In January 1918, U.S. President Woodrow Wilson proclaimed his Fourteen Points for resolution of the Great War. The last point was "A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."<sup>10</sup> There is some tension between "territorial integrity" in this

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8. See SYDNEY D. BAILEY & SAM DAWES, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 226 (3d ed. 1998) ("Unanimity had been a normal requirement in traditional diplomacy"); Vienna Convention on the Law of Treaties, arts. 54, 60, 62, May 23, 1969, 1155 UNTS 336, reprinted in *Official Documents: Vienna Convention on the Law of Treaties*, 63 AM. J. INT'L L. 875, 875-903 (1969). Additional background termination grounds include material breach by other parties; war between parties; emergence of "a new peremptory norm;" impossibility of performance; supervening force or occurrence; and *rebus sic stantibus*, or "changed circumstances." JANIS, *supra* note 6, at 32-39; SHAW, *supra* note 6, at 787, 824; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 616-22 (4th ed. 1990) (listing the methods available by which treaties may be terminated or suspended).

9. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Conventions]; see also Hague (I), Pacific Settlement of International Disputes, July 19, 1899, 30 U.S.T. 1664, 205 Consol. T.S. 234; Hague (II), Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 205 Consol. T.S. 277; Hague (III), Adaptation to Maritime Warfare Principles of Geneva Convention of 1864, July 29, 1899, 32 Stat. 1827, 205 Consol. T.S. 359; Hague (IV), Prohibiting Launching of Projectiles and Explosives from Balloons, July 29, 1899, 32 Stat. 1839, 205 Consol. T.S. 403 [hereinafter Hague Conventions]. The denunciation right is found in article 61 of the principal 1899 Convention. See Hague Convention (I); see also David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 1, 4-30 (2000).

10. Woodrow Wilson, Fourteen Points Speech to Congress (Jan. 8, 1918).

point and the fifth point's calling for establishment of territorial boundaries giving weight to "the interests of the populations concerned."<sup>11</sup>

The November 11, 1918 armistice was followed by a series of pacts, including one negotiated outside Paris to end hostilities with Germany. In January 1919, to implement his fourteenth point, Wilson proposed the formation of a League of Nations. This league would have a small Council of five permanent members (the United States, the United Kingdom (UK), France, Italy, and Japan) and four (later ten) rotating members drawn from the larger Assembly. The Versailles Treaty, part I of which was the Covenant of the League, was signed in June 1919, and became effective in January 1920.

Every state that was a member as applicable of the Council or the Assembly, even those interested in the matter at hand, wielded a veto. According to Article V: "Except where otherwise provided [for procedural questions and limited matters requiring abstention], decisions at any meeting of the Assembly or of the Council shall require the agreement of *all the Members of the League represented at the meeting.*"

If each state enjoyed such a veto, what objection could a Council member, especially, have raised against the League? The answer lies in obligations that appeared to be hard-wired in the Covenant beyond matters submitted for vote. Article X, said to be "for President Wilson the key article of the Covenant," stated: "The Members of the League undertake to respect and preserve as against external aggression the *territorial integrity and existing political independence* of all Members of the League."<sup>12</sup> The concern of isolationists everywhere was that disputes over "territorial integrity and existing political independence" would automatically require a member to defend poorly defined colonial claims and contested borders (coupled with a concern that one's own claims might be checked).

There were 58 members of the League at its peak. The Covenant was thus a curious mixture—with binding obligations that offended nationalists in theory, and decision-making bodies with up to 15 vetoes in the Council and 58 vetoes in the Assembly that thwarted collective action in practice. This structure weakened the institution both in its inception and in its operation.

In the United States, the Covenant was attacked by Republicans who assumed control of the Senate in November 1918 and who opposed international institutions generally. The veto had been "in part intended to forestall opposition in the American Senate."<sup>13</sup> But Senator Henry Cabot Lodge (R-Mass.) warned that Article X would deprive the United States of sovereignty and usurp Congress of its exclusive constitutional power to declare war.

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11. *Id.*; see also MARGARET MACMILLAN, PARIS 1919 41 (2001) (noting the French leader Georges Clemenceau had an issue with Wilson's fourteen points as mostly empty theory).

12. League of Nations Covenant art. 10 (emphasis added), <https://perma.cc/6CXV-7KRU>; F.P. WALTERS, HISTORY OF THE LEAGUE OF NATIONS 48 (1960).

13. WALTERS, *supra* note 12, at 47.

Wilson suffered a nervous collapse in September 1919 and a stroke the following month, halting his personal advocacy efforts. That fall, influential intellectuals such as Walter Lippmann and John Maynard Keynes emerged as critics of the accord. In November, thirty-five of forty-nine Republicans indicated support for the Covenant with a signing statement clarifying that Congress could require the United States to withdraw; Wilson and his advisers refused to consider the amendment. The treaty received a majority vote but fell well short of the two-thirds level required for consent to ratification.

The League limped along without the participation of the nation that was its major proponent.<sup>14</sup> The universal Council veto was among its weakest features. When Manchuria was invaded in 1931 and the Chinese government sought collective action against its fellow League member, Japan vetoed a condemnatory resolution and exited the League. Germany departed in 1933 and remilitarized the Rhineland in violation of the Versailles Treaty in 1936. Italy invaded Ethiopia in 1935, leading the latter's Emperor Haile Selassie I to petition the League in person; the League recommended sanctions but called for no military action. (Outside the League, the United States halted military aid to Italy—but also halted military aid to Ethiopia, the victim of a war of aggression, under the banner of neutrality.) Similar lack of strong action occurred during the Spanish Civil War, abetted by Germany, Italy, and the Union of Soviet Socialist Republics (USSR or Soviet Union).

The League did record some successes—such as brokering a Finnish-Swedish dispute and addressing a Colombian-Peruvian skirmish. But the comparative size of these hits and misses bears out the reported observation of Italian dictator Benito Mussolini: “The League is very well when sparrows shout, but no good at all when eagles fall out.” The same could be said of many institutions, not least the UN.

One event on which the League did take action was the Russo-Finnish War of 1940, when the USSR was expelled from membership. Soviet leader Joseph Stalin resented this move and recalled it in justifying his insistence on possessing a broad UN veto.

World War II leaders drew several lessons from the defects of the League of Nations: too many vetoes, to be sure, but also its inability to command a military response; the nonparticipation of an economic power like the United States; and the resentment of an expelled power like the Soviets. For all the heat it generated in debate, Article X turned out to be virtually a dead letter. It indeed created a formal obligation, but only a moral and an unenforceable one. No country felt unconditionally compelled to sacrifice unilaterally the lives of its youth and the contents of its treasury to defend the honor of someone else's territorial integrity.<sup>15</sup>

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14. Cf. WALTERS, *supra* note 12, at 73 (“What aggressor would fear the economic sanction of the League when the world's greatest markets were open to him?”).

15. See WALTERS, *supra* note 12, at 49 (noting President Wilson's specific desire for a reciprocal agreement to combat external aggression proved the greatest obstacle to the Covenant's ratification in the U.S. Senate); RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE

## II. THE VETO IN THE EARLY WARTIME CONFERENCES, 1941-44

### A. *Roosevelt, Churchill, and Stalin Meet*

In January 1941, U.S. President Franklin D. Roosevelt proclaimed his aspiration for the “Four Freedoms”—freedom of speech, freedom of religion, freedom from want, and freedom from fear. The latter liberty, in his eyes, required world police of some kind. He was acutely aware that much of his country had opposed the League, though he had supported it in his unsuccessful 1920 Vice-Presidential campaign, and he distanced himself from it in his successful 1932 and 1936 Presidential runs. But he was engaged in the great enterprise of moving the United States from isolationism, including the 1940 Destroyers for Bases and 1941 Lend-Lease programs with the UK. Roosevelt had to bring his country, and both political parties, toward his ideal—a transformation he led with characteristic skill and panache.<sup>16</sup>

Prior to the United States’ entry into the conflicts in Europe and the Pacific, Roosevelt met UK Prime Minister Winston Churchill offshore Newfoundland. The two leaders were similarly inclined, and on August 14, 1941, proclaimed the Atlantic Charter calling for a “wider and permanent system of general security.”<sup>17</sup>

The Canadian meeting was followed by a meeting of diplomats in Washington, D.C. that produced the January 1, 1942 “Declaration by United Nations.” Countries subscribing to the Declaration became the “Allies,” committed to defeating the Axis (obliquely described as the parties to the Tripartite Pact among Germany, Italy, and Japan) and fulfilling the Atlantic Charter.<sup>18</sup> The institutions by which these goals would be accomplished were dimly conceived and included at that stage both the concept of regional organizations as well as Roosevelt’s idea of Four Policemen.

On October 30, 1943, the Four-Nation Declaration was issued at a Moscow conference among diplomats of the United States, the UK, the USSR, and the Republic of China led by Generalissimo Chiang Kai-Shek (China). The so-called Big Four urged the formation of a “general international organization based on sovereign equality of all peace-loving states, and open to membership by all such

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United States 1940-1945 208-12 (1958) (discussing the collective action issues and poor incentives to combat aggression under the League of Nations). Treaties signed in the League of Nations era, such as the Kellogg-Briand Pact of 1928, would later be cited as having outlawed wars of aggression. Kellogg-Briand Pact of 1928, January 17, 1929; see OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS* 523-24 (2017) (“the Pact prohibited the resort to war”).

16. See RUSSELL, *supra* note 15, at 11-43; FRANKLIN D. ROOSEVELT AND THE FORMATION OF THE MODERN WORLD 11 (William D. Pederson & Steve Howard eds., 2003); TOWNSEND HOOPES & DOUGLAS G. BRINKLEY, *FDR AND THE CREATION OF THE U.N.* 11 (1997).

17. The Atlantic Charter, Gr. Brit-U.S., Aug. 14, 1941, 55 Stat. 1600. On the Newfoundland meeting, see generally Douglas G. Brinkley & David Facey-Crowther, *THE ATLANTIC CHARTER* (Arthur M. Schlesinger et al. eds., 4th ed. 1994); E.J. Hughes, *Winston Churchill and the Formation of the United Nations Organization*, 9 J. CONTEMP. HIST. 177, 180 (1974).

18. See Declaration by United Nations art. 1, Jan. 1, 1942, 55 Stat. 1600, 3 Bevans 697; see generally Tripartite Pact, Sept. 27, 1940.



states, large and small, for the maintenance of international peace and security.”<sup>19</sup>

In November and December 1943, Roosevelt, Churchill, and Stalin met at Tehran. Roosevelt laid out to Stalin his personal vision of the single international body. A necessary step was that the diplomats of the principal Allied countries would develop a draft of a charter for the new United Nations.<sup>20</sup>

### B. *The Staffers Draft*

The U.S. State Department tasked Leo Pasvolsky with advancing the draft. Pasvolsky worked first for Under Secretary Sumner Welles, then for Secretary Cordell Hull, then for Edward Stettinius (first as Assistant and Under Secretary and later as Secretary). These superiors had differing visions of the world organization. Welles preferred distributing authority to a number of regional blocs, while both Hull and Stettinius desired centralization—like the League of Nations, only improved. Welles was forced to resign in August 1943 when reports were about to surface of his propositioning two men for sex. Pasvolsky’s drafts thereafter reflected a single entity structure that became the UN.<sup>21</sup>

Roosevelt in 1943 publicly denied that the great powers would simply perpetuate the League of Nations.<sup>22</sup> Congressional resolutions passed in September and November 1943 provided him with valuable bipartisan political cover for his Four Policeman proposal.<sup>23</sup>

In his fireside chat of December 24, 1943, Roosevelt told listeners that the UK, the USSR, China, and the United States “and their allies represent more than three-quarters of the total population of the earth. As long as these four nations with great military power *stick together* in determination to keep the peace there will be no possibility of an aggressor Nation arising to start another world war. But those four powers must be united with and cooperate with all the freedom-loving peoples of Europe, and Asia, and Africa, and the Americas.”<sup>24</sup> “Stick together” might reasonably have been taken at face value and implied the existence

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19. Moscow Joint Four-Nation Declaration art. 4, Oct. 30, 1943.

20. See Tehran Declaration, Dec. 1, 1943.

21. In November 1944, Hull resigned as Secretary, and Stettinius succeeded him. See *The United States and the Founding of the United Nations, August 1941 – October 1945*, U.S. DEP’T OF STATE (Oct. 2005), <https://perma.cc/VK4Q-4MG2>; IRWIN F. GELLMAN, SECRET AFFAIRS: FRANKLIN ROOSEVELT, CORDELL HULL, AND SUMNER WELLES 313-18 (Welles forced resignation), 319 (Welles preference for regional blocs) (1995).

22. Forrest Davis, *Roosevelt’s World Blueprint*, SAT. EVENING POST, Apr. 10, 1943, at 20, 109; RUSSELL, *supra* note 15, at 100-02; see generally 1 U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, *Preliminaries to the establishment of an international organization for the maintenance of international peace and security* (William M. Franklin & E. R. Perkins eds., 1943), <https://perma.cc/4M83-NC6P>.

23. See H.R. Con. Res. 25, 78th Cong. (1943) (enacted) (known as the “Fulbright Resolution”); S. Res. 192, 78th Cong. (1943) (enacted) (known as the “Connally Resolution”). These resolutions were contrasted with the lack of Congressional input during the Vietnam War after the Gulf of Tonkin Resolution. See Philip J. Briggs, *Congress and Collective Security: The Resolutions of 1943*, 132 WORLD AFF. 332, 332 (1970).

24. President Franklin D. Roosevelt, Fireside Chat (Dec. 24, 1943) (emphasis added).

of vetoes—in the event, however unlikely at the time, that the four powers did experience a disagreement among themselves.

On December 29, 1943, Hull issued a memorandum to President Roosevelt entitled “US Plan for the Establishment of an International Organization for the Maintenance of International Peace and Security.”<sup>25</sup> With respect to Security Council voting, the memorandum set forth a tiered system: (1) on procedural questions, a simple majority vote; (2) on other subjects, a two-thirds vote; and (3) specifically on disputes and use or threats of force, either a three-fourths vote or unanimity of the four permanent members, in each case subject to abstention from voting by a party to the dispute in question (what I refer to as an “abstention mandate”). But the U.S. memo concluded: “The drafters have not been able to reach definitive conclusions on a number of crucial questions.”

### C. *The Soviets Say Nyet*

The lack of agreement stemmed from the insistence of the Soviets on a universal veto unburdened by abstention. The British and Chinese were reported to favor a supermajority pass mark for all substantive questions, and a veto of the permanent members, though in all cases subject to the abstention mandate.<sup>26</sup> But senior USSR officials rejected the abstention concept altogether.

These salvos of drafts and responses form the basis for the common understanding that the United States did not want the UN veto but was dragged into one by Stalin. In the wake of the 2022 Russian veto of Security Council action regarding the invasion of Ukraine, CNN informed its online readers:

“It was Franklin Roosevelt who wanted to set up an organization that would police the world . . . But the only way he could get Russia and other powers to agree to that deal, was if they had the ability to block any actions against themselves.” The late Soviet Union leader Joseph Stalin himself insisted on that power as a way for his state to protect itself.<sup>27</sup>

Trahan characterized an evolution of the parties with respect to aspects of the veto: “[T]he US and the UK initially had *qualms* about [Stalin’s] approach. Ultimately, . . . the US and the UK *acquiesced* to the Soviet Union’s position. . . .”<sup>28</sup>

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25. Memorandum from Secretary of State Cordell Hull to President Franklin D. Roosevelt (Dec. 29, 1943) (on file with the U.S. Dept. of State); see RUSSELL, *supra* note 15, at 244-51.

26. See Memorandum from Secretary of State Edward R. Stettinius to Secretary of State Cordell Hull (Aug. 22, 1944) (on file with the U.S. Dept. of State); see 1 U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, *Tentative Chinese Principles for a General International Organization* (E. R. Perkins & S. E. Gleason eds., 1944), <https://perma.cc/RQ5Q-78J3>.

27. Ashley Semler, *Why Isn’t the UN Doing More to Stop What’s Happening in Ukraine?*, CNN (Apr. 15, 2022), <https://perma.cc/ETC8-SRE2> (quoting International Crisis Group United Nations Director Richard Gowan).

28. TRAHAN, *supra* note 5, at 11 (emphasis added).



These explanations of the source of the veto can be misread. It is important to state clearly that the difference in positions among the great powers concerned the abstention mandate, *not* a disagreement about having a veto more generally. The USSR forcefully insisted on a “principle of unanimity”; it demanded a veto even where it was a party in the subject resolution. Here, there was indeed a substantive difference in positions between the Soviet leaders on the one hand and the American, British, and Chinese representatives on the other. The U.S. leaders expressed concern that “if the council were not to retain at least such limited authority, the smaller nations might withdraw their support of the United Nations entirely and the organization would be unable to deliver on its promises to keep the peace.”<sup>29</sup> Blocking action in a case where one is a party offends a deeply rooted legal principle—although it must be remembered that a Council is not a court of law.

But we must not make more of a disagreement over abstention than is warranted. Beyond some staff members, the political leaders of *all four powers* supported a veto right in nearly all other cases. Edward Epstein, by contrast, places the blame (or credit) on the United States, itself:

The single biggest issue in getting the [U.S.] Senate to go along was to ensure that the U.N. could not force the United States to use military force without Washington’s approval. *In later years, as the Soviets repeatedly used the Security Council veto to block U.N. action, it became a popular belief that Stalin had insisted on the veto power. In fact, it was mainly an American invention.*

The evidence does not support so isolated a charge that the United States was the principal originator of the veto. Perhaps the best characterization is multiple parentage. In the wry appraisal of *New York Times* journalist James Reston, “the Soviet Government and the American Senate opposed [veto weakening], and no group of nations can withstand such a coalition.”<sup>30</sup> The hawks in Washington and the Communists in Moscow could work wonders and move mountains when they were of the same mindset.

As to abstention, it would have been easier for the United States and the UK to be so burdened, because they knew they were submitting their disputes to a Security Council where they believed they had many friends and could exercise considerable leverage. Their positions were not symmetric to that of the USSR, which would walk into that body especially in 1945 without any friends or leverage. The Soviets fought all the harder for a veto without abstention given that

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29. See STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* 56 (2003). Note the prescient 1943 comment of Welles: “We could not permit the right of any power, great or small, to veto action against itself if it undertook to pursue policies of aggression.” Georg Schild, *The Roosevelt Administration and the United Nations*, 158 *WORLD AFF.* 26, 30 (1995).

30. Edward Epstein, *When Nations United*, *S.F. CHRON.*, Apr. 23, 1995, <https://perma.cc/E4QN-ZPAL> (emphasis added); James B. Reston, *Votes and Vetoes*, 25 *FOREIGN AFFS.* 13, 15 (1946).

context. Further, once elected politicians of the other permanent members saw that a veto free of abstention was likely, and began to consider possible scenarios, a number of them shed any qualms and became not merely acquiescent but rather enthusiastic about holding that right.<sup>31</sup>

### III. THE VETO AT AND AFTER DUMBARTON OAKS, 1944

The contemplated diplomats' gathering was the "Washington Conversations on International Peace and Security Organization," held at the Dumbarton Oaks estate in the District of Columbia in the fall of 1944. A curious aspect of these talks was that since the USSR had not yet declared war on Japan, Stalin did not want to entreat with Japan's enemy China. Thus, there were meetings first among the United States, the UK, and the USSR August 21-September 28—and then separately among the United States, the UK, and China September 29-October 7.

Staff from the United States, the UK and the USSR developed compromise language. On September 13, Soviet ambassador to the United States Andrei Gromyko rejected their approach and emphasized that there must be a veto with no abstention.<sup>32</sup> The conference ended in an impasse, and the October 1944 published Dumbarton Oaks "Proposals" provided: "Note: The question of voting procedure in the Security Council is still under consideration."

The disagreement continued after Dumbarton Oaks. In a December 27, 1944 letter to Roosevelt, Stalin personally rejected abstention; otherwise, a vote could "put certain powers in opposition to other great powers."<sup>33</sup> Trahan describes an ensuing shift in U.S. attitudes: "Following the letter from Stalin rejecting the U.S. proposal, sentiment began to *waver* within the U.S. administration about the issue of disqualifying a permanent member from voting on a matter to which it is a party."<sup>34</sup>

There is evidence, however, that U.S. elected officials perceived positive *advantages* to accepting the Soviet position. Trahan cites a January 8, 1945 memorandum records that it was Roosevelt himself who independently "said that he was still worrying as to what the situation would be if a controversy arose between, say, the United States and Mexico, and the matter was taken up by the

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31. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 571 (if there were no veto, "the United States, while lacking [a] veto, would likely need only a few other votes to protect itself"); JAN WOUTERS & TOM RUYSS, *Security Council Reform: A New Veto for a New Century?* 25 (Royal Inst. for Int'l Rels. 2005) (noting that in early years, the Soviet Union was the only Communist country among the Permanent Five, positioned against four hostile regimes).

32. Informal Minutes of Meeting No. 14 of the Joint Steering Committee Held at 10:30 a.m., September 13, at Dumbarton Oaks (Sept. 13, 1944) (on file with the Office of the Historian, U.S. Dept. of State); RUSSELL, *supra* note 15, at 440-47; see also ROBERT C. HILDEBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* (1990).

33. Letter from Chairman Stalin to President Roosevelt, Conferences at Malta and Yalta (Dec. 27, 1944) (on file with the Office of the Historian, U.S. Dept. of State).

34. TRAHAN, *supra* note 5, at 15 n.28 (emphasis added).

Security Council without the United States having a vote in whatever decisions might be taken.”<sup>35</sup>

#### IV. THE VETO AT YALTA, 1945

##### A. “Resolving” the Veto

Stalin, Churchill, and an ailing Roosevelt met at the Crimean resort town of Yalta. The minutes of a February 4, 1945 Big Three meeting record Stalin again resisting abstention. There was no sign of movement. Extraordinary meeting minutes record that Churchill was by that evening inclined to accept the Soviet position, while his foreign minister Anthony Eden expressed to his countrymen—in open forum in front of U.S. representatives—his continued opposition to such a compromise.<sup>36</sup> The February 6 United States and UK abstention proposal no longer applied to resolutions on the use or threat of use of force. The abstention mandate would only apply to votes concerning the peaceful settlement of disputes—essentially, following the text of the final Article 27 of the UN Charter: “Decisions of the Security Council [with limited exceptions] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”<sup>37</sup>

On February 7, Soviet Foreign Minister Vyacheslav Molotov expressed satisfaction with the revised proposal. The result on the veto was anticlimactic and was blandly summarized in Churchill’s and Roosevelt’s joint statement: “The present conference has been able to resolve this difficulty.”<sup>38</sup>

##### B. Related Issues at Yalta

Stalin’s demand for General Assembly memberships was narrowed at Yalta to three in addition to the USSR: the Lithuanian, Byelorussian, and Ukrainian Soviet Socialist Republics. Molotov declared “these three Republics had borne the greatest sacrifices in the war and were the first to be invaded by the enemy.”<sup>39</sup> (His argument for recognizing these republics is painful to read after 2022, when Russia’s current leader denied that Ukraine is a separate state at all.)

Concerned with political fallout in the United States, Roosevelt countered by privately asking Churchill and Stalin for flexibility, in case he needed it, for two more U.S. votes in the General Assembly. (I like to think these would have been for Texas and California.) For whatever reason, Roosevelt did not propose the

35. Memorandum from the Special Assistant to the Secretary of State Pasvolsky (Jan. 8, 1945) (on file with the Office of the Historian, U.S. Dept. of State); TRAHAN, *supra* note 5, at 15.

36. See Charles E. Bohlen, Bohlen Minutes, (Feb. 4, 1945) (on file with the Office of the Historian, U.S. Dept. of State) [hereinafter Bohlen Minutes].

37. *Id.*; see also Buel W. Patch, *Veto Power in the United Nations*, CONG. Q. RESEARCHER 630, 633 (Sept. 18, 1946); U.N. Charter art. 27 (emphasis added).

38. Franklin D. Roosevelt, Joint Statement with Churchill and Stalin on the Yalta Conference (Feb. 11, 1945). On the Yalta conference, see generally Geoffrey Roberts, *A League of Their Own: The Soviet Origins of the United Nations*, 54 J. CONTEMP. HIST. 303 (2019); S.N. PLOKHY, *YALTA: THE PRICE OF PEACE* (2010).

39. Bohlen Minutes, *supra* note 36.

extra votes, but the United States and the UK supported admitting what are now Belarus and Ukraine as UN members.<sup>40</sup>

The Allies resolved that attendance at the UN conference would be limited to states that had declared war against the Axis powers by March 1, 1945. The spotlight here was on Argentina, a state suspected of German sympathies (Churchill, concerned about exposing Argentinian food shipments to sinking or capture, had not desired Buenos Aires to be overtly partisan too early). Argentina declared war on March 27 and, despite Soviet unease, was invited to the conference.<sup>41</sup>

Meanwhile, the argument over Poland had become increasingly heated. A pro-USSR government in Lublin had been installed, to which supporters of the Polish government in exile in London objected. Churchill and Roosevelt called for a coalition government and prompt elections. Stalin made only vague statements, and despite some entreaties, collectively the United States and UK did not push for greater assurances.

The issue of trusteeships was another sensitive topic. The U.S. military wanted to retain some form of control over several Pacific Ocean islands, while Churchill did not want the trusteeship concept to apply automatically to the British colonial empire. The decision was made to confine UN trusteeship to (i) the mandates already under League of Nations jurisdiction, (ii) *all* territories taken over from the *Axis* powers, and (iii) territories *voluntarily* yielded by the *Allied* colonial powers. Thus, the UK (and France) were spared from being forced to yield their extensive colonies to trusteeships, yet the United States could lead the custody over the former Japanese and German possessions. The process of British and French decolonization slowly and painfully unfolded over the postwar decades.<sup>42</sup>

### C. *The San Francisco Invitation*

The UN conference was scheduled to commence in San Francisco on April 25, 1945. Its primary objective was to finalize the Charter based on the Dumbarton Oaks proposals, as supplemented by the Yalta accords on voting and trusteeships. The West Coast location dramatized the importance of the Pacific Theater war, which was still raging and was expected to rage for many months (or years). The planners feared that in a postwar environment, countries would lose interest in world affairs and focus on rebuilding their own cities.

Roosevelt addressed a joint session of Congress on March 1, 1945, doing so for the first time from his wheelchair. In announcing results of the Yalta conference, the President chose not to stress the muddled outcome on the Polish

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40. See RUSSELL, *supra* note 15, at 538-39; see generally DIANA PRESTON, EIGHT DAYS AT YALTA: HOW CHURCHILL, ROOSEVELT AND STALIN SHAPED THE POST-WAR WORLD (2019).

41. See David Sheinin, *Argentina: The Closet Ally*, in LATIN AMERICA DURING WORLD WAR II 183, 194-95 (Thomas M. Leonard & John F. Bratzel eds., 2009); ELISABETH BARKER, CHURCHILL AND EDEN AT WAR 202 (1979).

42. For a British view, see Huntington Gilchrist, *Trusteeship and the Colonial System*, 22 PROC. OF THE ACAD. OF POL. SCI. 95 203, 209 (1947). The restricted delineation of territories subject to trusteeship is enshrined in article 77 of the UN Charter.

government and election. The veto was being studied and critiqued around the globe, especially in the states that were not among the proposed permanent members (somewhat inaccurately referred to as the “smaller states”).

Unlike Wilson, who brought less influential Republicans to Paris in 1919, Roosevelt populated the U.S. delegation to San Francisco with prominent GOP members. The veto answered the concerns of sovereignty hawks in both parties, and the President took advantage of that consensus. The seven-member U.S. official delegation at San Francisco consisted of Secretary Stettinius, Senators Thomas Connally (D-Texas) and Arthur Vandenburg (R-Mich.), Representatives Sol Bloom (D-N.Y.) and Charles Eaton (R-N.J.), former Minnesota Governor Harold Stassen (R-Minn.), and Barnard College Dean Virginia Gildersleeve.<sup>43</sup>

Roosevelt planned to travel to San Francisco to open and close the proceedings. He even thought of serving as the UN Secretary-General after his presidency was over.<sup>44</sup> Then, on April 12, 1945, thirteen days before the scheduled opening, he died in Georgia. Would the San Francisco conference be postponed or cancelled?

## V. THE VETO AT SAN FRANCISCO, 1945

### A. *President Truman*

Harry S. Truman was not a college graduate. He was a product of the Prendergast political machine in Kansas City, Missouri, and had rarely traveled abroad. On his succession as President on April 12, only 82 days into his Vice-Presidential term, many facts about him—his positions regarding U.S. war plans (he only learned of the atomic bomb program April 24), Roosevelt’s postwar vision, or global affairs generally—were not widely known.

In fact, Truman was a staunch internationalist. He had digested classics warning of squabbling Greek city-states in the Peloponnesian War, and he carried around in his pocket a copy of a Tennyson poem envisioning “a Parliament of Man.”<sup>45</sup> He kept the United Nations Conference on International Organization (UNCIO), or San Francisco Conference, strictly on schedule—a result following Roosevelt’s death that was anything but inevitable.

Truman was no fan of Stettinius and intended to replace him with James Byrnes. Stettinius asked the President to make the change quietly, after San Francisco, and without denigrating him in public. Truman agreed, and what is more, he kept his word. This restraint kept intact the stature of Stettinius and of the United States at the conference.

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43. Former Secretary of State Cordell Hull was to join them as an adviser but was too ill to travel. Nelson Rockefeller, a Republican who was Assistant Secretary of State for Latin America, attended and essentially ran his own brand of diplomacy with the South Americans. See SCHLESINGER, *supra* note 29, at 63 (Hull), 128-30 (Rockefeller).

44. See *id.* at 72.

45. See Samuel W. Rushay, Jr., *Harry Truman’s History Lesson*, PROLOGUE, vol. 41, no. 1 (Spring 2009); SCHLESINGER, *supra* note 29, at 3-8; ALFRED, LORD TENNYSON, LOCKSLEY HALL (1835).

### B. *Springtime in San Francisco*

As in 1849, the world rushed in to San Francisco in 1945.<sup>46</sup> There were fifty or so delegations from 46 or 48 countries, depending on what counted as a country or a delegation.<sup>47</sup> Some delegates took trains from the East Coast, beholding the unblemished expanse of a battle-free and bomb-free America. A diplomat wrote home, “We are in an atmosphere of dazzling splendor where there are rich hotels teeming with the diplomatic corps of the world—food beyond description—wines—liquors—provide cars for one’s beck and call—free movies.”<sup>48</sup>

State Department official Alger Hiss served as Secretary-General of the Conference, supervising a large staff.<sup>49</sup> Stettinius, as senior diplomat of the host country, acted as president. The USSR objected, calling for periodically rotating presidents, then begrudgingly dropped the request. A young journalist for the Hearst newspapers, Navy veteran John F. Kennedy, astutely noted that this small skirmish presaged a long, drawn-out battle with the Soviets over everything.<sup>50</sup>

At the April 25 opening session at the Opera House, Truman spoke for ten minutes by radio. On May 2, the United States announced to the gathered delegates that Robert Jackson would be prosecutor at the International Military Tribunal upcoming that winter. The announcement in San Francisco of a Supreme Court Justice as prosecutor confirmed the sheer gravity and elevated significance of the first *ad hoc* tribunal for atrocity crimes. The Nuremberg trials (November 1945 to October 1946) served as precedent for similar tribunals for Japan and (despite UN inaction before the atrocities, largely owing to the veto) for the former Yugoslavia and Rwanda.

On May 8, V-E Day and the cessation of German hostilities were briefly commemorated. The Yalta planners were correct that peace might dissipate the energy required to establish a peacekeeping organization. Several senior diplomats, including those from the UK, France, the USSR, and China, departed early,

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46. Cf. J.S. HOLLIDAY, *THE WORLD RUSHED IN* (1981) (discussing the California Gold Rush); see Bill Van Nierkerken, *When the World Came to San Francisco to Create the United Nations*, S.F. CHRON., June 23, 2020.

47. Astoundingly, the Chinese Communist leader Mao Zedong supported the Dumbarton Oaks and Yalta outcomes and even had an observer in San Francisco, where the veto right was vested in their enemy, the Chinese Nationalist government of Chiang Kai-Shek. In an instance of playing a long game, Mao would succeed to that veto right 26 years later. See R.H. Sharan, *Communist China and the United Nations*, 26 INDIAN J. POLI. SCI. 58, 59 (1965); SAMUEL S. KIM, *CHINA, THE UNITED NATIONS AND WORLD ORDER* 100 (1979).

48. SCHLESINGER, *supra* note 29, at 115-16.

49. Records relating to the organization and proceedings of the San Francisco UN Conference on International Organization are preserved in 21 digitized volumes. Documents of the United Nations Conference on International Organization, San Francisco, 1945 (1945), <https://perma.cc/6FET-3U2J> [hereinafter UNCIO PROCEEDINGS].

50. Kennedy perceptively observed that national “sovereignty would not be relinquished until people are so horrified by war that they will go to any extent rather than have another war. . . . War will exist until that distant day when the conscientious objector enjoys the same reputation and prestige that the warrior does today.” SCHLESINGER, *supra* note 29, at 120, 155-56.



perhaps conveying intentionally or otherwise the impression that the Charter was a “done deal.” Stettinius elected to stay, remaining as the most prominent official.

The Yalta planners were sadly also correct that the war in the Pacific would still be under way during the conference. The battle of Okinawa began on April 1 and lasted 82 days, during which there were as many as 120,000 military fatalities and 150,000 civilian deaths. The bloody struggle, replete with *kamikaze* airstrikes and flamethrower attacks, for possession of a single remote island presaged the likely casualties from the expected invasion of the Japanese home islands. San Francisco rooftops supported plane spotters and anti-aircraft guns.

### C. *Smaller States Contest the Veto*

Hundreds of amendments were proposed. “Vigorous challenges were voiced in San Francisco to the size of the Council . . . [and] to the notion of permanent seats set aside for the self-selected few.” Small countries contended that the existence and scope of the veto violated the sovereign equality of all states proclaimed in the lofty wartime declarations.<sup>51</sup>

The Australian delegate Herbert Vere Evatt was an omnipresent participant in the deliberations, regarding Dumbarton Oaks merely as a draft rather than a near-final version. He made many suggestions, including requiring three vetoes to defeat a motion; or, if one or more vetoes were exercised, referring the matter for action to be taken by the applicable regional body.

The discussion of the veto appears to have begun at a high level of generality, with one side stressing the equality of nations and the other stressing the greater responsibilities (and privileges) of permanent membership. There were and are also practical obstacles to having a Security Council action override the interest of a permanent member. In particular, the Council’s ultimate power was to take military action, in the name of the UN itself, and to that end a Military Staff Committee was to be populated by the “Chiefs of Staff of each of the permanent members.”<sup>52</sup> How could the Security Council and such a unified military staff conduct themselves if, say, the Soviet Union and the United States were on opposite sides of a dispute?

Evatt responded to this difficulty, even when “die-hard” veto opponents did not.<sup>53</sup> He memorably summarized, “We don’t mind a veto in a shooting-match, because the big powers have to carry the burden of shooting. What we object to is a veto on a talking match.”<sup>54</sup>

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51. See EDWARD C. LUCK, *UNITED NATIONS SECURITY COUNCIL: PRACTICE & PROMISE* 13-14, 112 (2006); WOUTERS & RUYS, *supra* note 31. The debates on the veto are described in detail in RUSSELL, *supra* note 15, at 713-49.

52. U.N. Charter arts. 42, 47. As it turned out, the UN’s military capability has been principally used as a peacekeeping force for ceasefires agreed by the parties to a dispute, with varying success. See Jonathan Soffer, *All for One or All for All: The UN Military Staff Committee and the Contradictions within American Internationalism*, 21 *DIPLOMATIC HIST.* 45 (1997).

53. See Dwight E. Lee, *The Genesis of the Veto*, 1 *INT’L ORG.* 33, 38 (1947); LUCK, *supra* note 51, at 13-14.

54. See Moreen Dee, *Dr. H.V. Evatt and the Negotiation of the United Nations Charter* (no date) <https://perma.cc/2FAY-9TM9>; Charles Raudebaugh, *Conference Veto Issue Russian Appeal Nomination Proposal At Public Session*, S.F. *CHRON.*, May 31, 1945, at A1, A7.

On May 22, the smaller countries delivered a questionnaire (the so-called “23 Questions”).<sup>55</sup> Question 19 specifically addressed the veto. In the draft (and final) Article 27, a vote on “procedural matters” is not subject to vetoes. What, Question 19 inquired, is a “procedural matter”—and more importantly, who decides?

#### *D. The Matter of France*

The French government vacillated between being leader of the less powerful or being the junior partner of the more powerful. Before San Francisco, France signaled that it would not take a permanent seat. Thus, there would only have been four UN vetoes.

But its leaders grew concerned about maintaining their place in world affairs in general and their colonial network in particular. Stephen Schlesinger artfully describes the evolution in President Charles de Gaulle’s position:

As the San Francisco Conference drew closer, Stettinius intensified his overtures to France to reconsider its decision to forgo its role as the fifth permanent member of the Security Council. This approach, coming at a time when France was finding it increasingly difficult to act as the champion of the smaller nations, as well as flattering France’s pretensions to being a great power (thereby salving its hurt over Yalta), reignited the Quai d’Orsay’s interest. The French soon decided to accept their earlier assigned spot on the Security Council. France’s decision brought about a gradual collapse of the campaign to thwart the veto.

Once the French leaders accepted that a veto was going to happen for others, they coveted one of their own. A diplomat cabled Paris: “Although [the veto] may in some case seem an annoyance—and a very grave annoyance—it may also in others be a means of preventing the Council from meddling unduly in *affairs which are our own* or which we intend to settle through other channels.”<sup>56</sup>

France was no longer a champion of the smaller states. In any event, it would have had difficulty undertaking any such role. Midway through the San Francisco conference, French troops entered Lebanon and Syria without either government’s consent.<sup>57</sup>

#### *E. Saving the Right of Discussion*

As late as March 24, the U.S. State Department publicly stated that discussions of issues were not subject to the veto. That assumption was shattered toward the very end of the conference. In a June 1 response to the 23 Questions, Molotov

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55. Memorandum on Questionnaire on Exercise of Veto in Security Council (June 8, 1945) in 11 UNCTO PROCEEDINGS at 699-709.

56. SCHLESINGER, *supra* note 29, at 98, 102-03 nn.17 & 18 (emphasis added).

57. *See id.* at 171, 201; Gadi Heimann, *What does it take to be a great power? The story of France joining the Big Five*, 41 REV. INT’L STUD. 185 (2015).

announced that even discussion of an issue must be subject to “unanimity,” and therefore subject to veto.<sup>58</sup>

Truman had already asked Roosevelt’s “deputy president” Harry Hopkins to see Stalin in Moscow. Hopkins was ailing of stomach cancer (and would die in 1946 at age 55), but he was prevailed on to make the long journey because the Soviet leader respected and trusted him.

The original subject of Hopkins’s trip was the governance of Poland. Stalin firmly insisted that the Lublin government should remain in place until elections were held, sometime in the future. The free elections never came; by 1947 the non-Communists had been driven from even their limited positions. The Iron Curtain remained drawn for forty-two more years.

Alerted by telegram to the discussion issue, Hopkins brought up the veto on June 6, 1945—the one-year anniversary of D-Day. An extraordinary scene ensued. Stalin interrupted Hopkins and asked Molotov in Russian what this issue was all about—acting, in front of Hopkins, as if Stalin had never heard of a topic that was then being hotly contested. Molotov explained the need for unanimity even over discussion. Stalin quickly said that he could live without that protection: “it [is] an insignificant matter and [we] should accept the American position.”

Stettinius wrote: “If Stalin had adamantly supported Molotov, there would have been no United Nations formed at San Francisco.”<sup>59</sup> Perhaps Stalin felt he had gotten the upper hand on the cold reality of Poland and could afford to compromise on the discussion right. Perhaps representatives of a war-weary United States faced reality, for Poland and elsewhere in an Eastern Europe still occupied by a million Red Army troops.

The concession on the UN right of discussion appears to have been well choreographed. The very next day, June 7, at 3 o’clock p.m. back in San Francisco, Gromyko signaled assent to the discussion concept. The *New York Times* headline June 8 blared, “VETO ROW IS ENDED AS RUSSIA YIELDS, PERMITTING DISCUSSION OF DISPUTES.” A June 9 *Times* editorial also supported the result. The grim news about Poland leaked out more slowly.

#### *F. The Permanent Members Harden on the Veto*

The sponsoring governments were emboldened by the Stalin-Hopkins talks. Their focus was on unity for the great powers, rather than on equal powers for others. Each permanent member now jointly and severally signaled the party

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58. 12 U.S. DEP’T OF STATE, BULL. NO. 300, OPERATION OF THE PROPOSED VOTING PROCEDURE IN THE SECURITY COUNCIL 479 (1945); see Francis O. Wilcox, II., *The Yalta Voting Formula*, 39 AM. POL. SCI. REV. 943, 948 (1945) (drafting the 23 Questions proved to be a “happy” decision of the smaller powers, as they revealed a disagreement among the large powers that needed to be addressed); Alfred P. Fembach, *The United Nations Security Council*, 32 VA. L. REV. 114, 126 (1945).

59. SCHLESINGER, *supra* note 29, at 212-20.

line—no veto, no United Nations. They responded to the 23 Questions by reiterating the existing draft of Article 27.<sup>60</sup>

What of Question 19—who decides if a question is “procedural” and therefore *not* subject to the veto? The sponsoring governments said the question would rarely arise since the Charter explicitly identifies procedural articles—but if such a question ever arose, *that* would be a substantive question and the veto would apply. (Had I been counsel to the smaller states, I might have advised against asking a question to which the answer was not already known.)

The smaller states were disappointed at the delayed response, and even more by the lack of dialogue and rationale. Senator Connally was a bulldog in the veto debates—if they can be called debates.<sup>61</sup> Evatt pressed on the veto, and Connally made this famous response:

Then standing before the assembled delegates with a copy of the charter draft in my hands, I made the final plea. “You may go home from San Francisco—if you wish,” I cautioned the delegates, “and report that you have defeated the veto. Yes,” I went on, “You can say you defeated the veto. . . . But you can also say, ‘We tore up the charter!’” At that point, I sweepingly ripped the charter draft in my hands to shreds and flung the scraps with disgust on the table. The delegates fell silent, while I stared belligerently at one face after the other.<sup>62</sup>

In response to another proposal, Connally blurted, “We could make an alliance with Great Britain and Russia and be done with it.”<sup>63</sup> In today’s parlance, he said the quiet part out loud. In all candor, he was correct—while four, five and six permanent memberships were considered (with France possibly out and Brazil possibly in), three was the irreducible number of vetoes for there to have been a UN.<sup>64</sup>

60. Press Release, San Francisco Statement of the Sponsoring Governments on the “Yalta Formula” on Voting in the Security Council (June 8, 1945) in 11 UNCIO PROCEEDINGS at 710-14; see Leo Gross, *The Double Veto and the Four-Power Statement on Voting in the Security Council*, 67 HARV. L. REV. 251, 268 (1953).

61. See Francis O. Wilcox, *The Rule of Unanimity in the Security Council*, 40 AM. J. INT’L L. 51, 52 (1946) (calling marriage of Charter and principles a “shot-gun wedding”); Albert Guérard, *San Francisco Charter and Beyond*, 31 SW. REV. 9, 9 (1945) (“The Big Three, deftly toying with their big sticks, said with all possible courtesy: ‘Please go our way of your own accord. Every other way is absolutely barred.’”); DAVID L. BOSCO, FIVE TO RULE THEM ALL: THE UN SECURITY COUNCIL AND THE MAKING OF THE MODERN WORLD 37 n.113 (2009) (quoting a Canadian magazine: “the little nations had their say and the big powers got their way”). A UK participant suggested that challenging the veto in so many ways may have backfired, as the small powers may inadvertently have induced the great powers to assert the veto more strongly. Charles K. Webster, *The Making of the Charter of the United Nations*, 32 HIST. 34, 35 (1947).

62. SCHLESINGER, *supra* note 29, at 223; see Francis O. Wilcox, II, *The Yalta Voting Formula*, 39 AM. POLIT. SCI. REV. 943 (1945). On a more reasoned basis, Connally also said, “Since we would have to furnish most of the resources and manpower, I believe the U.S. should retain the right to say ‘no.’”

63. SCHLESINGER, *supra* note 29, at 171.

64. See Lee, *supra* note 53, at 34 (“Neither France nor China could be regarded as equal in power to any of the Big Three”); William T.R. Fox, *The Super-Powers at San Francisco*, 8 REV. POL. 115, 116 (1946) (“two of the Big Five were second-class members of the first-class group”). But the United

Senator Vandenburg, the powerful Republican, was “thrilled” that the veto power was “so conservative from a nationalist standpoint.”<sup>65</sup> Truman wrote: “All our experts, civil and military, favored [the veto], and without such a veto no arrangement would have passed the Senate.”<sup>66</sup> This is not the language found in the scholarly literature of “waver[ing],” “qualms,” or “acquiesce[nce].” Rather, it is the vocabulary of the full-throated veto aficionado.

The veto was approved in the final June 20 committee meeting by a vote of 30 to 2 (Colombia and Cuba dissenting), albeit with 15 abstentions. The defeat sounded the death knell of the small nations’ crusade. Charles Malik, a Lebanese delegate, wrote in his diary: “Intrigue, lobbying, secret arrangements, blocs, etc. It’s terrible. Power politics and bargaining nauseate me. There is so much unreality and play and sham that I can’t swing myself into this atmosphere and act.”<sup>67</sup>

### G. Closing the Conference

As the debates on the veto ended, other issues were resolved. Argentina was admitted, as were the Byelorussian and Ukrainian Republics. No concrete action safeguarded Polish elections, and the Lublin regime signed for the country.

The Charter contained Articles permitting the formation of UN regional bodies but delegating few powers to them. The limited definition of trusteeships was adopted, folding in the former Axis colonies but not the French and British ones.

The preamble was not finished until May 29. The famous first part, resolving to save “succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,” was authored by Barnard Dean Virginia Gildersleeve. Delegates of the countries without vetoes must have gritted their teeth when reading the reference to “the equal rights . . . of nations large and small.”<sup>68</sup>

Few women were present at the conference. The most prominent figure from sub-Saharan Africa was a familiar relic from the Versailles Treaty: Field Marshal Jan Smuts of South Africa, appearing in full dress uniform. It would be years before minorities and peoples of developing countries would find more voices and stronger representation in UN bodies and actions.<sup>69</sup>

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Kingdom strongly pushed for including France, as a counterweight on the European continent to the Soviets and as a second colonial empire, and the United States strongly pushed for China as a counterweight in Asia. Hence we have five and not some different number. *Id.* at 116. Other possible integers include six (for a while Roosevelt urged consideration of Brazil) and Stalin’s preferred two—just the United States and the Soviet Union. RUSSELL, *supra* note 15, at 400. Finally, note the 2005 comment of U.S. UN Ambassador John Bolton: “If I were redoing the Security Council today, I’d have one permanent member.” Wouters & Ruys, *supra* note 31, at 26 n.124.

65. SCHLESINGER, *supra* note 29, at 45-47.

66. 1 HARRY S. TRUMAN, MEMOIRS OF HARRY S. TRUMAN: YEAR OF DECISIONS 284 (1955).

67. Dix-neuvième séance du Comité III, Doc. No. 956 in 11 UNCIO PROCEEDINGS at 495; MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 20 (2001).

68. U.N. Charter preamble; SCHLESINGER, *supra* note 29, at 236-37, 243.

69. A “United Women’s Conference Day” was commemorated on May 19. Anti-imperialist and left advocates raised their voices during the conference. See Gerry Jarmin, *Sidney Roger and the Founding of the United Nations in San Francisco* (n.d.), <https://perma.cc/AD86-D8YG>.

The Charter was signed on June 26. Secretary-General Alger Hiss flew to Washington with the original in a 75-pound safe, equipped with its own parachute and a label requesting delivery if found to the Department of State.<sup>70</sup>

In his closing speech, Truman addressed the possibility of revision: “This charter, like our own Constitution, will be expanded and improved as time goes on. No one claims that it is now a final or a perfect instrument. It has not been poured into a fixed mold. Changing world conditions will require readjustments, but they will be the readjustments of peace and not of war.”<sup>71</sup>

#### *H. After San Francisco*

Truman, flanked by Senators Connally and Vandenberg, pushed the treaty through the Senate. After a committee hearing and opportunity for speeches from the floor, consent to ratification of the Charter was approved on July 28 by a vote of 89 to 2 with 5 abstentions. Perhaps the vote was too rushed, making it possible for members of both parties later to object to features not fully discussed. Still, in broad terms the U.S. South generally anticipated the benefits of resurgent world cotton trade and strong U.S. military bases, while the U.S. North generally applauded the restoration of global trade and finance. Based on the veto right and other features, the younger Senator Henry Cabot Lodge, Jr. (R-Mass.) said his grandfather would have approved this treaty.<sup>72</sup>

The San Francisco Conference and the veto battles took place just before the end of hostilities and the Japanese surrender on September 2. The Charter quickly came into effect on October 24, 1945, having been ratified by all five powers plus a majority of the rest. New York was announced as permanent UN headquarters in February 1946.<sup>73</sup>

### VI. LIVING WITH—AND BEYOND—THE UN VETOES

This origin story ends with the signing of the Charter. The newly born vetoes then began to impact the world. They have paralyzed the UN in whole or in part on humanitarian and security matters on several occasions. I will briefly mention developments since San Francisco that have changed, or may still change, the impact of that feature of governance.<sup>74</sup>

70. SCHLESINGER, *supra* note 29, at 257.

71. Harry S. Truman, President of the United States, Address in San Francisco at the Closing Session of the U.N. Conference (June 26, 1945).

72. SCHLESINGER, *supra* note 29, at 284. By June 27, Stettinius was out as Secretary of State in favor of Byrnes. Stettinius became the first U.S. envoy to the UN, accompanied in the delegation by Roosevelt’s widow, Eleanor.

73. See Carl Nolte, *U.N. Remembers 70 Years, and What Might Have Been for S.F.*, S.F. CHRON. (June 25, 2015), <https://perma.cc/3N4F-4RG2>, for the case for a permanent San Francisco headquarters, and the countries supporting and opposing its bid.; See also Bill Van Niekerken, *When San Francisco’s Presidio Almost Became the “World Capital,”* S.F. CHRON. (Oct. 2, 2019), <https://perma.cc/D7YM-2VKE>; PAUL GORE-BOOTH, *WITH GREAT TRUTH AND RESPECT* 151-52 (1974). San Francisco may have to wait for the Star Trek United Federation of Planets to be a headquarters city.

74. The Security Council was expanded in 1965 to fifteen including ten rotating members, and affirmative votes of nine out of fifteen (rather than six out of eleven) were required. But the five



The permanent membership of the Republic of China (driven to the island of Taiwan in 1949) was deemed transferred to the People's Republic of China in 1971. The USSR's permanent seat was occupied by the Russian Federation in 1992, though there is a renewed dispute over that succession because of Russia's actions in Georgia and Ukraine. The position of neither France nor the UK was affected by the formation of the European Community or European Union, or indeed by Brexit. Only the United States has not been the subject of a succession conversation (yet).

The vetoes have remained despite all reform attempts and widespread critique.<sup>75</sup> There have been proposals to drop UK and France in favor of the EU, and proposals to add Japan, but they have not advanced. Thomas Weiss and Giovanna Küle observe that “[n]o question has uselessly spilled more ink or printer toner than reforming the Security Council.” They drive home the reality: “A single state can stand in the way of robust action, or even condemnation, of aberrant behavior that contravenes international law. . . . The idea of going to war against a major power, even for a land-grab or abuse of power, makes little sense if the result is World War III.”<sup>76</sup>

The answer to Question 19 has not proven to be a recurrent issue; such a vote on whether a question is procedural has not arisen since 1959.<sup>77</sup> What about Article 27's requirement of “concurrence” of the permanent members? This word has surprisingly been interpreted as meaning the lack of a negative vote, not the presence of an affirmative vote. So neither absence nor abstention blocks a motion.<sup>78</sup> This was directly relevant in 1950, when the USSR was boycotting Security Council meetings from January onward over failure to seat the People's Republic of China. Korean War resolutions were passed in June and July with the Soviets absent. The USSR resumed its seat, and its exercise of the veto, in August.

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permanent memberships and vetoes were undisturbed. See UNITED NATIONS, EVERYONE'S UNITED NATIONS 16–17 (10th ed. 1986).

75. See, e.g., BOSCO, *supra* note 61, at 249-56; LUCK, *supra* note 51, at 13–14. BAILEY & DAWs, *supra* note 8, at 226; Peter Wilenski, *The Structure of the UN in the Post-Cold War Period*, in UNITED NATIONS, DIVIDED WORLD 437, 442 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993); G. R. BERRIDGE, DIPLOMACY: THEORY & PRACTICE 166-167 (2d ed. 2002); see generally C.W. Jenks, *Unanimity, The Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organisations*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD McNAIR 48 (1965); THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 (Vaughan Lowe, Adam Roberts & Jennifer Welsh eds., 2008).

76. Thomas G. Weiss & Giovanna Küle, *The Veto: Problems and Prospects*, E-INT'L RELS. (Mar. 12, 2014), <https://perma.cc/BP46-8BV4>.

77. See WOUTERS & RUYS, *supra* note 31, at 8.

78. See CARON, *supra* note 31, at 569 n.57; WOUTERS & RUYS, *supra* note 31, at 8. SHAW, *supra* note 6, at 1073 n.11. The International Court of Justice regards the interpretation as “generally accepted” (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion*, 1971 I.C.J. 16, 22 (June 21, 1971)). This construction is far from obvious; I note that among the authors of early articles, Wilcox in 1945 considered the concurrence question to be open, and Patch in 1946 assumed that absence or abstention would cause a motion instead to fail.

Many creative approaches have been developed to blunt the impact of the vetoes. The permanent members have been urged to make voluntary and reciprocal agreements to restrain their exercise. The United States sponsored the United for Peace Resolution 377, whereby the General Assembly may recommend economic and military action when the Security Council is thwarted by vetoes.<sup>79</sup>

More expansively, an Open-Ended Working Group since 1994 has articulated a role for General Assembly under compulsory international law (*jus cogens*) when the Security Council is blocked from acting by exercise of vetoes. The argument has been expanded, in the case of atrocity crimes (genocide, crimes against humanity, war crimes, and wars of aggression), to assert General Assembly authority to enforce the Charter's Purpose and Principles articles and the permanent members' duties under other treaties they have ratified. To advance this proposal, it has been suggested that appropriate parties seek an advisory opinion of the International Court of Justice.<sup>80</sup>

The parties to the San Francisco conference fatefully agreed that the Security Council and the General Assembly could discuss peace and security matters free of the veto. In other words, no permanent member—not the Soviets or Russians, not the Americans, no one—has the power to turn off the world forum's microphones.

This compromise with the Soviets made the UN a key arena for actions influencing world opinion—even a world in which a veto might be exercised at the Security Council. The California bargain paved the way for conventions such as the 1948 Genocide Convention, the 1948 Universal Declaration of Human Rights, the four 1949 Geneva Conventions and the three Geneva Protocols of 1977 and 2005, and the 1998 Rome Statute of the International Criminal Court. It is this array of instruments, more than the Charter, that has proven vital in the pursuit of international justice, particularly for victims of atrocity crimes.<sup>81</sup>

Postwar experience confirms that vetoes are not unusual for an international body with a scope that includes military power. Entry in the North Atlantic Treaty Organization is similarly constrained, as Article 10 of its 1949 pact provides that new members are to be admitted only “by unanimous agreement” of existing members. Recently, Turkey temporarily objected to admission of Sweden and Finland on the ground that they provide support for Kurdish groups the Turkish government labels as terrorist. The unanimity requirement is understandable in light of the famous Article 5, which commits the NATO parties to

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79. G.A. Res. 377, at 10–11 (Nov. 3, 1950).

80. See TRAHAN, *supra* note 5, at 143.

81. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Geneva Conventions, *supra* note 9; Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF 183/9, 2187 U.N.T.S. 90.

action without a vote or a veto (an attack on one member is an attack on all, with each being obligated to assist the attacked state).<sup>82</sup>

There is no easy alternative to some form of veto in security organizations composed of countries with disparate powers. If anything, the unusual aspect of the UN vetoes is that they are so few and so limited. Because of the interplay between the collective and its constituents, we still have systems that are inter-national rather than international.

#### CONCLUSION

It is easy to characterize a historic compromise as a battle between progressive visionaries and reactionary obstructors. But it is not always appropriate to do so. In negotiating the UN vetoes, the United States wanted a high degree of autonomy, perhaps as much as or more than the USSR did. In the Security Council, the Americans enjoyed the benefit of a hospitable forum. They might have lived without a veto and could have been burdened by an abstention mandate—so long as the nation was protected by supermajority rule in a chamber consisting mostly of states with which it enjoyed friendship or leverage. The Soviets in 1945 faced a more hostile environment; they could rely on neither allies nor influence in the Council, and thus insisted on being unburdened by abstention. Such a comprehensive veto was also attractive to the elected U.S. politicians who needed the support of the Senate to ratify the treaty. It was thus a confluence of interests as well as a clash of interests that drove the evitable compromise in San Francisco.

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82. North Atlantic Treaty arts. 5, 10, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. Some international bodies without military powers, like the Organization of American States (OAS), have come into being with a two-thirds majority rule rather than a veto. Organization of American States, May 2, 1948, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; *see also* Stephen Zamora, *Voting in International Economic Organisations*, 74 AM. J. INT'L L. 566, 574 (1980).

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