

Working Methods of the United Nations Security Council Failures in Syria

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Introduction

After almost nine years, the Security Council remains deadlocked on the Syrian crisis, incapable of passing any meaningful resolution. Throughout the Syrian civil war, Russia has continued to undermine its duty as a permanent Security Council member through its use of the veto power. As a result of the Security Council impasse, the General Assembly intervened by creating the International, Impartial and Independent Mechanism (IIIM) to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab

Republic since March 2011. The IIIM is the first step towards holding perpetrators accountable for the worst crimes known to mankind, providing long due hope for the Syrian people and for the international criminal justice system.

This article focuses on the Working Methods of the Security Council, specifically the permanent member veto power, and how it has failed the people of Syria. The fourteen Security Council draft resolutions vetoed by Russia will be analysed, demonstrating how the veto power allows national interests to take precedence over international peace and security. Last, Russia and Syria's criticism regarding the lawfulness of the General Assembly resolution which created the IIIM, will be analysed.

Early Dimensions of the United Nations Security Council

Established in the aftermath of the Second World War, the veto power was necessary to securing support for the formation of the Security Council. As set out in Article 23 of the Charter the Security Council consists of five permanent members (P5): China, France, Russia, the United States and the United Kingdom. The unanimity rule underlies the Security Council's decision-making power, a rule that was passed over from the League of Nations and is now entrenched under Article 27(3) of the *Charter* requiring all concurrent votes of all P5 members to pass Security Council resolutions, aside from procedural matters (Sabine Hassler, *Reforming the UN Security Council Membership: The Illusion of Representativeness*, 2012 at 33). The P5 members represent the major powers and their permanency and unanimity is dictated by the belief that "peace could only be maintained as long as the major powers had an interest and were willing to cooperate in maintaining it" (Hassler, 2012 at 32).

The conferral of the veto power under the Charter assumed that the P5 are prepared and willing to act in unity on issues of peace and war and assume added responsibilities (Hassler, 2012 at 30). However, the *Charter* allocates veto privilege to P5 members, allowing them to overturn an otherwise unanimous decision, without attaching any additional responsibility than that conferred on non-permanent members. Rather, under Article 24 of the *Charter*, the Security Council as a whole is responsible for maintaining international peace and security. This structural failure generally results in P5 members voting along national interests as opposed to upholding the United Nations' optimistic task of prioritizing international peace and security (Graham Melling & Anne Dennett, *The Security Council Veto and Syria: Responding to Mass Atrocities Through the "Uniting for Peace" Resolution*, 2017 at 290).

The use of the veto power in circumstances of grave human rights violations and the likely violation of international criminal law hinders the Council's legitimacy and efficiency, resulting in several proposals by various United Nations bodies to reform the Security Council Working Methods and veto power. In 2015 the Accountability Coherence and Transparency Group (ACT) put forward reforms focused on three issues, two of which related directly to the veto power: (1) all United Nations members refrain from using the veto power in cases of genocide and grave human rights abuses, and (2) require the annual Council report provide justification and reasons for member actions (Joanna Harrington, *The*

Working Methods of the United Nations Security Council: Maintaining the Implementation of Change, 2017 at 47). ACT has focused on a pledge for all United Nations members, known as the "Code of Conduct" which aims at achieving timely and decisive actions in cases of international criminal law violations as well as a pledge to refrain from voting against credible Council resolutions aimed at preventing or ending said crimes (Harrington, 2017 at 49). One hundred and twelve members of the United Nations currently support ACT's Code of Conduct, France and the United Kingdom being the only P5 members to support the Code (Centre for UN Reform Education, *Member States in Support of Limiting the use of Security Council Veto*).

Russia and the Veto Power

To date, Russia has vetoed a total of fourteen draft resolutions tabled by the Security Council in efforts to investigate, resolve and quell the ongoing and increasing human rights abuses and violations of international law in the Syrian Arab Republic.

Russia, the Veto and Condemning Syria

Russia's first exercise of the veto power, as it pertains to the Syrian civil war, was to reject early draft resolutions condemning violence, human rights abuses, violations of international law and refusing to support peace plan proposals. The early draft resolutions came amidst the High Commissioner for Human Rights' concerns that crimes against humanity were being committed in Syria as well as the Assad regime failing to make any serious efforts to cooperate. However, Russia justified its reluctance to support the Security Council resolution stating that no efforts were made to end attacks by armed groups, that members of the international community were still advocating regime change and that Russia was undergoing independent national efforts to work with Syria.

Russia, the Veto and Sanctions

In the early stages of the civil war, Russia was indirectly condemned for holding the Security Council hostage while simultaneously benefiting from arms trade with the Assad regime. Naturally, when the time came to impose tough sanctions and an arms embargo, Russia exercised its veto power. The proposed draft resolution on sanctions and embargos primarily focused on removing heavy weapons from the region by threatening sanctions if the regime did not abide by its commitment to halt the use of weapons in civilian neighbourhoods. The resolution also proposed a mandate extension for the United Nations Supervision Mission in the Syrian Arab Republic (UNSMIS).

Russia continued to justify its use of veto by claiming the draft resolution was a backdoor attempt at military intervention (Security Council, S/PV.6810 at 8). The United Kingdom condemned Russia's fears as unfounded, highlighting the Council's reference to Article 41 of the *Charter*, which only allows for non-armed force as opposed to Article 42, which would enable the Council to use armed alternatives. Russia maintained its position, stating Council resolutions, such as the threat of sanctions, are unfair and exclusively target the Government of Syria.

Russia is Syria's largest supplier of arms since 2009, with the exception of 2014 and 2016 where Iran marginally succeeded Russia (Stockholm International Peace Research Institute, *SPIRI Arms Transfers Database*). Russia's veto of the draft resolution threatening sanctions and embargos raises concern about the misuse of the veto, promoting national interests over international peace and security. Data from the Stockholm International Peace Research Institute (SIPRI), an independent international institute focused on research into conflict, armaments, arms control and disarmament, showcases why an arms embargo would be unfavourable to Russian interests. Between 2010 and 2018, Syria represented Russia's sixth largest arms partner and almost exclusively Syria's largest supplier (*SPIRI Arms Transfers Database*).

Russia, the Veto and the ICC

Established by the Human Rights Council, the Independent International Commission of Inquiry on the Syrian Arab Republic warned about possible war crimes and crimes against humanity being committed in Syria as early as August 2011. Over fifty thousand photographs depicting atrocities committed in Syria that amounted to war crimes, crimes against humanity and possible genocide, were published in the Caesar Report, after being leaked by anonymous military defector Caesar (Security Council, S/2014/244). By February 2013, the Commission of Inquiry concluded that Syria should be referred to the International Criminal Court (ICC).

The jurisdiction of the ICC is limited to those who are party to the Rome Statute. Syria is not a party to the Rome Statute and is therefore not subject to the jurisdiction of the ICC unless Syria self-refers to the ICC or the Security Council, through a resolution, refers Syria to the ICC. Relying on the findings of the Commission of Inquiry, the Security Council presented a draft resolution in May 2014 to refer Syria to the ICC. Russia vetoed the draft, referring to Western military intervention, an issue that has repeatedly been addressed by Council members, and reference to the failures in Libya following a referral to the ICC (Security Council, S/PV. 7180 at 13).

Russia, the Veto and Chemical Warfare

Between February 2017 and April 2018 five draft resolutions condemning chemical weapon use in Syria were also vetoed by Russia. In February 2017, a draft resolution based on the findings of the Joint Investigative Mechanism of the Organization for the Prohibition of Chemical Weapons (OPCW) was presented to the Council with the effect of imposing sanctions on entities and individuals deemed to be involved in the production or use of chemical weapons in Syria (Security Council, S/2017/172). The OPCW Report identified 21 companies, organizations and individuals linked to the use of chemical weapons and that would be subject to travel bans, asset freezing and embargoes on certain materials, should the resolution pass. The draft resolution also required all States take appropriate measures to prevent the direct or indirect supply, sale or transfer to, or for the benefit of, the individuals or entities identified by the OPCW.

Russia's use of the veto power in February 2017 directly contradicted Resolution 2118 (2013) where

the Security Council decided “in the event of non-compliance with this resolution, including unauthorized transfer of chemical weapons, or any use of chemical weapons by anyone in the Syrian Arab Republic, to impose measures under Chapter VII of the United Nations Charter”. Furthermore, Russia’s veto undermined its commitment to The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (OPCW). Specifically, Russia’s veto violated Article 1 (d) of OPCW, whereas “Each State Party to this Convention undertakes never under any circumstances… to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.” Russia ultimately denounced the resolution on the basis that it was voting against confrontation and in support of cooperation.

In April 2017, Russia’s commitment to cooperation rather than confrontation led to another veto of a draft resolution calling for the cooperation of Assad's government with an investigation into the deadly suspected chemical attack in the rebel-held town of Khan Sheikhun. Russia claimed that the draft resolution was slanted against the Government of Syria and again denounced the findings of use of chemicals (Security Council, S/PV.7922 at 7). Russia’s committed belief in the lack of impartiality of OPCW and the Joint Investigative Mechanism lead to another veto in November 2017, which denied a renewed mandate for the UN-led probe of chemical weapon attacks in Syria (Security Council, S/PV.8105). After a chemical attack on the Syrian city of Duma, renewed efforts were made in April 2018 with the American lead initiative to establish a new mechanism for independent investigation into the use of chemical weapons, the United Nations Independent Mechanism of Investigation (UNIM). The draft resolution was vetoed by Russia due to concern over the independence and impartiality of the Mechanism, claiming the findings of the Joint Investigative Mechanism, which initially found chemical use, was incorrect.

Russia, the Veto and Humanitarian Aid

Two humanitarian draft resolutions were presented in late 2019: the September draft focused on ending hostilities in Syria following the attacks in Idilib and the December draft intended to renew cross-border assistance. Both were vetoed by Russia. Russia accused the authors of the September 2019 bill of protecting international terrorists and attempting to blame the hostilities in Idilib on Russia and Syria (Security Council, S/PV.8228 at 2). In December, Russia claimed that the cross-border assistance mechanism presented by the Council did not take into account changes to the conflict since 2014 (Security Council, S/PV.8697 at 2). Russia emphasized the positive changes brought about by the Syrian government and denied that areas that would be assisted by the mechanism required assistance. Russia supported assistance going through the Syrian government, failing to make light of the consistent refusal of the Syrian government to cooperate with neither the Security Council nor the High Commissioner of Human Rights.

International Response to Security Council Deadlock

On 21 December 2016 the General Assembly of the United Nations adopted Resolution 71/248, establishing the International, Impartial and Independent Mechanism (IIIM) to assist in the

investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011. Lichtenstein introduced the draft resolution for the establishment of the IIIM as a response to the limitations and failure of the Security Council to establish peace and security in Syria. The IIIM is tasked with collecting, consolidating, preserving and analysing evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law (General Assembly, A/71/755 para 10).The lawfulness of the IIIM resolution, which passed by a vote of 105 to 15 with 52 abstentions, garnered significant attention and criticism by dissenting votes of Russia, China and Syria.

Legal Criticism of the IIIM

United Nations Charter, Article 2(7)

The delegation of the Syrian Arab Republic criticized the IIIM Resolution for undermining the sovereignty of Syria but more specifically for violating Article 2(7) of the *Charter*. Syria, Russia and China contend that the matters relate to the Syrian civil war, and therefore any investigative or judicial mechanism infringes on the domestic jurisdiction of Syria contrary to Article 2(7).

The scope of influence of the United Nations has developed significantly since its inception and member States have increasingly become party to treaties and obligations under the United Nations auspices (Kawser Ahmed, *The Domestic Jurisdiction Clause in the United Nations Charter: A Historical View*, 2006 at 175). Naturally the interpretation of the Charter developed alongside the changing dimensions of the organization. While the framers of the *Charter* may have intended that Article 2(7) be interpreted quite literally, limiting the UN from stepping into domestic matters, more recently, matters that are essentially within the jurisdiction of a sovereign state are far fewer with some arguing Article 2(7) is obsolete (Georg Nolte, *Purposes and Principles in The Charter of the United Nations: A Commentary*, 2012).

Sovereignty, as it is understood today, does not mean complete independence or absolute power over internal matters, as Syria, Russia and China tried to argue in the face of the draft resolution vote for the creation of the IIIM. While fundamental sovereignty and integrity continue to underscore the work of the United Nations, the period of absolute sovereignty is no longer. In the 1992 Secretary General statement *An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping* Boutros Boutros-Ghali explicitly stated that sovereignty, territorial integrity, independence of States, the very terms used to oppose the IIIM, should not work against self-determination of peoples. In other words, sovereignty cannot be used by member states to enable them to inflict suffering on their people. This has not stopped member States from invoking sovereignty to shield itself from accountability and criticism in the international arena.

The mandate of the IIIM does not qualify as “interference” as prescribed in Article 2(7). The term ‘intervention’ under Article 2(7) has generally enjoyed a very broad definition in order to limit the United Nations from going beyond its regulated function (Nolte, 2012). However, in the context of international law, the term ‘interference’ is commonly defined as ‘dictatorial interference’ (Nolte, 2012). In the case of the Syrian civil war, assigning the term ‘dictatorial interference’ limits the otherwise broad scope of interference to interference that makes use of force or imperative pressure. Referring back to the mandate of the IIIM, the purpose of the mechanism is quasi-judicial and focused on investigating, collecting and protecting evidence that may be used by a body, future or present, that has the jurisdiction to prosecute. There is no imperative pressure or force assigned to the IIIM, its mandate largely administrative and investigative in nature. Therefore, the IIIM, as a mechanism, does not constitute ‘interference’ as prescribed in Article 2(7) of the Charter.

United Nations Charter, Article 12(1)

The resolution to establish the IIIM was introduced by the General Assembly while the Security Council remained seized of its responsibilities vis-à-vis the Syrian civil war, contrary to Article 12(1). However, Article 24 gives primary responsibility over matters of international peace and security to the Security Council, but not exclusive responsibility. The General Assembly still enjoys authority over international peace and security as articulated and justified under articles 10, 11(2), 14, and 35(1). The General Assembly is not prevented from making recommendations on matters just because they are on the Security Council agenda (Nolte, 2012). In fact, the Legal Counsel of the Security Council previously clarified that “is exercising” in Article 12(1) is to be interpreted as “is exercising in this moment” (Nolte, 2012). While the Security Council does remain seized of its responsibilities vis-à-vis the Syrian civil war, the Security Council was not, at this very moment, considering an investigative body similar in nature to the IIIM and therefore the General Assembly was not violating Article 12(1).

This view is supported by jurisprudence from the International Court of Justice (ICJ). The ICJ released an Advisory Opinion in the *Israeli Wall Case* where the ICJ distinguishes between specific and general disputes (Christian Wenaweser & James Cockayne, *Justice for Syria?*, 2017 at 222). The ICJ chose to take an approach of breaking down a dispute into several categories and assessing which categories were under the direct purview of the Security Council and therefore could not be considered by the General Assembly. The Opinion clarified that regardless of whether the Security Council remains seized of its responsibilities by claiming the topic as a whole is on the agenda of items, the General Assembly can continue to make recommendations on topics and areas that the Security Council are not directly dealing with (Nolte, 2012).

Limitations of the Mandate of the General Assembly

The final substantial legal question raised by the resolution to create the IIIM is the issue of whether the General Assembly went beyond its remit. Russia argued that the General Assembly cannot create an organ with prosecutorial powers because they do not possess these powers themselves (Security Council, S/PV.7180 at 11). Russia was correct in stating that the General Assembly does not have the

authorisation under the Charter to establish prosecutorial bodies.

However, Russia's assertion that the IIIM is a prosecutorial body was incorrect.

The creation of the IIIM was an innovative and unprecedented move by the General Assembly extending the mechanism as far as possible within its mandate by creating a quasi-judicial mechanism, not a prosecutorial body. The Mechanism mandate tasks the IIIM (1) with collecting, consolidating, preserving and analysing evidence of violation of international humanitarian law and human rights violations and abuses for future use, not prosecuting, (2) the IIIM resolution calls for voluntary cooperation from all States, parties to the conflict and civil society, (3) the IIIM resolution instructs the Mechanism to cooperate with the Human Rights Council Mechanism and the Independent International Commission of Inquiry on the Syrian Arab Republic. None of which are prosecutorial in nature.

Russia clarified its position in a *note-verbale*, where it stated the act of analysing evidence and preparing files rendered the Mechanism prosecutorial in nature. Once again, Russia misrepresents the functions of the IIIM and misinterprets the mandated functions of the General Assembly. The only connection with the prosecution of crimes are the standards of the IIIM in collecting and analysing evidence. Standards do not create a prosecutorial function, they simply set the standard for the quality of evidence to be gathered. The work of the IIIM is held to international criminal law standards but does not hold an international criminal law function but rather facilitates present or future proceedings for bodies equipped with prosecutorial powers.

The question remains whether the General Assembly is acting within its mandate by creating a quasi-judicial body. While the creation of the IIIM is unprecedented, Articles 10 and 22 of the Charter suggest that the General Assembly is acting within its mandate and the IIIM is a lawful exercise of its functions as it does not decide guilt. Under Functions and Powers of the General Assembly, Article 10 states the General Assembly is empowered to discuss and make recommendations regarding any question or matters within the scope of the Charter or in regard to powers and functions of any organ of the Charter. International peace and security are an unquestionable matter and question of the Charter when considering the wide-ranging goals and principles of the Charter, meaning the scope of Article 10 covers nearly all political questions of international importance. (Eckart Klein & Stefanie Schmahl, *The General Assembly: Functions and Powers in The Charter of the United Nations: A Commentary,* 2012).

The limitations of Article 10, that the Security Council enjoys primacy in international peace and security functions, does not hinder the General Assembly's power to create the IIIM. As discussed previously, the Security Council was not explicitly dealing with this issue and the General Assembly resolution does not undermine international peace and security nor does it contradict the work of the Security Council as it stands.

Furthermore, the General Assembly is empowered “to establish such subsidiary organs as it deems necessary for the performance of its functions” under Article 22. The limits of these functions have not been clearly established but have generally been interpreted in an expansive manner. (Daniel-Erasmus Khan, *The General Assembly: Procedure in The Charter of the United Nations: A Commentary*, 2012). However, the ICJ clarified that Article 22 does not extend to adjudicatory powers (Khan, 2012). In other words, the General Assembly does not hold adjudicatory powers and therefore cannot create subsidiary organs with powers which it does not hold. However, as clarified previously, the IIIM itself is not adjudicatory in nature but rather investigative and informs the General Assembly’s discussions and recommendations.

However, if we were to lead with the assumption that the IIIM is adjudicatory in nature, as Russia and Syria claim, the ICJ allowed the General Assembly to create subsidiary organs with judicial power on the basis of the General Assembly’s implied power (Khan, 2012). In fact, implied powers allowed the General Assembly to establish the United Nations Appeal Tribunal back in the 1950s (Khan, 2012). Articles 7(2), 22 and 101, together, supported an implied power that allowed the General Assembly to create a tribunal, which unlike the IIIM, was mandated with very clear adjudicative powers, on the basis that the mechanism is necessary for the work of the United Nations. Therefore, Russia and Syria’s argument that the creation of the IIIM undermines the Charter by going beyond the mandated function of the Assembly fails on both accounts.

Moving Forward: Accountability for War Crimes Committed in Syria

Since October 2011, when the first of fourteen vetoes was cast, Security Council members dedicated to quelling the Syrian conflict maintained that they would be undeterred by Russia’s lack of cooperation. While the determination of the majority of Security Council members was unwavering, cracks in the Working Methods of the Security Council were made ever so obvious.

The IIIM represents innovative ways the world community has responded to the Syrian crisis that adds support to our commitment of international peace, security and the international justice system. Russia and Syria’s unsuccessful legal criticism of the IIIM, relying on misrepresentation of the IIIM mandate and misinterpretation of the Charter, only acts to chip away at increasingly unconvincing justification for non-intervention.

Security Council members committed to justice for Syria did not waiver. However, it is disappointing that this commitment could not be realised by those we primarily entrust with international peace and security. The innovative work of the General Assembly is commendable, but we need to continue to work towards a resolution that can make use of the IIIM’s work. Until then, justice remains aspirational.

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