



Universiteit
Leiden
The Netherlands

Imagining justice for Syria : water always finds its way

Schaack, E.M. van

Citation

Schaack, E. M. van. (2020, April 29). *Imagining justice for Syria : water always finds its way*. Retrieved from <https://hdl.handle.net/1887/87514>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/87514>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/87514> holds various files of this Leiden University dissertation.

Author: Van Schaack, E.M.

Title: Imagining justice for Syria : water always finds its way

Issue Date: 2020-04-29

The Security Council & Syria: A Study In Dysfunction

*[T]hose on the Council who have been given a very special right called the right of veto ... should exercise it only in the rarest type of case, and they should defer to the democratic majority of this Council, if there is such a majority.*¹

The Security Council occupies a dominant place in the United Nations' peace and security architecture. And the Council's five permanent members—China, France, Russia, the United Kingdom, and the United States (the P-5)—occupy a dominant place in the Council. As is well known, substantive decisions of the Council require an affirmative vote of nine Council members including the “concurring vote”—understood as either a “yes” vote or an abstention—of the P-5.² This perennially-controversial veto power—and the imperative of securing unanimity among the then-Great Powers—was the price paid to garner the victorious Allies' support for the establishment of the United Nations after World War II.³ The theory was that any executive course of action to maintain international peace and security would inevitably involve the P-5, thus necessitating their concurrence.⁴ Upon ratifying the U.N. Charter, all U.N. member states have agreed to carry out the decisions of the Council, which prevail over any competing international legal obligations, except perhaps when it comes to *jus cogens*—peremptory norms that brook no derogation.⁵

In the early days of the United Nations and during the Cold War period, the Union of Soviet Socialist Republics invoked its veto the most frequently, a pattern that dropped off precipitously once Russia succeeded to the Soviet Union's seat after the latter's dissolution in 1991.⁶ The United States comes in second in exercising its veto prerogative, particularly when it comes to resolutions that appear to be aimed at Israel.⁷ At the end of the Cold War, the Council went through a period of time in which the veto was used sparingly, heralding exultations about the rebirth of the Council.⁸ During this revival, the P-5 endeavored to operate via consensus and avoid provoking any one among them to invoke its veto, attesting to the power of the so-called “pocket veto.”⁹ This

¹ U.N. SCOR, 1st Sess., 46th mtg. at 356, U.N. Doc. S/PV.46 (June 17, 1946) (statement of Australia).

² U.N. Charter art. 27. The term “veto” is actually not employed in the Charter. Decisions on procedural matters require just nine votes, but the question of whether a matter is procedural or substantive is a substantive question.

³ Francis O. Wilcox, *The Yalta Voting Formula*, 39 AM. POL. SCI. REV. 943, 944 (1945).

⁴ Edward C. Luck, *A Council for All Seasons: The Creation of the Security Council and its Relevance Today*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, 61, 63 (Vaughan Lowe et al. eds., 2008).

⁵ Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUROP. J. INT'L L. 59 (2005).

⁶ Yehuda Z. Blum, *Russia Takes over the Soviet Union's Seat at the United Nations*, 3 EUROP. J. INT'L L. 354 (1992).

⁷ See *The 43 Times US has Used Veto Power against UN Resolutions on Israel*, MIDDLE EAST EYE, Dec. 18, 2017. A notable exception was President Obama's abstention on Resolution 2334 condemning and demanding a halt to Israeli settlements. S.C. Res. 2334, ¶¶ 1-2, U.N. Doc. S/RES/2334 (Dec. 23, 2016). The United States had vetoed a similar resolution in 2011, marking the only veto exercised by the Obama Administration.

⁸ See Global Policy Forum, *Changing Patterns in the Use of the Veto in the Security Council* (Aug. 2012).

⁹ Sahar Okhovat, *The United Nations Security Council: Its Veto and Its Reform*, CPACS Working Paper No. 15/1, at 15 (Dec. 2001).

mutual restraint can create space for useful dialogue, reflection, and compromise and can ensure the Council exercises self-discipline before moving forward with coercive action.¹⁰ As a direct result of this more constructive dynamic, the number of resolutions passed by the Council increased substantially—from an average of 15 resolutions per year to more than 50 per year in the 1990s and 2000s.¹¹ As revealed by the situation in Syria and elsewhere, however, this trend proved to be no more permanent than the one that preceded it.

Once Syria descended into violence, relations within the Council chamber became increasingly acrimonious, with the two camps occupying very little common ground. Reading the Council's Syria-related records reveals the steady deterioration of relations between Russia (and its few erstwhile allies) and the P-3 (the United States, France and the United Kingdom), which generally enjoyed the support of the rest of the Council's elected members (except Venezuela, which aligned itself with Russia). The Security Council has only issued about two dozen formal resolutions, and half as many presidential statements, dedicated to the situation in Syria—a conflict now entering its ninth year.¹² Accountability for the crimes being committed in Syria has been a casualty of this dysfunction.

The Security Council discursive practices, pronouncements, operational initiatives, and vetoed resolutions offer a distinctive window into the history of the conflict and the international community's meager and ineffectual reaction to the atrocities underway. This chapter traces these malfunctions on a number of fronts alongside the few areas of progress. The areas of concern include condemnations of human rights violations and abuses; attempts to impose ceasefires and expand humanitarian access; the use of force and the Responsibility to Protect; inspiring the parties to pursue a political transition; countering terrorism and violent extremism; neutralizing Syria's chemical weapons; sanctions regimes; and—most relevant to this volume—promoting accountability. The most spectacular failure in the accountability realm is no doubt the French-led ICC referral effort, defeated by the tag-team of Russia and China.¹³ Although numerous states, U.N. entities, and international personalities supported France's proposal, the draft resolution proved dead on arrival. The demise of a Joint Investigative Mechanism dedicated to attributing responsibility for chemical weapon use marked another low point, attesting to the fragility of multilateral arrangements subject to the veto. As a result of these outcomes, states and advocates have looked elsewhere to advance accountability.

As this dissertation demonstrates, the inability of the Council to operate has opened the way for individual states and other international institutions—multilateral and non-governmental—to innovate to advance the justice imperative as Syria devolved into total war. In the absence of resolute action by the Council, work to address the Syrian conflict occurred elsewhere, such as the office of the U.N. Secretary-General through serial Joint Special Envoys of the United Nations and the League of Arab States (Kofi Annan, Lakhdar Brahimi, Staffan de Mistura, and now Geir O. Pedersen) as well as in various multilateral assemblages, such as the

¹⁰ See Philippa Webb, *Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria*, J. CONFLICT & SECURITY L. 1, 2-3 (2014) (arguing that the veto may be used not only to “block the Council from fulfilling its role under the Charter,” but also to “engender restraint by preventing the Council from engaging in ‘excessive’ maintenance of international peace and security”).

¹¹ See Global Policy Forum, *Table on Number of Security Council Resolutions and Presidential Statements (1998-2009)*, <https://www.globalpolicy.org/component/content/article/102/32802.html>.

¹² All the Council's Syria pronouncements are compiled here: <http://www.securitycouncilreport.org/un-documents/syria/>.

¹³ See Albania et al.: draft resolution, U.N. Doc. S/2014/348 (May 22, 2014).

League of Arab States, the Friends of the Syrian People (FOSP),¹⁴ the Action Group for Syria,¹⁵ and the International Syria Support Group (ISSG).¹⁶ The General Assembly, U.N. Human Rights Council, and the Organisation for the Prohibition of Chemical Weapons (OPCW)—where Russian influence is negligible—also stepped up, at times with small and middling states in the lead. The Assembly has regularly adopted virtually the very text vetoed in the Council and, with exceptional candor, condemned the Council’s inaction. To be sure, Russia and P-3 have occasionally been able to reach consensus outside the United Nations and away from the dominion of Chapter VII, but the seemingly inexorable vetoes have eclipsed the areas of agreement.

The existence and operation of the veto has always been controversial, all the more so when invoked in the face of atrocities.¹⁷ Criticism of the Security Council’s (in)action on Syria has galvanized a number of creative U.N. reform efforts that have found broad support within the General Assembly, but only limited endorsement among the P-5, whose assent will be necessary to achieve any meaningful amendments to the U.N. Charter or the working methods of the Council. The chapter closes with a discussion of the way in which these proposals have been further animated by the trenchant deadlock on Syria.

Security Council Turns to Syria

Given the dynamics dividing the P-3 and the P-2, the Security Council has largely failed in its peace and security mandate when it comes to the conflict in Syria. Although Russia presented itself as a reliable and responsible partner in the global counter-terrorism effort, there is no question it has abused its veto prerogative to shield and even prop up the Assad regime—fourteen times as this project comes to a close, often with China in tow.¹⁸ As a result of this paralysis, coercive measures of any consequence against Assad or senior members of his regime have been foreclosed. Even the provision of basic food and medical aid within Syria became politically polarized as President Bashar Al-Assad flouted humanitarian principles and manipulated the provision of aid along sectarian lines.¹⁹ To be sure, the Council has remained “actively seized” of the conflict and has performed decisively in some areas—most saliently on humanitarian initiatives, within the

¹⁴ The FOSP was a coalition of states that coalesced as Russia began to veto resolutions devoted to Syria. It met several times during 2012-13 before petering out.

¹⁵ The Action Group for Syria was composed of the ministers of foreign affairs (or the equivalent) for China, France, Russia, the United Kingdom, the United States, Turkey, Iraq, Kuwait, and Qatar. The European Union was represented through the High Representative for Foreign Affairs and Security Policy. The Secretaries General of the United Nations and the League of Arab State were also included.

¹⁶ These various alliances are discussed in more detail in chapter 2. ISSG is a multilateral body established when no agreement was reached in the Geneva II conference held in January 2014. It is chaired by the United States and Russia. See The Syria Institute, *International Syria Support Group (ISSG)* (June 2016). Unlike the FOSP, all major players in Syria, including Iran, were members of ISSG.

¹⁷ A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY: REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, U.N. Doc. A/59/565, at 64 (Dec. 2, 2004) (“The Charter of the United Nations provided the most powerful States with permanent membership on the Security Council and the veto. In exchange, they were expected to use their power for the common good and promote and obey international law.”).

¹⁸ For a compilation of all vetoes exercised in the Council, see Dag Hammarskjöld Library, *Security Council—Veto List*, <http://research.un.org/en/docs/sc/quick>. The first P-2 double veto cast came on a draft resolution dedicated to Myanmar in 2007. Zimbabwe (2008) and Venezuela (2019) were next. The rest all concern Syria.

¹⁹ See U.N. Doc. S/PRST/2013/15 (Oct. 2, 2013) (invoking the 1991 U.N. Guiding Principles on Humanitarian Emergency Assistance (U.N. Doc. No. A/RES/46/182), which are premised on such assistance being delivered on the basis of need and devoid of any political prejudice).

counter-terrorism realm, and in response to the use of chemical weapons—but otherwise, it has disappointed.

In the negotiations, Russia laid down its own “Negroponte Doctrine”,²⁰ generally rejecting draft resolutions that singled out the Assad regime too pointedly, that did not call for the armed opposition to dissociate from extremist groups, or that did not sufficiently condemn terrorism. On offense, Russia advanced language that suggested an equivalency of responsibility for abuses among the conflict’s parties and insisted the Council address the scourge of terrorism. Russia also implicitly criticized Western support for members of the armed opposition. As Russia’s intransigence set in, the P-3 dispensed with diplomatic decorum and rushed forth draft resolutions knowing full well they would fail. The P-3 then highlighted these predictable results to underscore Russia’s complicity with the Syrian government—a pattern not lost on the Russian representative, who at one point noted, “[i]t is absolutely clear to us why adopting a draft resolution ahead of time has been proposed. ... This has not been done out of good intentions; it is intended to embarrass Russia once again.”²¹ This willingness to isolate and attempt to shame Russia on Syria is also attributable to the Europeans’ and the Americans’ aggravation over Russia’s actions in Ukraine. Equally unprecedented has been the frequency of the double veto, with China setting aside its prior practice of abstaining from resolutions doomed to fail or following the lead of the relevant regional organization. Instead, China has regularly thrown in its lot with Russia, at times in opposition to the League of Arab States.²² Prior to this point, China exercised its veto sparingly, primarily where it has economic interests (as in Zimbabwe and Burma/Myanmar) or to punish states for their support for or recognition of Taiwan (as with Guatemala and Macedonia).

Adding to the noise, the Syrian Permanent Representative to the United Nations, who remained loyal to the regime, was often invited to participate in these gatherings because Syria’s interests were “specially affected.”²³ He used this prerogative to offer a series of confrontational, and at times delusional, soliloquys protesting any intrusion into Syria’s internal affairs, proclaiming Syria’s faithful adherence to international humanitarian law (IHL), and objecting to the provision of foreign support for terrorist elements in its midst. Given these battle lines, reading states’ explanations-of-vote in the Council is like playing the “Exquisite Corpse” parlor game—delegates seem to be discussing entirely different conflicts in their Council interventions. All this has been to the regret of elected members attempting to create space for more genuine negotiations. As the Egyptian representative noted at a particularly contentious meeting of the Council: “the Council, which was created in the previous century to peaceably settle disputes, is gradually becoming a mere media platform. ... [C]onsultations have amounted to no more than a repetition of traditional positions and dialogue that falls on deaf ears.”²⁴

It is impossible to fully understand the Security Council’s collective approach to the arrival of the Arab Spring in Syria without recalling the situation in Libya. When protests broke out in

²⁰ John Negroponte, the United States’ Permanent Representative to the United Nations during the administration of George W. Bush, spelled out in this eponymous doctrine the elements that would have to be contained in any draft resolution involving Israel-Palestine to avoid a U.S. veto. Michael H. Jordan, *Symbolic Fight for Israel at the UN*, CHRISTIAN SCIENCE MONITOR, Dec. 8, 2003.

²¹ See, e.g., U.N. SCOR, 72nd sess., 8073rd mtg., at 2, U.N. Doc. S/PV.8073 (Oct. 24, 2017).

²² See Minxin Pei, *Why Beijing Votes with Moscow*, N.Y. TIMES, Feb. 7, 2012 (noting that China has few strategic or economic interests in Syria but wants Russia’s help to oppose Council action in countries where it does, such as in Myanmar and Zimbabwe).

²³ U.N. Security Council, Provisional Rules of Procedure art. 37.

²⁴ U.N. SCOR 71st sess., 7785th mtg., at 12, U.N. Doc. S/PV.7785 (Oct. 8, 2016) (statement by Egypt).

Syria in 2011, the Security Council was preoccupied with events in Northern Africa, where Muammar Qadhafi had launched his own violent crackdown against an explosive citizen uprising. In short order, the Council referred Libya to the ICC and imposed robust sanctions with Resolution 1970.²⁵ Soon after, in Resolution 1973, it established a no-fly zone and authorized states to “take all necessary measures” to protect civilians in Libya, language that opened the door to an armed intervention by NATO that ultimately led to the fall of the Qadhafi regime.²⁶ This robust response inspired hope among members of the nascent Syrian opposition that Assad might be similarly dispatched with.

Whether this outcome in Libya was contemplated at the time Resolution 1973 was adopted remains contested. Russia, which joined the first Libya resolution but abstained on the second, now claims that the Council’s authorization to engage in atrocities prevention and response improperly evolved into an exercise in regime change.²⁷ It is insisted that this experience sowed seeds of distrust that now justify Russia’s firm obstructionism in Syria.²⁸ More likely, the Libyan history gave Russia a set of arguments it could deploy to appeal to states concerned about Security Council overreach and distrustful of the Responsibility-to-Protect doctrine. In any case, even if taken at face value, the Libya comparison arguably enjoyed a hint of sincerity when first uttered in connection with Syria, but it sounded increasingly tactical and pretextual as time wore on. In an effort to alleviate Russia’s Libya hangover, almost every resolution passed on Syria contained the standard language reaffirming the Council’s “strong commitment to the sovereignty, independence and territorial integrity of the Syrian Arab Republic, and to the purposes and principles of the Charter of the United Nations.”²⁹ These commitments, however, began to ring hollow as more and more states became indirectly, and then directly, embroiled in the conflict.³⁰

The Denunciation of Escalating Human Rights Violations and Abuses

Turning to the specifics of the Security Council’s resolutions on Syria, member states have regularly condemned, in the strongest available terms, the international crimes underway in Syria in the preambular and operative paragraphs of the resolutions that have passed. Each succeeding text announced mounting levels of violence and the death and displacement of ever more civilians, including increasing numbers of children. This language became boilerplate over the years, with additional elements being added as the warring parties discovered new ways to violate international law and jeopardize the civilian population.³¹ In addition to a focus on the targeting of civilians, the Council also specifically condemned attacks on humanitarian workers, medical

²⁵ S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

²⁶ S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). Several states abstained on this vote, indicating concern with the course of action but also the influence of the League of Arab States, which largely supported the intervention. See Ranj Alaaldin, *Libya & the Arab League*, in POLITICAL RATIONALE AND INTERNATIONAL CONSEQUENCES OF THE WAR IN LIBYA 105 (Dag Henrikson & Ann Karin Larssen eds., 2016).

²⁷ *Russia has a Serious Stake in Libya’s Uncertain Future*, THE CONVERSATION, June 20, 2017 (noting Russia’s profound dissatisfaction with the way UNSCR 1973 was implemented).

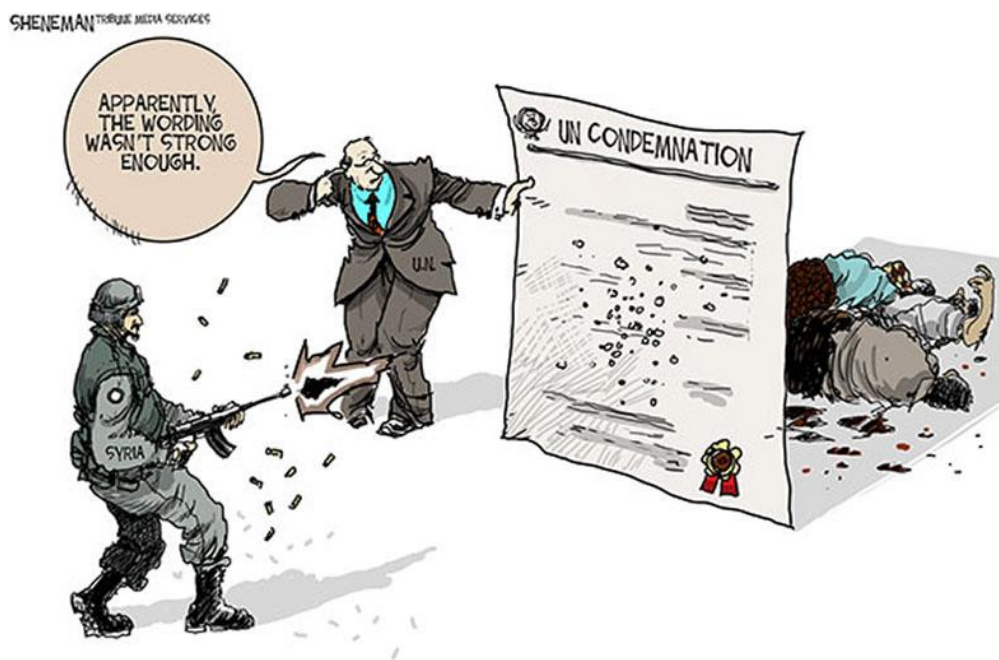
²⁸ But see Erik Voeten, *How Libya Did and Did not Affect the Security Council Vote on Syria*, THE MONKEY CAGE, Feb. 7, 2012 (arguing that observers should not take Russia’s arguments at face value).

²⁹ See, e.g., S.C. Res. 2118, pmb1, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

³⁰ Uri Friedman, *Syria’s War Has Never Been More International*, THE ATLANTIC, Feb. 14, 2018.

³¹ See, e.g., Andorra et al.: draft resolution, S/2016/826 (Oct. 8, 2016) (noting grave distress at the “continued deterioration of the devastating humanitarian situation in Syria, and the fact that now more than 13.5 million people are in need of humanitarian assistance in Syria, and that about 6.1 million people are internally displaced (in addition to the half a million Palestinian refugees who had settled in Syria), [and that] several hundred thousands of people are suffering in besieged areas”) (draft vetoed by Russia).

teams, U.N. personnel, and journalists.³² The Council often observed with equivocation that “some of these violations may amount to war crimes and crimes against humanity.”³³ Although early resolutions focused on the Assad regime, as the war wore on, a rhetorical equivalency gradually emerged between the regime and the increasingly fractured opposition forces. This was a key concession to Russia but also reflected the emergence of less moderate opposition groups as well as a general deterioration of opposition compliance with IHL. With the introduction of terrorist elements into the Syrian theater, the Council generally reserved its strongest accountability language for Al Qaida, the Islamic State in Iraq and the Levant (ISIL), and their affiliates. This section looks at these condemnations, and the rhetorical evolution of the Council’s pronouncements, in more detail.



© Drew Sheneman

The Council first turned its full attention to Syria in 2011.³⁴ At the time, Russia argued that the situation did not present a threat to international peace and security and blocked even a press statement from going forward.³⁵ Later, it invoked its pocket veto to block a European draft

³² See, e.g., S.C. Res. 2393, pmbl, U.N. Doc. S/RES/2393 (Dec. 19, 2017). See generally Beth Van Schaack, *Attacks on Journalists a War Crime*, JUST SECURITY (Aug. 20, 2014) (discussing U.N., civil society, and other initiatives condemning the targeting of journalists).

³³ S/RES/2393, *supra* note 32, ¶ 1.

³⁴ See, e.g., U.N. SCOR, 66th Sess., 6520th mtg., U.N. Doc. S/PV.6520 (Apr. 21, 2011) (containing expressions of concern by the United States, France, Germany about the crackdown on protests and calls for the government to address the legitimate demands of the Syrian people).

³⁵ U.N. SCOR, 66th Sess., 6524th mtg., U.N. Doc. S/PV.6524, at 7 (Apr. 27, 2011) (“The main thing, in our view, is that the current situation in Syria, despite increasing tension and confrontations, does not present a threat to international peace and security.”); Neil MacFarquhar, *Push in UN for Criticism of Syria is Rejected*, N.Y. TIMES, Apr. 27, 2011.

resolution, effectively stalling any concrete action.³⁶ Upon the introduction of a revised text, Russia indicated the draft was still “excessive” and a presidential statement—an instrument that follows consultations and is based on unanimity, but is not put to a vote³⁷—would be “satisfactory.”³⁸ Accordingly, in August 2011, the Council merely issued a presidential statement condemning the violence, calling upon the Syrian regime to respect human rights, urging all parties to act with restraint, and recalling that those responsible for human rights violations should be held accountable.³⁹ It also welcomed promises of reform from the regime but regretted the lack of progress on implementation.⁴⁰ This statement would prove to be a highpoint of agreement within the Council.⁴¹ In a bizarre turn of events, Lebanon—whose leadership was pro-Syria at the time—allowed the statement to go forward but then disassociated itself from it.⁴²

In October 2011, several European Union members floated a new draft resolution that would have denounced the regime’s violent response to the protests and demanded Syrian authorities allow the full exercise of human rights, including the rights of freedom of expression and assembly.⁴³ The draft also called for “an inclusive Syrian-led political process conducted in an environment free from violence, fear, intimidation, and extremism, and aimed at effectively addressing the legitimate aspirations and concerns of Syria’s population.” During the deliberations, all more coercive elements were removed from the original text in an effort to enable the Council to speak with a unified voice. So, instead of imposing an arms embargo or sanctions, as had been contemplated, the draft merely called on states to “exercise vigilance and restraint” over the supply of arms to Syria and indicated the Council’s intention to consider measures under Article 41, the U.N. Charter provision that undergirds U.N. sanctions.⁴⁴

Despite weeks of negotiations and concessions, this draft became the first resolution dedicated to Syria to be put to a vote with the knowledge that it would likely be vetoed by Russia. In its explanation of vote, Russia—which had been unsuccessful in its attempts to include explicit language barring military intervention—repeatedly invoked the specter of Libya and stressed the need to respect national sovereignty and the principle of non-intervention.⁴⁵ It warned that prior Chapter VII resolutions on Libya had been expansively interpreted to authorize more intrusive actions. It also decried the draft resolution’s confrontational and “unilateral, accusatory bent” toward Damascus, the inclusion of ultimatums, and the failure to call upon the Syrian opposition to distance itself from extremist groups. In explaining its own veto, China emphasized its fealty to

³⁶ The United Nations Security Council, *Under-Secretary-General for Political Affairs Briefs Security Council on Syria, Says ‘Repression Is Not the Solution,’ Inclusive Dialogue, Reforms Needed*, U.N. Doc. SC/10235 (Apr. 27, 2011). For a detailed treatment of early responses in the Council, see Saira Mohamed, *The U.N. Security Council and the Crisis in Syria*, 16(11) ASIL INSIGHTS (Mar. 26, 2012).

³⁷ See Marko Milanovic, *Can UNSC Presidential Statements be Legally Binding?*, EJIL TALK! (Apr. 15, 2009).

³⁸ Margaret Besheer, *UN Security Council Again Considers Syria Resolution*, VOA, Aug. 1, 2011.

³⁹ U.N. Doc. S/PRST/2011/16 (Aug. 3, 2011).

⁴⁰ *Id.*

⁴¹ WILLEM VAN DER WOLF & CLAUDIA TOFAN, *LAW AND WAR IN SYRIA: A LEGAL ACCOUNT OF THE CURRENT CRISIS IN SYRIA* 18 (2013).

⁴² *Security Council, in Statement, Condemns Syrian Authorities for ‘Widespread Violations of Human Rights, Use of Force against Civilians*, U.N. Doc. SC/10352 (Aug. 3, 2011) (noting Lebanon’s critique of the statement after it was read out).

⁴³ France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: draft resolution, U.N. Doc. S/2011/612 (Oct. 4, 2011).

⁴⁴ See generally U.N. SCOR 69th sess., 7323rd mtg., U.N. Doc. S/PV.7323 (Nov. 25, 2014) (discussing agenda item “General Issues Relating to Sanctions”).

⁴⁵ These debates are available here: U.N. SCOR, 66th sess., 6627th mtg., U.N. Doc. S/PV.6627 (Oct. 4, 2011).

the principle of noninterference and argued that sanctions would have further complicated, rather than ameliorated, the situation on the ground.

Four states abstained: Brazil, India, Lebanon, and South Africa. Brazil expressed the view that more time should have been given to negotiations within the Council in order to enable it to reach consensus. India explained its reticence on the grounds that the draft resolution did not do enough to place obligations on the Syrian opposition to “abjure violence” and submit their grievances to a “peaceful political process.” South Africa observed that prior Security Council resolutions had been “abused” and opined that elements of the resolution “were designed as a prelude to further actions” and reflected a “hidden agenda aimed at once again instituting regime change, which has been an objective clearly stated by some.” Ambassador Susan Rice, then the United States’ Permanent Representative to the United Nations, dismissed these latter concerns as mere pretext, arguing the draft was “not about military intervention; this is not about Libya. That is a cheap ruse by those who would rather sell arms to the Syrian regime than stand with the Syrian people.” In the meantime, the General Assembly, with the support of 133 member states, adopted a resolution containing much of the same language as the failed Council text, but without the command of Chapter VII behind it.⁴⁶

In February 2012, coincidentally on the thirtieth anniversary of the 1982 Hama massacre, the P-2 vetoed an otherwise consensus resolution, initiated by Morocco and dedicated to encouraging a peaceful resolution of the conflict.⁴⁷ Although some states argued that this new resolution should include an arms embargo, a sanctions regime, and/or a commission of inquiry, the final text was more moderate. Indeed, after the vote, the United Kingdom’s permanent representative noted, “There is nothing in this text that should have triggered a veto. We removed every possible excuse.”⁴⁸ The draft, conceptualized under Chapter VI, would merely have welcomed the ambitious Plan of Action put forward by the League of Arab States and its offer to facilitate a dialogue between the government and the “whole spectrum of the Syrian opposition.” The draft resolution would also have demanded that the Syrian government put an end to human rights violations, implement U.N. Human Rights Council resolutions, allow humanitarian aid, and cooperate with the Human Rights Council’s Commission of Inquiry, established the previous August. In a show of even-handedness, it similarly called upon armed groups to cease attacks on state institutions.

In exercising its second veto vis-à-vis the Syrian conflict, Russia repeated its earlier paranoid prognostications that the supporters of the draft were laying the groundwork for regime change. Member states again attempted to counter this charge in their explanations of vote, to no avail. Russia further argued that the draft continued to send a “biased signal.” For its part, China again lamented that the resolution was put to a vote prematurely, given there had been a request for continued consultations and the Council remained divided. Historically, China has often followed the lead of the pertinent regional organization, so its departure from the Arab League position was notable.⁴⁹ The resolution’s supporters reacted with diplomatic ferocity. Ambassador

⁴⁶ See G.A. Res. 66/176, U.N. Doc. A/RES/66/176 (Dec. 19, 2011). The resolution garnered 11 nays and 43 abstentions (including Russia and China).

⁴⁷ Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, U.N. Doc. S/2012/77 (Feb. 4, 2012).

⁴⁸ These debates are available here: U.N. SCOR, 67th sess., 6711th mtg., U.N. Doc. S/PV.6711 (Feb. 4, 2012).

⁴⁹ Mohamed, *supra* note 36 (noting that China had distanced itself not only from the Arab League but also from members of the Non-Aligned Movement, which supported the resolution).

Rice, for example, expressed “disgust” at the outcome of the vote by a Council “held hostage” by at least one member delivering weapons to Assad. The vetoes inspired the convening of the so-called Friends of the Syrian People (FOSP), which met several times in 2012-13 with members of the Syrian opposition, then styled as the National Coalition for Syrian Revolutionary and Opposition Forces (SOC), which some elements of the international community eventually recognized as the legitimate representative of the Syrian people.⁵⁰

In frustration, states turned to the General Assembly, which once more issued its own resolution. It condemned the widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities and violence by all parties, endorsed the Arab League’s actions, stressed “the importance of ensuring accountability and the need to end impunity and hold to account those responsible for human rights violations, including those violations that may amount to crimes against humanity,” and asked the Secretary-General to appoint a special envoy dedicated to the conflict.⁵¹ The U.N. Human Rights Council also weighed in.⁵² The U.N. Secretary-General and League of Arab States Secretary-General subsequently appointed former U.N. Secretary General Kofi Annan as the first Special Envoy for Syria.

These developments mark the emergence of the General Assembly as a force for action vis-à-vis Syria. Of note, the General Assembly has proceeded with little consideration of Article 12 of the U.N. Charter, which implies that the General Assembly should refrain from making recommendations with regard to situations simultaneously under consideration before the Council (which partially explains why the Council often ends its resolutions with its decision to “remain actively seized of the matter”). This is consistent with subsequent state practice and jurisprudence emanating from the International Court of Justice (ICJ), which has determined that there is ample state practice since the promulgation of the Charter allowing for the two U.N. organs to work in parallel.⁵³ Nor did the Assembly invoke the “Uniting for Peace” resolution, which was designed to circumvent the veto and purports to allow the General Assembly to “make recommendations concerning international peace and security—up to and including the use of force” in the face of deadlock in the Council.⁵⁴ Rather, states proceeded under an existing agenda item on the

⁵⁰ See generally Stefan Talmon, *Recognition of Opposition Groups as Legitimate Representative of a People*, 12 CHINESE J. INT’L L. 219 (2013) (discussing the international community’s political recognition practice in Syria).

⁵¹ G.A. Res. 66/253A, U.N. Doc. A/RES/66/253A (Feb. 16, 2012). See also G.A. Res. 67/262, U.N. Doc. A/RES/67/262 (May 15, 2013) (further condemning abuses by the Syrian authorities, calling for the release of those arbitrarily detained and journalists covering the conflict, demanding that Syria give unfettered access to the COI, and calling for accountability).

⁵² Human Rights Council, *The Escalating Grave Human Rights Violations and Deteriorating Humanitarian Situation in the Syrian Arab Republic*, U.N. Doc. A/HRC/RES/19/1 (Apr. 10, 2012). China, Cuba, and Russia voted against the resolution.

⁵³ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 I.C.J. Rep. 136, 149–50 (“there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. ... The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12.”).

⁵⁴ G.A. Res. 377 (V), § A, U.N. Doc. A/RES/5/377 (Nov. 3, 1950). For further discussion of the General Assembly’s powers within Syria, see chapter 5. See also Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18(3) J. CONFLICT & SECURITY L. 453, 456 (2013) (“the Uniting for Peace resolution holds significant modern potential as a safety valve capable of temporarily shifting the responsibility for the maintenance of international peace and security from a blocked Council to the world’s fully inclusive conference of states, the General Assembly”).

prevention of armed conflict.⁵⁵ In an unprecedented follow-up resolution, the Assembly deplored the failure of the Council to take effective action in Syria or “to agree on measures to ensure the compliance of Syrian authorities with its decisions.”⁵⁶

The Council Condemns “All Parties”

With the emergence of other bad actors on the Syrian scene, the conflict further deteriorated both from the perspective of the levels of violence and the parties’ compliance with IHL. The Council began to condemn all sides with equal vigor. For example, in Resolution 2139, which was focused on alleviating the suffering caused by siege warfare, the Council uniformly condemned the “widespread violations of human rights and international humanitarian law by the Syrian authorities, as well as human rights abuses and violations of international humanitarian law by armed groups,” including:

all forms of sexual and gender-based violence, as well as all grave violations and abuses committed against children in contravention of applicable international law, such as recruitment and use, killing and maiming, rape, attacks on schools and hospitals as well as arbitrary arrest, detention, torture, ill treatment and use as human shields.⁵⁷

It demanded that “all parties” put an end to all forms of violence and “cease all attacks against civilians,”⁵⁸ particularly the indiscriminate use of weapons and the use of indiscriminate weapons (such as barrel bombs) in populated areas, as well as methods of warfare “which are of a nature to cause superfluous injury or unnecessary suffering.”⁵⁹ The Resolution also stressed

that some of these violations may amount to war crimes and crimes against humanity [and emphasized] the need to end impunity for violations of international humanitarian law and violations and abuses of human rights, and [reaffirmed] that those who have committed or are otherwise responsible for such violations and abuses in Syria must be brought to justice.⁶⁰

As the parties continued to resort to siege tactics, the Council rebuked “the use of starvation of civilians as a method of combat, including by the besiegement of populated areas” and attacks on humanitarian convoys,⁶¹ and indicated that sieges on the civilian population are counter to international law, marking an advancement from extant positive law.⁶² In a subsequent resolution not tied to any particular conflict, the Council designated the use of starvation as a weapon of war as an international law violation and potential war crime.⁶³ The Council specifically decried the

⁵⁵ See Steven Mathias, *The United Nations and Syria: A Work in Progress?*, 106 ASIL PROCEEDINGS 220, 222 (2012).

⁵⁶ G.A. Res. 66/253B, pmbl, U.N. Doc. A/RES/66/253B (Aug. 7, 2012) (garnering 133 votes to 12 opposed with 31 abstentions).

⁵⁷ S.C. Res. 2139, ¶ 11, S/RES/2139 (Feb. 22, 2014).

⁵⁸ *Id.* ¶ 3.

⁵⁹ *Id.*

⁶⁰ *Id.* ¶ 2.

⁶¹ S.C. Res. 2332, pmbl, U.N. Doc. S/RES/2332 (Dec. 21, 2016).

⁶² S.C. Res. 2393, *supra* note 32, at pmbl.

⁶³ See also S.C. Res. 2417, pmbl & ¶ 5, U.N. Doc. S/RES/2417 (May 24, 2018). *But see* Ruwanthika Gunaratne, *Advocating for a Separate Designation Criterion on Starvation*, JUST SECURITY (June 6, 2018) (critiquing the resolution for allowing for sanctions only for the intentional imposition of conditions of starvation).

abduction, exploitation, trafficking, and abuse of women and children, including forced marriages committed by ISIL, the Nusra Front (ANF), and other entities associated with Al Qaida.⁶⁴

Notwithstanding this appearance of equivalency and undifferentiated language in the Council's formal texts, resolutions regularly condemned acts that could only be, or were only being, committed by the regime given its control of the skies and superior weaponry. These include:

the continuing indiscriminate attacks in populated areas, including an intensified campaign of aerial bombings and the use of barrel bombs in Aleppo and other areas, artillery, shelling and air strikes, and the widespread use of torture, ill-treatment, sexual and gender-based violence as well as all grave violations and abuses committed against children.⁶⁵

Furthermore, in their individual interventions, many Council members singled out the regime for its actions. In connection with Resolution 2165, for example, France decried the regime's use of cluster bombs, ballistic missiles, chemical weapons, and barrel bombs against the civilian population.⁶⁶

As ISIL and the Nusra Front became more active in Syria, the Council ratcheted up its accountability language. In Resolution 2170 (2014), for example, the Council recalled that

widespread or systematic attacks directed against any civilian populations because of their ethnic or political background, religion or belief may constitute a crime against humanity, emphasize[d] the need to ensure that ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida are held accountable for abuses of human rights and violations of international humanitarian law, [and] urge[d] all parties to prevent such violations and abuses...⁶⁷

The Council invoked earlier resolutions devoted to counter-terrorism and urged all states to "cooperate in efforts to find and bring to justice individuals, groups, undertakings and entities associated with Al-Qaida including ISIL and [the Nusra Front] who perpetrate, organize and sponsor terrorist acts and in this regard underlines the importance of regional cooperation."⁶⁸ By 2017, the list of international crimes regularly being condemned by the Council had expanded to include terrorist acts associated with ISIL affiliates. The list of international law breaches is now a long one:

attacks against civilians and civilian objects, including those involving attacks on schools, medical facilities and the deliberate interruptions of water supply, the indiscriminate use of weapons, including artillery, barrel bombs and air strikes, indiscriminate shelling by mortars, car bombs, suicide attacks and tunnel bombs, as well as the use of starvation of civilians as a method of combat, including by the besiegement of populated areas, and the widespread use of torture, ill-treatment, arbitrary executions, extrajudicial killings, enforced disappearances, sexual and

⁶⁴ S.C. Res. 2199, pmb, U.N. Doc. S/RES/2199 (Feb. 12, 2015).

⁶⁵ S.C. Res. 2165, pmb, U.N. Doc. S/RES/2165 (July 14, 2014).

⁶⁶ U.N. SCOR, 69th sess., 7116th mtg., U.N. Doc. S/PV.7116 (Feb. 22, 2014), at 5.

⁶⁷ S.C. Res. 2170, ¶ 3, U.N. Doc. S/RES/2170 (Aug. 15, 2014).

⁶⁸ *Id.* ¶ 4.

gender-based violence, as well as all grave violations and abuses committed against children.⁶⁹

The Council later issued a thematic resolution aimed at protecting cultural heritage worldwide that identified the involvement of non-state actors (including ISIL) in its destruction, looting, and pillage, and urged states to develop effective national measures to counter trafficking in cultural property.⁷⁰

The conflict in Syria has featured siege warfare of medieval proportions. Although the government has been primarily responsible for this state of affairs, there have been government-controlled towns, such as Fuaa and Kefraya in Idlib Province, that have been besieged by the opposition. By 2016, the United Nations estimated that 400,000 people were under siege or in hard-to-reach areas (with the latter euphemism being employed at times to avoid the term “siege” with its war crimes implications).⁷¹ The Council regularly recalled that “starvation of civilians as a method of combat is prohibited by international humanitarian law”⁷² and that “sieges directed against civilian populations ... are a violation of international humanitarian law,”⁷³ although it did not designate these tactics as war crimes *per se*. As the situation in locales under siege worsened, both U.N. Secretary-General Ban Ki-Moon and then-U.S. Secretary of State John Kerry publicly denounced the use of starvation as a weapon of war.⁷⁴

The Absence of the Responsibility to Protect

The commission of grave international crimes in Syria offered an opportunity for the international community to operationalize the Responsibility-to-Protect doctrine (R2P).⁷⁵ And yet, R2P has not featured prominently in the Council’s approach to the conflict, attesting to its erosion following controversial military operations in Iraq and Libya.⁷⁶ The R2P framework consists of three pillars: (1) states bear the primary responsibility to protect their population from genocide, war crimes, crimes against humanity, and ethnic cleansing; (2) the international community must assist states in fulfilling these protection obligations; and (3) when a state manifestly fails in its obligations (including when it is itself a perpetrator of these crimes), the international community has a responsibility to take appropriate collective action “in a timely and decisive manner” through the Security Council.⁷⁷

⁶⁹ S/RES/2393, *supra* note 32.

⁷⁰ S.C. Res. 2347, ¶ 3, U.N. Doc. S/RES/2347 (Mar. 24, 2017).

⁷¹ U.N. Office for the Coordination of Humanitarian Affairs, *Joint Statement on Hard-to-Reach and Besieged Communities in Syria* (Jan. 7, 2016). The Syrian American Medical Society (SAMS) put the estimate at 600,000. SAMS, *Slow Death: Life and Death in Syrian Communities Under Siege* (Mar. 2015).

⁷² S/RES/2165, *supra* note 65, ¶ 7.

⁷³ S/RES/2393, *supra* note 32, at pmb.

⁷⁴ See Beth Van Schaack, *Siege Warfare and the Starvation of Civilians as a Weapon of War and War Crime*, JUST SECURITY (Feb. 4, 2016).

⁷⁵ G.A. Res. 60/1, 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

⁷⁶ David Rieff, *R2P, R.I.P.*, N.Y. TIMES, Nov. 7, 2011; Tom Esslemont, *As Syrian Deaths Mount, World’s ‘Responsibility to Protect’ Takes a Hit: Experts*, REUTERS, Oct. 24, 2016. R2P did make an appearance in neighboring Iraq when a massacre was threatened on Sinjar Mountain. See Beth Van Schaack, *ISIL = Genocide?*, JUST SECURITY (Aug. 29, 2014).

⁷⁷ Report of the Secretary General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/577 (Jan. 12, 2009), at 8-9.

At first, the Council was silent on R2P in its Syria pronouncements, even as it invoked the doctrine in resolutions addressed to other crises.⁷⁸ Over time, however, the Council began to make oblique references to at least the first pillar of R2P. For example, in Resolution 2165 on humanitarian access, it reaffirmed in preambular language “the primary responsibility of the Syrian authorities to protect the population in Syria.”⁷⁹ Individual Council members also made reference to the doctrine in their interventions. Rwanda, in its remarks around chemical weapons, noted that “the primary responsibility of this global body is the responsibility to protect.”⁸⁰ Rwanda and Australia mentioned the Council’s role in implementing R2P—with accountability as a form of protection—in connection with the failed ICC referral.⁸¹ Notwithstanding these cameo appearances, R2P has not been particularly influential in the full Council in terms of its decision making or as a restraint on the veto.⁸² Indeed, Russia used one of its explanations of vote to denounce the situation in Libya as a perversion of the concept by NATO. Specifically, the Russian permanent representative noted, “The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect.”⁸³

Efforts to Resolve the Conflict & Facilitate Humanitarian Relief

The Council has undertaken a number of abortive efforts to de-escalate the conflict and alleviate the suffering caused by the Syrian crisis, including through the deployment of a U.N. supervision mission and attempts to establish *seriatim* ceasefires. It was hoped that the latter would lay the foundation for a permanent resolution of the conflict. Sadly, these pauses in the fighting have come and gone, providing the people of Syria with only the most fleeting of respites from the relentless warfare. Meanwhile, a number of proposals emerged to help resolve the conflict—including Annan’s six-point plan, a Security Council roadmap, and efforts convened by Russia in Astana—but none proved viable as the conflict continued to rage. All the while, the humanitarian situation deteriorated, in part because Assad politicized the provision of aid.

The United Nations Supervision Mission in Syria

One of the Council’s first responses to the unfolding conflict in Syria was a presidential statement that called for a sequential cessation of hostilities by the government on April 10, 2012, and then by the opposition 48 hours later.⁸⁴ In Resolution 2042, the Council also unanimously endorsed the six-point proposal put forth by Special Envoy Annan, and directed all parties to help

⁷⁸ See, e.g., S.C. Res. 1653, ¶ 10, U.N. Doc. S/RES/1653 (Jan. 27, 2006) (Great Lakes region); S.C. Res. 1996, ¶ 3, U.N. Doc. S/RES/1996 (July 8, 2011) (South Sudan); S.C. Res. 2014, pmb1, U.N. Doc. S/RES/2014 (Oct. 21, 2011) (Yemen); S.C. Res. 2016, ¶ 3, U.N. Doc. S/RES/2016 (Oct. 27, 2011) (Libya); and S.C. Res. 2085, ¶¶ 9, 17, U.N. Doc. S/RES/2085 (Mali).

⁷⁹ S/RES/2165, *supra* note 65, at pmb1. See also S.C. Res. 2254, pmb1, U.N. Doc. S/RES/2254 (Dec. 18, 2015); S/RES/2139, *supra* note 57, ¶ 9 (demanding that all parties take all appropriate steps to protect civilians, and stressing that “the primary responsibility to protect its population lies with the Syrian authorities”).

⁸⁰ U.N. SCOR, 68th sess., 7038th mtg., U.N. Doc. S/PV.7038 (Sept. 27, 2013), at 14.

⁸¹ U.N. SCOR, 69th sess., 7180th mtg., U.N. Doc. S/PV.7180 (May 22, 2014), at 6 (statement of Rwanda); *id.* at 9 (statement of Australia).

⁸² See generally Aidan Hehir, *The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect*, 38 INT’L SECURITY 137 (2013).

⁸³ S/PV.6627, *supra* note 45, at 4.

⁸⁴ U.N. Doc. S/PRST/2012/10 (Apr. 5, 2012).

implement its provisions.⁸⁵ The proposal called on the warring parties to, *inter alia*, cease troop movements and the use of heavy weapons in population centers, allow humanitarian access and effectuate a two-hour daily humanitarian pause in the fighting, release arbitrarily detained persons, and initiate a comprehensive political transition. The Council also deployed an advance mission of unarmed military observers to lay the groundwork for a larger in-country supervision mission, assuming a sustained cessation of armed violence.⁸⁶ In the resolution's preamble, the Council condemned widespread human rights violations (by the regime) and abuses (by armed groups), and "recall[ed] that those responsible shall be held accountable,"⁸⁷ but did not otherwise address issues of justice and accountability.

The next week, Russia introduced the text of what became Resolution 2043 (2012), which established the United Nations Supervision Mission in Syria (UNSMIS).⁸⁸ While states praised the unity exhibited by the Council, many U.N. members were skeptical about the Mission's prospects absent a durable cessation of violence, particularly given the government's relentless shelling of opposition strongholds.⁸⁹ Ambassador Rice made plain that the United States would not extend the Mission without tangible progress toward implementing the Special Envoy's six-point plan. At the same time, many states warned this might be the last opportunity to change the course of events and avoid a full-scale civil war. As it turns out, the Mission had to temporarily suspend its operations in June 2012 following an intensification of the conflict.

The unanimity displayed by the Council in passing these twin UNSMIS resolutions proved to be short-lived as the P-3 tried to amplify pressure on the regime. The United Kingdom tabled a draft resolution⁹⁰ aimed at creating the permissive conditions necessary for a meaningful political process in keeping with Annan's plan and the Action Group for Syria's Geneva Communiqué.⁹¹ This text included a demand that the regime remove heavy weapons and pull its troops back from population centers and that all parties cease armed violence in all its forms. The proposed text would also have extended UNSMIS and obliged Syria to ensure its effective operation. Non-compliance would have been met with immediate "measures under Article 41" (which typically implies sanctions). The draft condemned violence by all sides and also recalled that "those responsible for human rights violations and abuses, including acts of violence, must be held accountable." It specifically addressed the need for accountability for the perpetrators of attacks on U.N. personnel deployed with UNSMIS. In addition, the draft text would have required the Syrian government to cooperate with the Commission of Inquiry (COI) deployed by the U.N. Human Rights Council and provide its members with immediate entry and access to all areas of Syria.

⁸⁵ S.C. Res. 2042, U.N. Doc. S/RES/2042 (Apr. 14, 2012). The text of the plan is annexed to this resolution. *See also* U.N. Doc. S/PRST/2012/6 (Mar. 21, 2012) (expressing full support for the Envoy's plan).

⁸⁶ *Id.* ¶¶ 5-7 (dispatching an advanced team to determine the feasibility of a wider supervision operation). The League of Arab Nations had put forward a proposal in 2011 aimed at stopping the fighting; although Syria signed the proposal, violence continued. The League had also deployed monitors but terminated the mission in early 2012. Ayman Samir & Erika Solomon, *Arab League Suspends Syria Mission as Violence Rages*, REUTERS, Jan. 27, 2012.

⁸⁷ S/RES/2042, *supra* note 85, at pmb1.

⁸⁸ S.C. Res. 2043, U.N. Doc. No. S/RES/2043 (Apr. 21, 2012) (establishing UNSMIS comprised of up to 300 unarmed military observers accompanied by a civilian component).

⁸⁹ These debates are available here: U.N. SCOR, 67th sess., 6756th mtg., U.N. Doc. S/PV.6756 (Apr. 21, 2012).

⁹⁰ France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, U.N. Doc. S/2012/538 (July 19, 2012).

⁹¹ *See* Final Communiqué of the Action Group for Syria, U.N. Doc A/66/865-S/2012/522, annex (July 6, 2012).

The draft resolution came to a vote at an awkward time: just after an audacious opposition attack targeted the Syrian leadership in Damascus and killed the Defence Minister and other top aides. The proposal failed upon Russian and Chinese vetoes (their third in tandem). The explanations of vote remained contentious and *ad hominem*. France blamed Russia for endeavoring to “win time for the Syrian regime to crush the opposition” and render the Council “a fig leaf for impunity.”⁹² Pakistan, which had abstained in the vote, lamented the divisive measures proposed under Chapter VII should have been set aside in favor of a more “constructive spirit of flexibility.” Russia repeated its concerns about bias and the veiled threat of military intervention in justifying its veto. It accused the “Western members of the Council” of fanning “the flames of confrontation.” China similarly decried the draft’s sponsors for their “rigid and arrogant approach” and for linking the extension of the UNSMIS with one-sided coercive measures against Syria.

A day later, the Council issued a technical resolution, extending the Mission for a period of 30 days in light of the “dangerous security situation” prevailing in the country.⁹³ Russia had floated, but then withdrawn, a competing resolution that would have extended UNSMIS further and demanded that all parties facilitate its work, but that excluded any levers to ensure compliance.⁹⁴ In the end, UNSMIS met its demise August 19, 2012, after the Secretary-General reported its monitors could no longer implement their mandate safely or effectively.⁹⁵ The majority of the Council concluded that without coercive measures to ensure its ability to operate on the ground, the Mission had become untenable.



© Emad Hajjaj

Fleeting Ceasefires

Over the years, and barring a nationwide ceasefire, members of the Council and the international community regularly called for and urged the players to pursue piecemeal humanitarian pauses, freezes in hostilities, days of tranquility, regimes of calm, localized ceasefires, and de-escalation zones to give civilians around the country a break and allow for the

⁹² These debates are here: U.N. SCOR, 67th sess., 6810th mtg., U.N. Doc. S/PV.6810 (July 19, 2012).

⁹³ S.C. Res. 2059, U.N. Doc. S/RES/2059 (July 20, 2012).

⁹⁴ Russian Federation: draft resolution, S/2012/547/Rev.2 (July 17, 2012).

⁹⁵ Letter dated 10 August 2012 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2012/618 (Aug. 10, 2012).

provision of humanitarian assistance.⁹⁶ The parties did occasionally implement localized truces, but a durable nationwide ceasefire remained elusive until late in the conflict.

In the fall of 2015, all the major belligerents in Syria formed the International Syria Support Group (ISSG). At this point, much subsequent work to effectuate more lasting ceasefires, and ultimately a political transition, happened outside the Security Council. Meeting in Vienna, Austria, the ISSG was able to make some progress towards a cessation of hostilities (meant as a precursor to a more comprehensive nationwide ceasefire) and the provision of humanitarian assistance to be supervised by the United Nations with the support of the P-5.⁹⁷ Although all 100 or so opposition factions within the High Negotiations Committee—the opposition’s umbrella organization—were covered, the truce did not apply to offensive attacks against terrorist organizations designated as such by the Security Council, including ISIL, the Nusra Front, and its derivatives. In one of its Vienna Statements, the ISSG stressed that when taking action against these groups, combatants should avoid attacks on parties to the cessation as well as on civilians.⁹⁸

These various efforts to bring about a cessation of hostilities have failed for multiple reasons.⁹⁹ For one, they have often contained the seeds of their own demise: ceasefire formulations have specifically excluded attacks on ISIL and other terrorist groups.¹⁰⁰ These gaps in coverage create a cavernous loophole for fighting to continue under the guise of counter-Nusra Front/ISIL operations and the Council’s counter-terrorism agenda, and have offered the Assad regime and Russia a pretense for continuing to engage opposition forces. Because the international community was unwilling to pause these counter-terrorism operations, the ceasefires are inherently unstable.

A Comprehensive Resolution to the Conflict

Resolution 2254 of 2015 offered the first—and only—concrete roadmap for a political transition initiated by the Council. In it, members unanimously blessed the 2012 Geneva Communiqué and ISSG’s “Vienna Statements,” endorsed the work of the ISSG, and requested the Secretary-General and his Special Envoy to convene representatives of the Syrian government and the opposition to engage in formal negotiations to bring about a comprehensive and Syrian-owned political transition. It acknowledged the need for confidence-building measures to demonstrate the viability of a political process and a lasting ceasefire.

In terms of concrete steps, the text called for a new constitution to be approved within 18 months and for internationally-supervised elections.¹⁰¹ The resolution was silent on the constitutional arrangements for the transition period, although the Preamble also called for “the establishment of an inclusive transitional governing body with full executive powers, which shall be formed on the basis of mutual consent while ensuring continuity of governmental institutions,”

⁹⁶ See, e.g., S/PRST/2012/6, *supra* note 85 (expressing support for the Envoy’s proposal to “implement a daily two-hour humanitarian pause and to coordinate exact time and modalities of the daily pause through an efficient mechanism, including at the local level”).

⁹⁷ ISSG, Statement of the International Syria Support Group Vienna (Nov. 14, 2015).

⁹⁸ ISSG, *Note to Correspondents: Statement of the International Syria Support Group* (May 17, 2016).

⁹⁹ Bassam Barabandi & Hassan Hassan, *Ceasefires in Syria: How Russia and Iran Can Help Broker Honest Deals*, FOREIGN AFF., Jan. 25, 2016.

¹⁰⁰ See S/RES/2254, *supra* note 79, ¶ 8 (calling on all states to prevent terrorist acts by ISIL, the Nusra Front, and Al Qaida and eradicate safe havens in Syria, and noting that any ceasefire would “not apply to offensive or defensive actions against these individuals, groups, undertakings and entities”).

¹⁰¹ *Id.* ¶ 4.

which could be interpreted in multiple ways.¹⁰² Other than entreating the parties to pursue a political transition, the resolution did not address the ultimate fate of Assad except to imply that he would stay in power until U.N.-supervised elections could be held 18 months hence.¹⁰³ In their explanations of vote, however, several states indicated that Assad could not be a part of any solution to the crisis.¹⁰⁴ The United Kingdom, for example, insisted that “That process [of political transition] necessarily involves the departure of Bashar Al-Assad, not only for moral reasons, given the destruction that he has unleashed upon his own people, but also for practical reasons, because it will never be possible to bring peace and unity to Syria as long as he remains in office.”¹⁰⁵ Likewise, while the resolution itself did not address accountability, several states raised the issue in their interventions.

Resolution 2254 made explicit the indelible link between a durable truce and a “credible, inclusive and non-sectarian” political solution. The Council also asserted that aid should be made available to “all people in need,” language that was later reiterated when it became clear that humanitarian assistance was still not reaching opposition areas. With Resolution 2268, passed in 2016, and thereafter, the Council has consistently demanded the prompt implementation of Resolution 2254 and the acceleration of the delivery of humanitarian assistance.¹⁰⁶

Humanitarian Assistance

In parallel with these ceasefire and conflict resolution efforts, the Security Council made marginal progress in responding to the spiraling deterioration of the humanitarian conditions in Syria, particularly with respect to civilians in besieged and hard-to-reach areas. It began with the issuance of a presidential statement that established the important doctrinal point that the arbitrary denial of humanitarian access “can constitute” a violation of IHL.¹⁰⁷ No guidance was offered on what constitutes an “arbitrary withholding,” but the abject need coupled with willing providers would certainly be key factors.¹⁰⁸ This was followed by a unanimous Resolution 2139 in 2014, calling on all warring parties to lift their sieges on populated areas—such as in Homs, Aleppo, and Damascus (areas generally under besiegement by the government *vice* the opposition)—and to allow unhindered humanitarian access and the evacuation of civilians.¹⁰⁹ This demand was directed at “all parties,” but “in particular the Syrian authorities.” The Council also insisted all parties respect the principle of medical neutrality (including by demilitarizing medical facilities) and enable medical personnel to care for the wounded and sick in keeping with IHL.¹¹⁰ As the

¹⁰² *Id.* p.mbl. See generally THE CARTER CENTER, SYRIA’S TRANSITION GOVERNANCE & CONSTITUTIONAL OPTIONS UNDER U.N. SECURITY COUNCIL RESOLUTION 2254 (June 2016) (proposing constitutional arrangements for the 18-month transition period).

¹⁰³ *Id.* ¶ 4.

¹⁰⁴ See, e.g., U.N. SCOR, 70th sess., 7588th mtg., U.N. Doc. S/PV.7588 (Dec. 18, 2015).

¹⁰⁵ *Id.* at 12.

¹⁰⁶ S.C. Res. 2268, ¶ 2, U.N. Doc. S/RES/2268 (Feb. 26, 2016).

¹⁰⁷ See S/PRST/2013/15, *supra* note 19 (condemning violence against civilians, terrorist attacks, the denial of humanitarian access and the prevailing impunity, and calling upon “all parties, in particular the Syrian authorities,” to facilitate humanitarian efforts).

¹⁰⁸ See Dapo Akande & Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict* (Aug. 21, 2014), <https://www.unocha.org/sites/unocha/files/dms/Documents/Arbitrary%20Withholding%20of%20Consent.pdf> (setting forth framework for evaluating arbitrary withholding).

¹⁰⁹ S/RES/2139, *supra* note 57, ¶¶ 5-7. In adopting Resolution 2139, many states decried the fact that the prior presidential statement was never implemented. See, e.g., S/PV.7116, *supra* note 66, at 13 (statement of Rwanda).

¹¹⁰ *Id.* ¶¶ 8, 10. See Rule 25, International Committee of the Red Cross, Customary International Law Database.

resolution passed, Secretary-General Ban Ki-Moon protested that humanitarian assistance is “not something to be negotiated; it is something to be allowed by virtue of international law.”¹¹¹

In their explanations of votes, Council members welcomed the unanimity of Resolution 2139 and its long overdue focus on the acute humanitarian crises created by the conflict. Many states raised the issue of accountability and the need for an ICC referral as the impact on the civilian population worsened,¹¹² with Luxembourg insisting that “the starvation of civilians as a method of combat is prohibited under international humanitarian law” and Lithuania arguing that “[i]mpunity breeds violence and perpetuates conflict. ... The Council must use all the tools at its disposal, including referrals to the International Criminal Court.” Russia, in turn, accused members of the Council of using the humanitarian situation in Syria to effectuate regime change and members of the opposition of plundering humanitarian convoys and targeting humanitarian workers. Russia painted a picture of humanitarian progress, claiming that aid was reaching many besieged areas through an air bridge and humanitarian terminals, as well as via polio vaccination campaigns. The United Kingdom—citing a recent briefing from Valerie Amos, the then-U.N. Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator—took issue with this rosy assessment, arguing the reality on the ground was much more dire. A group of international law experts took to the press and argued that there was no legal barrier to the United Nations providing aid without Syria’s consent, in part because the United Nations would be operating with the consent of groups exercising effective control over territory.¹¹³

Despite these differing perspectives, in Resolution 2165 of 2014, the Council unanimously condemned the Syrian government’s arbitrary withholding of consent to the activities of humanitarian actors, in violation of Resolution 2139, and—in an unprecedented and precedent-setting move—authorized the delivery of cross-border aid without Syria’s express permission through certain identified border crossings (via Turkey, Iraq, and Jordan).¹¹⁴ It established a monitoring mechanism to track the loading and dispatch of relief consignments by the United Nations and their implementing partners. The Council also called upon all parties to implement humanitarian pauses to enable the provision of assistance. In their interventions, states charged Syria with manipulating humanitarian aid to advance its military strategy, including by confiscating medical equipment intended for areas controlled by the opposition.¹¹⁵ Russia drew attention to the resolution’s recognition of increasing terrorist activity—a point also emphasized by Syria—as well as the fact that the resolution did not provide for an automatic authorization of enforcement measures.¹¹⁶ Following the establishment of aid corridors, some areas saw improvement. Nonetheless, blockages, attacks on humanitarian convoys, and the looting of aid

¹¹¹ S/PV.7116, *supra* note 66, at 2.

¹¹² *See, e.g., id.* at 14.

¹¹³ *There is no Legal Barrier to UN Cross-Border Operations in Syria*, THE GUARDIAN (Apr. 28, 2014)

¹¹⁴ S/RES/2165, *supra* note 65. Undergirding the resolution was set of monthly reports by the U.N. Secretary-General on the lack of implementation of Resolution 2139 by the Syrian authorities. The new resolution was cheered by the National Coalition of Syrian Revolution and Opposition Forces. Statement on UNSC Resolution 2165, https://www.etilaf.us/unsr_2165 (noting that the resolution “sends a strong signal to the Syrian regime that its calculated policy of siege warfare will no longer be tolerated”).

¹¹⁵ U.N. SCOR, 69th sess., 7216th mtg., U.N. Doc. S/PV.7216 (July 14, 2014), at 3 (statement of Luxembourg); *id.* at 7 (statement of the United States).

¹¹⁶ *Id.* at 13. Syria also called upon states to bring pressure on governments that it believes are financing, arming and training terrorist elements and facilitating their passage into Syria, namely Saudi Arabia, Qatar, and Turkey.

continued. Despite some grumbling from Russia, the previous arrangements were renewed several times.¹¹⁷

In Resolution 2258 of 2015, the Council commended the efforts of humanitarian actors in the field but condemned—in preambular language—their continued lack of access to the majority of people in need.¹¹⁸ In particular, the resolution noted growing impediments to the delivery of assistance and the decline in approvals emanating from the Syrian authorities. Nonetheless, its directives to Syria were couched in rather anodyne terms, merely requesting the Syrian authorities “to expeditiously respond to all requests for cross-line deliveries ... and to give such requests positive consideration.”¹¹⁹ The resolution ended with the toothless threat to “take further measures under the Charter” in the event of non-compliance with this and previous resolutions.¹²⁰ Such rhetorical tact was no doubt employed in order to win Moscow’s support, induce Damascus’s compliance, and avoid exacerbating an already tenuous humanitarian situation. The ISSG also pushed for better humanitarian access and indicated it would support air bridges and air drops by the World Food Program if the United Nations was denied access to certain besieged areas. It also insisted the provision of aid should not “benefit any particular group over any other” and must include all categories of assistance (food, medical, sanitation, etc.) in keeping with Resolution 2254.¹²¹ The Council continued to raise concerns about the insufficient implementation of Resolution 2165 and its progeny, attacks on humanitarian convoys (without identifying the origins), breaches of the principle of medical neutrality, and the acute needs throughout the country.¹²² It demanded that all parties allow safe, unimpeded, and sustained access for humanitarian assistance and threatened further action in the event of non-compliance.

Over the years, although the Security Council did not issue any legally binding decisions on refugees *per se*, it regularly commended states of the region for taking in Syrians fleeing the war. In Resolution 2165, for example, the Council

[r]eiterated its appreciation for the significant and admirable efforts that have been made by the countries of the region, notably Lebanon, Jordan, Turkey, Iraq and Egypt, to accommodate the more than 2.8 million refugees who have fled Syria as a result of ongoing violence.¹²³

It urged all U.N. member states to support states in the region as they tried to cope with the growing humanitarian crisis in keeping with burden-sharing principles. It also noted the need to build the conditions necessary to allow for the safe and voluntary return of refugees and internally-displaced persons (IDPs).¹²⁴ Controversially, Turkey later agreed to prevent migrants from passing through its territory into Europe in exchange for visa liberalization, aid, and a revitalized European Union

¹¹⁷ See S.C. Res. 2191, U.N. Doc. S/RES/2191 (Dec. 17, 2014); S.C. Res. 2258, U.N. Doc. S/RES/2258 (Dec. 22, 2015); S/RES/2332, *supra* note 61, ¶ 2; S/RES/2393, *supra* note 32, ¶ 2; S.C. Res. 2449, ¶ 3, U.N. Doc. S/RES/2449 (Dec. 13, 2018). See generally U.N. Office for the Coordination of Humanitarian Affairs (OCHA), United Nations Cross-border Operations from Jordan to Syria (in October 2017) (Nov. 9, 2017).

¹¹⁸ S/RES/2258, *supra* note 117, at pmbl.

¹¹⁹ *Id.* ¶ 3.

¹²⁰ *Id.* ¶ 6.

¹²¹ ISSG, *Note to Correspondents: Statement of the International Syria Support Group* (May 17, 2016).

¹²² S/RES/2449, *supra* note 117, at pmbl.

¹²³ S/RES/2165, *supra* note 65; see also S/RES/2139, *supra* note 57, at pmbl.

¹²⁴ S/RES/2254, *supra* note 79, at ¶ 14. See also S/RES/2258, *supra* note 117, at pmbl (expressing its appreciation to neighboring countries for accommodating Syrian refugees but noting with concern that the international response has fallen short of meeting the needs of host governments).

accession process.¹²⁵ Following an escalation of fighting in February 2020 with its troops increasingly drawn into battle, Turkey appeared to renege on this controversial agreement.¹²⁶

The system established by Resolution 2165 came under threat at the end of 2019 when it was due to expire in the midst of the Idlib crisis.¹²⁷ Russia and China vetoed a Belgian, German and Kuwaiti proposal to extend and the effort,¹²⁸ arguing that it was obsolete because Syria had retaken most of the country and so it was time to “revert to established parameters for humanitarian assistance.” In a tit-for-tat move, the P-3 rejected Russia’s version of the resolution, which reduced the number of border crossings to two and only extended the system for only six months, with France arguing in its explanation of vote that Syria was “weaponizing” humanitarian assistance.¹²⁹ Frantic negotiations ensued, with OCHA and the World Health Organization insisting on the need for at least the three border crossings to ensure the provision of critical medical assistance, and particularly the corridor in the northeast at Al-Yarubiyah, Iraq, closest to where the opposition was concentrated. Eventually, as the arrangement was hours from expiring, the Council extended Resolution 2165, largely on the terms demanded by Russia.¹³⁰ But no one was happy.¹³¹ Indeed, China, Russia, the United Kingdom and the United States all abstained. France, the only member of the P-5 to vote in favor of the resolution, accused Russia of “yielding to the demands of a criminal regime,” and several states lamented the elimination of two crossings on political grounds, the abandonment of the four humanitarian principles (humanity, neutrality, impartiality and independence), and the wielding of ultimatums when people are dying.

The Crisis in Aleppo

Notwithstanding all these efforts, the situation on the ground continued to deteriorate. The crisis in Aleppo—Syria’s “second city,” economic capital, and a UNESCO World Heritage site—offers a microcosm of the war’s most devastating effects and the Security Council’s dysfunction. By way of background, the uprising spread to Aleppo in 2012.¹³² When rebels took control of the east, the city was effectively split in two. ISIL gained a solid foothold in 2013, creating a three-way battleground. Circumstances in Aleppo were rendered even more fractured by in-fighting between rebel groups, more perilous by the government’s introduction of barrel bombs, and more complicated by Russia’s intervention in the conflict in 2015, ostensibly in pursuit of ISIL.¹³³ Localized ceasefires came and went; hospitals were destroyed by air attacks; and evidence emerged that suggested the government had launched a chemical attack in an attempt to definitively take the divided city.¹³⁴ The parties did manage to open corridors to allow civilians,

¹²⁵ Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POLICY INSTITUTE (March 2016).

¹²⁶ Dominic Evans & Orhan Coskun, *Turkey Says it will let Refugees into Europe after Troops Killed in Syria*, REUTERS, Dec. 26, 2020.

¹²⁷ The debates are here: U.N. SCOR, 74th sess., 8697th mtg., U.N. Doc. S/PV.8697 (Dec. 20, 2019).

¹²⁸ Belgium, Germany and Kuwait: draft resolution, U.N. Doc. S/2019/961 (Dec. 20, 2019).

¹²⁹ Russia: draft resolution, U.N. Doc. S/2019/962 (Dec. 20, 2019).

¹³⁰ S.C. Res. 2504, ¶ 3, U.N. Doc. S/RES/2504 (Jan. 10, 2020).

¹³¹ These debates are here: U.N. SCOR, 75th sess., 8700th mtg., U.N. Doc. S/PV.8700 (Jan. 10, 2020).

¹³² *Aleppo Under Siege: A Timeline*, SKYNEWS, Dec. 14, 2016, <https://news.sky.com/story/aleppo-under-siege-a-timeline-10613396>. See generally Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N.Doc. A/HRC/34/64 (Feb. 2, 2017) (special report on Aleppo).

¹³³ Amnesty International, *‘Death Everywhere’—War Crimes and Human Rights Abuses in Aleppo, Syria* (May 5, 2015).

¹³⁴ Human Rights Watch, *Syria: Coordinated Chemical Attacks on Aleppo* (Feb. 13, 2017) (recounting evidence of chlorine attacks in Aleppo at the end of 2016).

as well as militants willing to surrender, to flee the besieged city. Little Omran Daqneesh—dusty, bloodied, and dazed¹³⁵—became a global symbol of this “complete meltdown of humanity.”¹³⁶

In response to the increasingly dire situation in eastern Aleppo, the United States and Russia negotiated a notional cease-fire agreement in September 2016 that would have had the parties recommit to the cessation of hostilities, allow the provision of verified humanitarian assistance (to be transported in containers that would be sealed at the Turkish border to protect against plunder and weapons smuggling), pull back all heavy weapons, and prevent the Nusra Front from advancing into the demilitarized zone. Securing Castello Road, which had earned the epithet “Death Road,” featured prominently in the agreement as it provided the main route in and out of Eastern Aleppo.¹³⁷ The ceasefire was to lead the way to a joint U.S.-Russia air campaign against ISIL organized through a Joint Implementation Center (JIC). The truce did not hold, as government forces continued to bombard opposition areas in Aleppo. The United States suspended talks with Russia, alleging it had not held up its end of the deal to keep Assad in check.¹³⁸ It also argued that Russia shared responsibility for an attack on a U.N.-Syrian Red Crescent humanitarian convoy on September 19, 2016, likely committed by the Syrian regime.¹³⁹ Other sources suggested the JIC arrangement was scuttled because the Pentagon refused to coordinate intelligence and targeting decisions with the Russians.¹⁴⁰

Shortly thereafter, France and Spain introduced a draft resolution that demanded an immediate end to “all aerial bombardments of and military flights over Aleppo city.”¹⁴¹ The text reiterated the obligations of parties to prevent material and financial support to terrorist groups, called for a resumption of the cessation of hostilities, underlined the need for enhanced monitoring, and urged states to facilitate the safe and unhindered provision of the “full spectrum” of humanitarian assistance. The latter concept euphemistically responded to repeated allegations that the Syrian government was blocking aid to certain opposition areas and removing medical supplies from aid convoys.¹⁴² In the fifth exercise of its veto, Russia rejected the draft, portraying it as little more than an act of propaganda since it was doomed to failure. Russia was joined by the Bolivarian Republic of Venezuela, which accused members of the Council of providing weapons to “violent non-State actors who then became terrorist groups that are no longer under their control” and blamed the moderate opposition for not disassociating itself from the Nusra Front. Marking a departure from its previous practice, China abstained during the vote, reasoning that while the draft contained some important elements, it did not fully respect Syria’s sovereignty or incorporate the “constructive views” of other Council members. The United States blamed Russia for claiming the mantle of counter-terrorism under the guise of assisting the Assad regime in re-taking Aleppo and

¹³⁵ Euan McKirdy and Mohammed Tawfeeq, *Omran Daqneesh, Young Face of Aleppo Suffering, Seen on Syrian TV*, CNN, June 7, 2017.

¹³⁶ *Aleppo: ‘A Complete Meltdown of Humanity,’* EURONEWS, Dec. 13, 2016 (quoting Jens Laerke, spokesperson for OCHA).

¹³⁷ Faith Karimi, *‘Death Road’ Stands in Way of Crucial Aid to Eastern Aleppo*, CNN, Sept. 16, 2016.

¹³⁸ Lesley Wroughton, *U.S. Suspends Syria Ceasefire Talks with Russia, Blames Moscow*, REUTERS, Oct. 3, 2016.

¹³⁹ *Syria Aid Convoy Attack: What We Know*, BBC, Oct. 5, 2016. The U.N. investigation is discussed in chapter 8 on documentation.

¹⁴⁰ Gareth Porter, *How the Pentagon Sank the US-Russia Deal in Syria—and the Ceasefire*, MIDDLE EAST EYE, Sept. 23, 2016.

¹⁴¹ Andorra et al.: draft resolution, U.N. Doc. S/2016/846, ¶ 4 (Oct. 8, 2016). The resolution garnered three dozen U.N. member state co-sponsors.

¹⁴² S/PV.7785, *supra* note 24, at 4 (statement by Spain). See Save the Children, *Some Aid Arrives in Eastern Ghouta, Convoys Stripped of Medical Supplies* (Mar. 5, 2018).

also for using the presence of a couple hundred Nusra Front fighters to justify an indiscriminate aerial bombardment campaign. In this regard, the United Kingdom representative concluded his statement with a terse entreaty to Russia: “Please stop now.”

For its part, Russia floated a competing resolution in October 2016 focused on humanitarian access and urging parties to cease “conducting joint combat operations with terrorists.”¹⁴³ The text advocated the separation of moderate opposition forces from the Nusra Front and called upon ISSG members to demand the parties stop fighting in collaboration with them. There was no mention of ceasing airstrikes in Aleppo, although the draft text did contain the boilerplate language urging the parties to abstain from targeting civilians. The draft garnered only three votes (China, Venezuela, and Egypt).¹⁴⁴ The United States characterized the resolution as an attempt to ratify “what Russia and the regime are doing in Aleppo.”

By December 2016, the Assad regime—backed by Russian air power and regional Shi’ite militia—had surrounded the city, trapping rebels in an eastern enclave. Russia and the United States arranged to meet in Rome in an effort to resolve the situation and avoid further mass deaths. In the meantime, Egypt, New Zealand, and Spain tried again in the Council, floating text that called for an end to all violence in Aleppo for seven days to allow for humanitarian needs to be addressed, with an eye towards implementing further extensions on a recurring basis.¹⁴⁵ Once again, the coveted cessation would not have applied to military engagement with terrorist groups. The draft resolution featured a number of familiar elements: condemnations of violence, particularly against medical and humanitarian personnel, and a demand to implement the political process outlined in the long-neglected Resolution 2254. It also directed all parties to cease collaborating with terrorist groups and all ISSG members to seek to dissuade any party from doing so. As a new imperative, it contained a call to stem the flow of foreign terrorist fighters. The ISSG was also asked to coordinate efforts to monitor the ceasefire in Aleppo, facilitate humanitarian aid, and prevent terrorist acts. Finally, the draft would have given rebel forces 10 days to indicate whether they would remain a party to the cessation of hostilities.¹⁴⁶

Russia (joined by China and Venezuela) rejected this effort (its sixth veto and the fifth draft text to earn the double veto). Russia was irritated that the draft appeared to give rebels time to replenish their ranks and supplies and did not require them to immediately evacuate the city and ensure the security of civilians.¹⁴⁷ Russia also cried procedural foul given the timing of the resolution (prior to the United States-Russia meeting and without the necessary notice) and accused the P-3 of having “shamelessly pressured” the “humanitarian troika” (Egypt et al.) to submit the “doomed draft.” Russia further complained that the United States was an undependable negotiating party that did not speak with a consistent voice when it comes to agreements on a way forward in Syria. Venezuela painted a delusional picture in which Russia and Syria were engaged in a noble counter-terrorism effort, other states were actively supporting terrorist groups, and civilians were trying desperately to flee to government-controlled areas “where they find safety

¹⁴³ See Russian Federation: draft resolution, U.N. Doc. S/2016/847 (Oct. 8, 2016).

¹⁴⁴ S/PV.7785, *supra* note 24, at 12.

¹⁴⁵ Egypt, New Zealand and Spain: draft resolution, U.N. Doc. S/2016/1026 (Dec. 5, 2016).

¹⁴⁶ *Id.* ¶ 8 (demanding “that all parties to the cessation, within 10 days of the adoption of this resolution, indicate publicly, or to the Co-Chairs of the International Syria Support Group, their commitment to remain a party to the cessation of hostilities”).

¹⁴⁷ U.N. SCOR, 71st sess., 7825th mtg., U.N. Doc. S/PV.7825 (Dec. 5, 2016), at 2 (statement of Russia).

and humanitarian assistance.” It also blamed the United States and its “interventionalist policies in the Middle East” for the emergence of terrorism in the region.

Other states that had voted for the resolution bemoaned the Council’s lack of progress on Aleppo to date, even on purely humanitarian issues. The sponsors in particular expressed disappointment that their weeks of work, which included making key concessions to Russia, had come to naught. The session ended with the delegations trading diplomatic jabs at each other and with the Syrian delegation insisting the United Nations had become a platform to “defend, protect and promote terrorism in Syria” with futile ceasefires offering little more than an opportunity for terrorists to rearm.¹⁴⁸ The United States’ Permanent Representative at the time, Samantha Power, condemned the actions of Russia, Syria, and Iran in Aleppo, accusing them of placing a “noose” around the necks of civilians.¹⁴⁹ Once again, the General Assembly stepped in with a resolution demanding a cessation of hostilities, a range of civilian protection measures, and adherence to Security Council resolutions.¹⁵⁰

By the end of 2016, the members of the Council finally put aside their differences and issued Resolution 2328, which articulated an agreement to evacuate civilians from Aleppo in accordance with humanitarian law.¹⁵¹ The Council thus demanded

complete, immediate, unconditional, safe and unhindered access for the United Nations and its implementing partners, in order to ensure that humanitarian assistance reaches people through the most direct route in order to meet basic needs, including the provision of medical care ... for the whole of Syria.¹⁵²

In many respects, this consensus reflected a *fait accompli*, as the Assad government had finally taken control of the city in December 2016. The Resolution did not contain many of the elements from the failed draft put forward several weeks prior by the troika. In particular, the text only “took note” of efforts to carry out evacuations of civilians and fighters from Aleppo and asked the United Nations and others to monitor such evacuations. States did not offer explanations of vote, so the dynamics in the Council leading to this moment of solidarity after the prior acrimony remain hazy.¹⁵³ The reference to the evacuation of “fighters” alongside civilians reflected the fact that it was assumed that any ceasefire could not take hold while members of ISIL or the Nusra Front remained billeted in Eastern Aleppo, so President Assad offered them an amnesty if they would leave the city voluntarily.¹⁵⁴ Assad hailed the evacuation of the once-divided city as a historic victory on par with the fall of the Soviet Union.¹⁵⁵ Hyperbole aside, there is no question the loss of Aleppo ended the hopes of many that a military victory against Assad might be possible.

Ghouta Becomes the New Aleppo

¹⁴⁸ Syria also took this opportunity to accuse the United Kingdom of continuing to provide weapons to Saudi Arabia in its war in Yemen. *Id.* at 15-16.

¹⁴⁹ ‘Are you capable of shame?’ *Samantha Power Criticizes Syria, Iran and Russia over Aleppo—Video*, REUTERS, Dec. 13, 2016.

¹⁵⁰ G.A. Res. 71/130, U.N. Doc. A/RES/71/130 (Dec. 9, 2016).

¹⁵¹ S.C. Res. 2328, ¶ 2, U.N. Doc. S/RES/2328 (Dec. 19, 2016).

¹⁵² *Id.* ¶ 5.

¹⁵³ See U.N. SCOR, 71st sess., 7841st mtg., U.N. Doc. S/PV.7841 (Dec. 19, 2016).

¹⁵⁴ Ellen Francis & Tom Miles, *Assad Offers Rebels Amnesty if They Surrender Aleppo*, REUTERS, Oct. 5, 2016.

¹⁵⁵ Kareem Shaheen, *Hundreds Leave Besieged East Aleppo on First Day of Evacuation*, THE GUARDIAN, Dec. 15, 2016.

With the situation in Aleppo “under control” (which is to say, under the government’s control), the international community returned to the challenge of resolving the broader conflict. These efforts proved short-lived as Ghouta—the site of chemical weapons attacks that have book-ended this crisis—emerged as another city on the brink. Prior to the second chemical weapon attack, however, Russia and Turkey put forward a package of documents that contained a proposed nationwide ceasefire to go into effect on December 30, 2016, with Russia and Turkey as guarantors; a monitoring mechanism; a sanctions regime for ceasefire violators; and a negotiating blueprint for meetings contemplated for Astana, Kazakhstan, in January 2017.¹⁵⁶ The Council collectively expressed gratitude for Russia and Turkey’s efforts to “jumpstart” a political process.¹⁵⁷ A series of de-escalation zones in May 2017 brought some respite; these held for some time but ultimately went the way of their predecessors. After President Donald J. Trump’s bellicose response to the use of chemical weapons and the downing, in June 2017, of a Syrian warplane that was attacking U.S.-backed opposition groups, the United States changed tact and met with Russia on the margins of the G20 summit in July 2017 to announce an open-ended ceasefire.

In February 2018, as the conflict entered its eighth year, the government intensified strikes against rebel-held areas with assistance from Russian fighter jets. Ghouta, the last rebel redoubt near Damascus, came under intense fire. After Russia delayed a vote for several days, the Council unanimously passed Resolution 2041, establishing a 30-day nationwide ceasefire in order to allow for the sustained delivery of humanitarian assistance.¹⁵⁸ The resolution was introduced by Kuwait and Sweden, the humanitarian penholders at the time, in an effort to operationalize requests from the humanitarian community. Member states were called upon to “use their influence” with the parties to reinforce the cessation of hostilities and to build on existing arrangements to monitor events on the ground.¹⁵⁹ The resolution also envisioned weekly aid convoys and immediate medical evacuations. Russia justified its delay in joining consensus on the impossibility of implementing an immediate and extended ceasefire without concrete agreements between the parties. It also implied that horrific accounts from Ghouta and elsewhere were mere “propaganda” and expressed concern about public statements “by certain United States officials threatening aggression against Syria.” Syria admitted its responsibilities towards its citizens but also emphasized its sovereign right to counter terrorism, acts of aggression, and a “United States occupying military presence.”

Once again, the imposed ceasefire did not apply to military operations against ISIL or related groups.¹⁶⁰ Perhaps as a result, fighting and shelling continued, particularly in eastern Ghouta, where opposition fighters were entrenched. Convoys were unable to offload aid and no

¹⁵⁶ Letter dated 29 December 2016 from the Permanent Representative of the Russian Federation to the United Nations and the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2016/1133, annexes (Dec. 26, 2016).

¹⁵⁷ S.C. Res. 2336, ¶ 1, U.N. Doc. S/RES/2336 (Dec. 31, 2016).

¹⁵⁸ S.C. Res. 2401, ¶ 1, U.N. Doc. S/RES/2401 (Feb. 24, 2018) (demanding that all parties “cease hostilities without delay, and engage immediately to ensure full and comprehensive implementation of this demand by all parties, for a durable humanitarian pause for at least 30 consecutive days throughout Syria, to enable the safe, unimpeded and sustained delivery of humanitarian aid and services and medical evacuations of the critically sick and wounded, in accordance with applicable international law”).

¹⁵⁹ *Id.* ¶ 3-4. In their explanations of vote, several states specifically identified the parties to a peace process that had been convened in Astana, Kazakhstan, to act as guarantors to ensure the Syrian regime ceases hostilities. *See, e.g.*, U.N. SCOR, 73rd sess., 8188th mtg., U.N. Doc. S/PV.8188 (Feb. 24, 2018), at 6 (statement of France).

¹⁶⁰ S/RES/2401, *supra* note 158, ¶ 2.

medical evacuations ensued because of the security situation. Russia eventually brokered an Aleppo-style deal whereby members of the opposition and their families were able to leave Eastern Ghouta for rebel-held Idlib. Members of the opposition who wished to stay were offered a pardon. It was another blow to the rebels, who had held Ghouta since 2012.

Idlib Becomes the New Ghouta

By the end of 2019, the conflict became centered on Idlib, where the remaining opposition and extremist groups had found safe haven amongst Syrian civilians who have been displaced “twice or thrice” before.¹⁶¹ Government forces re-captured dozens of villages backed by Iranian-backed militias and Russian air power. The fighting displaced close to a million people from December onward alone. Germany, Belgium, and Kuwait—the humanitarian co-penholders—introduced a ceasefire proposal in September 2019 that did not specifically exclude counter-terrorism operations, as prior drafts had, although it did contain language encouraging member states to ensure that all measures taken to counter terrorism complied with international law.¹⁶² Russia—which held the Presidency at the time—and China wasted no time deploying their vetoes, accusing the troika of having “hidden objectives” and attempting to “save the international terrorists who are entrenched in Idlib from their final defeat.”¹⁶³ The pair table dropped a competing proposal, without undergoing prior negotiations, that contained the historical language.¹⁶⁴ This draft received only two votes in favor, with 4 abstentions. The United Kingdom argued that the latter text pretended “that the humanitarian situation in Idlib [was] caused solely by terrorists rather than by the indiscriminate aerial bombardment that is being carried out with scant regard for the principles of distinction and proportionality.” Many states in their interventions lamented the lack of unity and polarization within the Council, even around humanitarian concerns. With the Council deadlocked, the P-3 and allies on the Council formally demarched Secretary-General António Guterres urging the United Nations to take action.¹⁶⁵

Countering Terrorism

Russia and Syria began raising the scourge of terrorism early in their Security Council interventions;¹⁶⁶ eventually, the entire Council found common ground here.¹⁶⁷ With the emergence of the Nusra Front and ISIL on the scene, references to terrorism began to appear more frequently in the Security Council’s pronouncements. In Resolution 2139 of 2014, for example, the Council lamented

the increased terrorist attacks resulting in numerous casualties and destruction carried out by organizations and individuals associated with Al-Qaeda, its affiliates and other terrorist groups, and reiterate[ed] its call on all parties to commit to

¹⁶¹ INTERNATIONAL CRISIS GROUP, *THE ELEVENTH HOUR FOR IDLIB, SYRIA’S LAST REBEL BASTION 1* (Feb. 6, 2020).

¹⁶² Belgium, Germany and Kuwait: draft resolution, U.N. Doc. S/2019/756 (Sept. 19, 2019).

¹⁶³ These debates are here: U.N. SCOR, 74th sess., 8623rd mtg., U.N. Doc. S/PV.8623 (Sept. 19, 2019).

¹⁶⁴ Russia and China: draft resolution, U.N. Doc. S/2019/757 (Sept. 19, 2019).

¹⁶⁵ Edith Lederer, *Western Nations Demand Immediate Cease-fire in Syria’s Idlib*, AP (Feb. 27, 2020).

¹⁶⁶ For example, just after the attack on the Syrian leadership in July 2012, Russia floated and then withdrew a resolution that would have decried “the series of bombings that have made the situation more complex and deadly, some of which are indicative of the presence of well-organised terrorist groups.” See Russian Federation: draft resolution, U.N. Doc. S/2012/547/Rev.2 (July 17, 2012), at pmb. Likewise, when invited to offer its views, Syria regularly complained that the Council had failed to denounce terrorism. See, e.g., S/PV.7116, *supra* note 66, at 15.

¹⁶⁷ That said, the United States blocked a statement condemning a car bomb attack in Damascus near the Russian embassy, arguing that the statement should have also censured the use of heavy weapons against civilians. *Russia-US Spat Dooms UN Statement on Damascus Bomb*, WASH. EXAMINER, Feb. 22, 2013.

putting an end to terrorist acts perpetrated by such organizations and individuals, while reaffirming that terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security, and that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed.¹⁶⁸

It then called upon both the Syrian authorities and opposition groups to combat and defeat organizations and individuals associated with Al Qaida and other terrorist groups.¹⁶⁹ In subsequent resolutions, Council members also expressed alarm at the spread of extremism, extremist groups, and the targeting of civilians based upon their ethnicity or confessional affiliations.¹⁷⁰ Council members insisted that “terrorism cannot and should not be associated with any religion, nationality, or civilization” and can only be defeated by “a sustained and comprehensive approach involving the active participation and collaboration of all States, and international and regional organizations to impede, impair, isolate and incapacitate the terrorist threat.”¹⁷¹ At the same time, the Council repeatedly cautioned that “Member States must ensure that any measures taken to combat terrorism ... comply with all their obligations under international law, in particular international human rights, refugee and international humanitarian law” and underscored that “effective counter-terrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort.”¹⁷²

After the coordinated terrorist attacks in Paris in November 2015, the Council explicitly linked events in Syria with acts of terrorism attributed to ISIL in Europe and elsewhere.¹⁷³ The Council unanimously reaffirmed in Resolution 2249 that

terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed...

The Council identified ISIL as “a global and unprecedented threat,” with special mention of the Nusra Front and other entities associated with Al Qaida. Member states with the requisite capacity were called upon to “take all necessary measures”—code for the use of armed force—in compliance with international law to prevent and suppress terrorist acts committed by ISIL, the Nusra Front, and other terrorist groups. France had contributed to United States-led airstrikes underway in Iraq since September 2014, and to a lesser extent in Syria since September 2015 as part of *Opération Chammal*—named for a northwesterly wind that blows over the Persian Gulf. Following the Paris attacks, France launched more robust retaliatory strikes in Raqqa, one of the *de facto* “capitals” of the imagined caliphate. Resolution 2249’s language bolstered states’

¹⁶⁸ S/RES/2139, *supra* note 57, at pmb1; *see also id.* ¶ 14; U.N. Doc. S/PRST/2014/23 (Nov. 19, 2014) (omnibus presidential statement condemning various manifestations of modern terrorism).

¹⁶⁹ S/RES/2139, *supra* note 57, ¶ 14. Citing the G-8 declaration of June 2013, which committed members to seek to dismantle the global threat of terrorist networks, Russia reiterated its demands that “all Syrian sides ... break with terrorists” and encouraged the opposition to work together with the government to overcome terrorism. *See* U.N. Doc. S/PV.7116, *supra* note 66, at 8.

¹⁷⁰ S/RES/2165, *supra* note 65, at pmb1.

¹⁷¹ S/RES/2199, *supra* note 64, at pmb1.

¹⁷² S/RES/2170, *supra* note 67, at pmb1.

¹⁷³ S.C. Res. 2249, ¶¶ 1-2, U.N. Doc. S/RES/2249 (Nov. 20, 2015) (condemning ISIL attacks in Tunisia, Turkey, Russia, Lebanon, and France).

arguments that their actions in Syria constituted legitimate self-defense, marking another area of common ground on the Council. The resolution also suggested the need to expand the list of designated terrorist groups, a research task ultimately undertaken by Jordan, and reaffirmed that “those responsible for committing or otherwise responsible for terrorist acts, violations of international humanitarian law or violations or abuses of human rights must be held accountable.”

Notwithstanding U.S.-led airstrikes, ISIL had gained considerable ground in Syria by the start of 2015. This increased the number of people living under ISIL’s ominous black banners and requiring public services previously provided by the Syrian government or emergent opposition bureaucrats. In 2016, the Security Council in Resolution 2332 took note of the “negative impact of their presence, violent extremist ideology and actions on stability in Syria and the region, including the devastating humanitarian impact on the civilian populations” in areas under ISIL control.¹⁷⁴ Reaching a common understanding of what conduct constitutes “terrorism” and which groups embattled within Syria were members of the moderate Syrian opposition in good standing versus those who should be considered terrorist groups *non grata* emerged as a perennial challenge within the Council. Russia repeatedly stressed the need for a united anti-terrorism front that would encompass the Assad regime, the “armed patriotic Syrian opposition,” Kurdish volunteers, and other member states.¹⁷⁵ In Resolution 2254, the Council praised efforts by Jordan to reach a shared understanding within the ISSG of which individuals and groups were exempt from the ceasefire, i.e., which non-state actors remained targetable notwithstanding the cessation of hostilities.¹⁷⁶

Blocking Foreign Fighters

Although by no means a new global phenomenon, the Syrian conflict brought laser-focused attention to the concept of foreign fighters, which the Council defined as:

individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.¹⁷⁷

The Council began to increasingly fixate on this element of the conflict in 2014. Most importantly, it passed Resolution 2178, an omnibus resolution devoted to preventing the international flow of foreign fighters worldwide that established global duties of prevention, information sharing, verification, and prosecution. The text condemned the recruitment of foreign terrorist fighters and demanded that all foreign fighters withdraw from the fight. It also expressed concern about the use of new information and communication technologies to recruit and incite terrorists and threatened to list such individuals under existing sanctions regimes devoted to Al Qaida. The resolution imposed far reaching new legal obligations on all member states to bring foreign fighters to justice, prevent the recruitment and movement of terrorists and terrorists groups through the implementation of effective border controls etc., and prohibit terrorist financing, including trade and other financial engagements that could constitute providing financial support to such groups.¹⁷⁸ Attesting to the magnitude of the significance accorded to this issue, the resolution was

¹⁷⁴ S/RES/2332, *supra* note 61, at pmb1.

¹⁷⁵ S/PV.7588, *supra* note 104, ¶ 5.

¹⁷⁶ S/RES/2332, *supra* note 61, ¶ 9.

¹⁷⁷ S.C. Res. 2178, pmb1, U.N. Doc. S/RES/2178 (Sept. 24, 2014).

¹⁷⁸ *Id.* ¶¶ 12, 20. *See also* S/RES/2332, *supra* note 61, at pmb1; S/RES/2249, *supra* note 157, ¶ 6 (urging member states to intensify their efforts to stem the flow of foreign fighters).

passed by Security Council members' heads of state or government—only the sixth time in the United Nations' history.¹⁷⁹ In December 2017, the Council passed a follow up resolution, calling on all member states to respond to foreign fighters and their accompanying family members through appropriate border control, prosecutorial, rehabilitative, and reintegration measures in keeping with their obligations under international law.¹⁸⁰ Civil liberties advocates expressed concern that these measures, coupled with loose definitions of “terrorism” under international law, will be abused by oppressive regimes and gives insufficient attention to prevention.¹⁸¹

The Use of Force in Syria

Beyond the ambiguous authorization discussed above in connection with the Council's counter-terrorism agenda, the Council never authorized further uses of force in Syria, compelling states to articulate other legal justifications for their kinetic actions in Syria.¹⁸² Russia called for an emergency session of the Council the day after the second major round of airstrikes in Syria by the United States, with the participation of France and the United Kingdom, following the Douma chemical weapons attack. Secretary-General Guterres opened the session with an admonition that any use of chemical weapons is “abhorrent,” but in the same breath reminded all member states of their Charter obligations.¹⁸³ The Russian Permanent Representative introduced a draft resolution that would have condemned the operation as an act of aggression¹⁸⁴ and read a statement from President Putin to this effect.¹⁸⁵ The United States rejected this conclusion and explained that it had acted “to deter the future use of chemical weapons by holding the Syrian regime responsible for its crimes against humanity” in a way that was “justified, legitimate and proportionate.” Ambassador Nikki Haley blamed Russia for defending Assad's use of “barbaric weapons.” She also warned that the United States stood ready to act again if necessary: “When our President draws a red line, our President enforces the red line.”

In addition to a deterrence rationale, the United Kingdom invoked the doctrine of humanitarian intervention: “Any State is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering” so long as there is convincing evidence of extreme humanitarian distress, there is no practicable alternative, and the use of force is necessary and proportionate to the underlying humanitarian aim. France noted that the use of chemical weapons constitutes a war crime within the Rome Statute and, in an explanation sounding of reprisals, justified its participation as necessary to address the Syrian regime's repeated violations of international law. Poland overtly supported the action, whereas the Netherlands described the response as “understandable” and “measured.” A number of states reiterated calls for the perpetrators of the chemical attacks to be held accountable, including via

¹⁷⁹ Michael Plachta, *Security Council Adopts Resolution on Foreign Terrorist Fighters*, 30 INT'L ENFORCEMENT L. REP. 500 (2014).

¹⁸⁰ S.C. Res. 2396, U.N. Doc. S/RES/2396 (Dec. 21, 2017).

¹⁸¹ Martin Scheinin, *Back to Post-9/11 Panic? Security Council resolution on Foreign Terrorist Fighters*, JUST SECURITY (Sept. 23, 2014); Bibi van Ginkel, *The New Security Council Resolution 2178 on Foreign Terrorist Fighters: A Missed Opportunity for a Holistic Approach*, International Centre for Counter-Terrorism (Nov. 4, 2014).

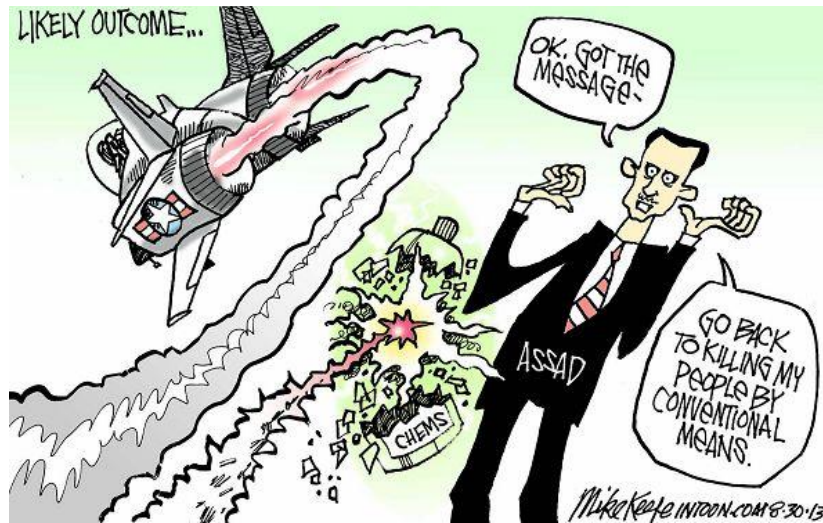
¹⁸² See Ryan Goodman, *What Do Top Legal Experts Say About the Syria Strikes?*, JUST SECURITY, Apr. 7, 2017; Vito Todeschini, *Debate Map: Armed Conflict and Use of Force in Syria*, OXFORD PUBLIC INTERNATIONAL LAW (Apr. 30, 2017).

¹⁸³ These discussions are here: U.N. SCOR, 73rd sess., 8233rd mtg., U.N. Doc. S/PV.8233 (Apr. 14, 2018).

¹⁸⁴ Russian Federation: draft resolution, U.N. Doc. S/2018/355 (Apr. 14, 2018) (condemning “the aggression against the Syrian Arab Republic by the US and its allies in violation of international law and the UN Charter”).

¹⁸⁵ S/PV.8233, *supra* note 183, at 4. China, Kazakhstan, and Equatorial Guinea were also critical of the strikes, but less provocatively so. *Id.* at 9-10, 17.

action outside the Security Council. Other members did not express their views on the strikes other than to counsel restraint, express their condemnation of the use of chemical weapons, and urge a political resolution to the conflict. Russia's proposed draft resolution gained the support of only three states: Bolivia, China, and Russia. Later, other members of the international community positioned themselves along this legality continuum.¹⁸⁶



© Mike Keefe, www.intoon.com

Neutralizing Syria's Chemical Weapons

Another important, but fleeting, moment of consensus followed the use of chemical weapons in Ghouta on August 21, 2013. Prior to the war, Syria's arsenal of chemical weapons was reputed to be among the world's largest and most advanced—one of the many issues of concern within the international community as peaceful protests devolved into a full-scale civil war.¹⁸⁷ The Ghouta attack occurred at a time when a U.N. inspection team was on the ground to respond to earlier allegations of chemical weapon use.¹⁸⁸ The August assault—which resulted in hundreds of deaths and left 3,000 people suffering from neurotoxic symptoms¹⁸⁹—marked the most significant use of chemical weapons since Saddam Hussein's attack on his Kurdish citizenry in Halabja, Iraq, in 1988. The Security Council convened an emergency session, but no resolution emerged, in part because Russia suggested the attack was a rebel "provocation" to discredit Assad.¹⁹⁰ The Secretary-General, invoking an earlier General Assembly authority, asked the U.N. Organisation

¹⁸⁶ See Alonso Gurmendi Dunkelberg et al., *Mapping States Reactions to the Syria Strikes of April 2018*, JUST SECURITY (Apr. 22, 2018).

¹⁸⁷ See generally Nuclear Threat Initiative, *Syria* (Apr. 2018) (discussing history of Syria's chemical weapons program).

¹⁸⁸ United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, *Final Report*, U.N. Doc. A/68/663-S/2013/735 (Dec. 13, 2013) (reporting on U.N. investigations confirming chemical weapon use in Ghouta and elsewhere).

¹⁸⁹ Médecins Sans Frontières, *Syria: Thousands Suffering Neurotoxic Symptoms Treated in Hospitals Supported by MSF* (Aug. 24, 2013).

¹⁹⁰ Dominic Evans and Khaled Yacoub Oweis, *Syria Gas 'Kills Hundreds,' Security Council Meets*, REUTERS, Aug. 21, 2013.

for the Prohibition of Chemical Weapons (OPCW) to deploy an investigative mission.¹⁹¹ Both the United States and the United Kingdom released intelligence assessments purporting to confirm the attacks.¹⁹²

In September 2013, Russia proposed and ultimately brokered a Framework for the Elimination of Syrian Chemical Weapons, which envisioned an international mission to inspect all potential chemical weapons sites within Syria and supervise the destruction of toxic material and equipment under the aegis of the OPCW.¹⁹³ This *deus ex machina*, coupled with lukewarm support from the U.S. Congress, decelerated President Barack Obama's drive toward deploying armed force in Syria.¹⁹⁴ In the Framework Agreement, the United States and Russia agreed to work towards the prompt adoption of a Security Council resolution to reinforce the scheme. Resolution 2118 ensued, which blessed a decision of the Executive Council of the OPCW establishing procedures for the expeditious inspection and destruction of Syria's chemical weapons program by a joint U.N.-OPCW mission to be funded in part by a trust fund of voluntary contributions.¹⁹⁵ Resolution 2118 stressed that those responsible for the use of chemical weapons—a “serious violation of international law” and a threat to international peace and security—“must be held accountable,”¹⁹⁶ a point echoed by then-U.S. Secretary of State John Kerry and other state representatives in their explanations of vote.¹⁹⁷ Indeed, Secretary Kerry also reiterated that the resolution established that *any* use of chemical weapons is a threat to international peace and security, regardless of the circumstances.¹⁹⁸

The resolution also indicated the Council would take coercive action in the event of non-compliance by the Syrian regime and utilized the verb “decides” when it came to Syria's cooperation with the plan. This term usually indicates that the Council's action is a “decision” of the type that all U.N. members are legally obliged to accept and carry out under Article 25 of the

¹⁹¹ G.A. Res. 42/37C, ¶ 4, U.N. Doc. A/RES/42/37 C (Nov. 30, 1987) (requesting the Secretary-General to carry out investigations in response to reports concerning the possible use of chemical, bacteriological, or toxic weapons anywhere).

¹⁹² See White House, *Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013* (Aug. 30, 2013); U.K. Joint Intelligence Organization, *Syria: Reported Chemical Weapons Use* (Aug. 29, 2013) (memo from the Chair of the Joint Intelligence Committee to the Prime Minister). Despite this latter report, the British Parliament voted against supporting military action in Syria.

¹⁹³ Joint National Paper by the Russian Federation and the United States of America, *Framework for Elimination of Syrian Chemical Weapons*, EC-M-33/NAT.1 (Sept. 17, 2013).

¹⁹⁴ See S.J. Res. 21, Authorization for the Use of Military Force Against the Government of Syria to Respond to Use of Chemical Weapons, 113th Cong. (2013-14), <https://www.congress.gov/bill/113th-congress/senate-joint-resolution/21/all-actions>.

¹⁹⁵ The Executive Council Decision is appended as an Annex to Resolution 2118. See OPCW, Decision: Destruction of Syrian Chemical Weapons, EC-M-33/Dec. 1 (Sept. 27, 2013). For background see OPCW, Note by the Director-General, Progress in the Elimination of the Syrian Chemical Weapons Programme, EC-7/DG.1 (Feb. 23, 2018).

¹⁹⁶ S/RES/2118, *supra* note 29, at pmb1, ¶ 1. See also *id.* ¶ 15 (expressing the Council's “strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be held accountable”).

¹⁹⁷ S/PV.7038, *supra* note 80, at 4-5 (Statement of the United States). Luxembourg indicated that the time had come to refer the situation in Syria to the ICC. *Id.* at 7. Argentina affirmed that the use chemical weapons is a war crime and a crime against humanity. *Id.* at 13.

¹⁹⁸ *Id.* at 4. France pointed out that this text allows the Council to act on this issue anytime in the future and to become a guarantor of chemical disarmament. *Id.* at 7.

U.N. Charter. Although the Resolution did not expressly invoke Chapter VII, many members nonetheless insisted it was legally binding.¹⁹⁹

Although the resolution did not assign responsibility for the attack, many delegations blamed the Syrian government in their interventions.²⁰⁰ Russia, by contrast, noted that implementation of the Framework Agreement would fall not just to the Syrian government but also required the cooperation of the Syrian opposition and other states to ensure that chemical weapons did not fall into the hands of “extremists.” Importantly, the attack seemed to inspire the Council to endorse for the first time the Geneva Communiqué calling for transfer of power to a transitional governing body, conceived by many delegations as an important precursor towards convening the Geneva II conference.²⁰¹ Although delegates cheered the fact that the Security Council had overcome its internal divisions and set in motion a process to eliminate a significant chemical weapons program through non-military means, they also called attention to the need to resolve the conflict, respond to the humanitarian catastrophe in the region, and condemn equally attacks on civilians by conventional means. Indeed, Argentina noted that “the horror of chemical weapons ... should not overshadow the fact that 99 per cent of the casualties in the conflict have been from conventional weapons.”²⁰²

As part of this deal, Syria acceded with immediate effect to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC).²⁰³ In the period that followed, Syria purported to submit detailed information about all chemical weapons agents and precursors in its stockpiles. Experts later neutralized 1,300 metric tons of weapons-grade chemicals via hydrolysis on a U.S. cargo vessel in international waters. However, subsequent chemical weapons use suggested that there were significant omissions in Syria’s reporting or that its chemical weapons production capabilities were not entirely dismantled. As a result, the OPCW Director-General established a Declaration Assessment Team (DAT) to resolve inconsistencies, gaps, and discrepancies in the original Syrian declaration of its arsenal. In response to additional allegations of chemical weapon attacks, OPCW also created a fact-finding mission (FFM) in April 2014 under its authority to uphold the object

¹⁹⁹ *Id.* at 5 (statement of Luxembourg). See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 162 (July 9) (finding that Israel had contravened several Security Council resolutions even though the texts did not expressly invoke Chapter VII); Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16(5) EUR. J. INT’L L. 879 (2005).

²⁰⁰ S/PV.7038, *supra* note 80, at 6 (statement of France); *id.* at 15 (“Australia’s assessment is that the evidence available shows that it was the Syrian authorities who were responsible for this crime, and this incident has confirmed what Australia has said for a long time—that the Council should refer the situation in Syria to the International Criminal Court.”).

²⁰¹ S/RES/2118, *supra* note 29, ¶ 16. See, e.g., S/PV.7038, *supra* note 80, at 10 (statement of China).

²⁰² See, e.g., S/PV.7038, *supra* note 80, at 13; *id.* at 14 (statement by Rwanda).

²⁰³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I, Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317. The CWC enjoys almost universal ratification; only Egypt, Israel, North Korea and South Sudan have not ratified it. See Arms Control Association, *Chemical Weapons Signatories and States Parties*, <https://www.armscontrol.org/factsheets/cwcsig>. Syria had been a party to the 1925 Protocol for the Prohibition on the Use in War of Asphyxiating, Poisonous or Other Gases and Bacteriological Methods of Warfare (the 1925 Gas Protocol) since 1968. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65. It prohibits the use of chemical weapons, but not their production or stockpile.

and purpose of the CWC. The terms of reference were agreed upon through an exchange of letters with the Syrian government.

The Council re-engaged on this issue once evidence emerged of chlorine gas attacks in rebel strongholds in 2014—the first documented use of chemical weapons by a state party to the CWC.²⁰⁴ Although chlorine was not technically a target agent in the OPCW removal process or subject to reporting by Syria (since it has many ordinary industrial and commercial uses), it can be weaponized in gas form. As such, its use in combat violates the treaty and Resolution 2118. These incidents provoked renewed condemnation from the Council, which in Resolution 2209 of 2015 threatened Chapter VII measures in the event of future non-compliance.²⁰⁵ The Council called again for accountability, stressing that “those individuals responsible for any use of chemicals as weapons, including chlorine or any other toxic chemical, must be held accountable.”

The FFM, which remains in operation, was originally mandated to establish facts surrounding allegations of the use of toxic chemicals for hostile purposes, but not to attribute responsibility to any party to the conflict.²⁰⁶ In Resolution 2235 (2015), the Council created a new mechanism—an OPCW-UN Joint Investigative Mechanism (JIM)—to take this next step and “identify to the greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organisers, sponsors or otherwise involved in the use of chemicals as weapons.”²⁰⁷ The JIM was, by and large, supposed to follow up on instances of chemical weapon use confirmed by the FFM. As a subsidiary body of the Council, it was also encouraged to examine additional information and evidence obtained from elsewhere, including with respect to the potential use of prohibited weapons by non-state actors and terrorist groups.²⁰⁸ The JIM ultimately confirmed multiple instances of chemical weapon use by the regime (e.g., in several towns in Idlib Governorate) and the Islamic State (e.g., in Marea and Umm Hawsh).²⁰⁹

In February 2017, the P-3, with the support of a number of other states, circulated a new draft resolution on chemical weapons. The text would have taken note of the reports of the JIM, concluded that Resolution 2118 had been violated, condemned the use of chemical weapons by the Syrian Armed Forces and ISIL, and expressed particular concern about efforts by non-state actors to acquire and use chemical weapons.²¹⁰ An Annex identified a number of individuals, groups, and entities that would be immediately subject to sanctions, including asset freezes and a travel ban. It would also have imposed an embargo on listed chemicals, devices used to weaponize such chemicals, and helicopters used to disburse them. The list of sanctions designees named a number of senior officials within the Syrian Armed Forces, including individuals who would have

²⁰⁴ See Second Report of the OPCW Fact-Finding Mission in Syria: Key Findings, U.N. Doc. S/1212/2014 (Sept. 10, 2014). All the OPCW-FFM’s reports are available here: <https://www.opcw.org/special-sections/syria/fact-finding-mission-reports/>.

²⁰⁵ S.C. Res. 2209, ¶ 7, U.N. Doc. S/RES/2209 (Mar. 6, 2015).

²⁰⁶ See OPCW, Note by Technical Secretariat: Future Activities of the OPCW Fact-Finding Mission in Syria, S/1255/2015 (Mar. 10, 2015).

²⁰⁷ S.C. Res. 2235, pmbl, U.N. Doc. S/RES/2235 (Aug. 7, 2015). The Secretary General was tasked with presenting recommendations and terms of reference for this new entity in coordination with the OPCW Director-General. *Id.* ¶ 5.

²⁰⁸ S.C. Res. 2319, U.N. Doc. S/RES/2319 (Nov. 17, 2016).

²⁰⁹ See Third Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, U.N. Doc. S/2016/38/Rev. 1 (Aug. 24, 2016); Seventh Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, U.N. Doc. S/2017/904 (Oct. 26, 2017).

²¹⁰ Albania et al.: draft resolution, U.N. Doc. S/2017/172, ¶¶ 1-2 (Feb. 28, 2017).

been in the position to allow chemical weapons use in their areas of responsibility, and other personnel associated with the Syrian Scientific Studies and Research Center (SSRC), which undertakes the research and development of Syrian weapons technology.²¹¹ All those listed were already subject to unilateral sanctions by the United States.²¹² The draft also would have established a committee and a panel of experts to monitor implementation. Finally, the text reiterated the importance of accountability by expressing the Council's

strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be thoroughly investigated, and prosecuted, as appropriate, before a competent tribunal which is both independent and impartial ... [and its] intent to review additional options to ensure accountability for perpetrators, organizers, sponsors, or persons or entities otherwise involved in the use of chemical weapons in the Syrian Arab Republic.²¹³

The draft's supporters insisted the source of the chemical weapon attacks had been identified by the JIM and so the time had come to sanction individual perpetrators, lest the Council appear to be promoting impunity or forsaking the venerable chemical weapon non-proliferation regime.²¹⁴ In support, the U.K. Permanent Representative reminded the states that in Resolution 2118 the Council agreed that any use of chemical weapons would lead to the imposition of Chapter VII measures. He concluded: "This is about taking a stand when children are poisoned."

As was expected, Russia—joined by China and Bolivia—rejected the draft, marking Russia's seventh veto and China's sixth.²¹⁵ In its explanation of vote, Russia took issue with the methodology employed and the determinations reached by the Mechanism, arguing that its conclusions were uncorroborated and could not support criminal charges. It noted in particular that the Mechanism had relied upon "questionable information" provided by the armed opposition and that its staff did not travel to many of the places where the crimes were alleged to have been committed. Rather, Russia alleged, the JIM's results were preprogrammed at the behest of the West. Russia also complained that two-thirds of the mission's expert team lacked geographic diversity. To this, the United Kingdom noted that in Resolution 2235 Russia agreed to the methodology that the JIM would apply, and so could not suddenly complain about the conclusions the Mechanism drew by applying this methodology impartially and independently. Syria amplified Russia's first point, criticizing the P-3 for putting to a vote "draft resolutions that draw from unprofessional reports that are unable to come to definitive conclusions and that draw on the false, fabricated eyewitness accounts of members of terrorist groups that are supported by those very same countries." In a bit of a non-sequitur, Syria also charged that the resolution was actually aimed at protecting Israel's nuclear, chemical, and biological stockpiles. In justifying its veto, China invoked the specter of Iraq and reminded members of the Council that "the purported existence of weapons of mass destruction was used in the past to unleash a war that has brought untold suffering to the people in the Middle East."²¹⁶ China emphasized the need to stabilize the

²¹¹ See Nuclear Threat Initiative, *Syrian Scientific Studies and Research Center* (Aug. 17, 2012).

²¹² See Department of the Treasury, Syria Sanctions, <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/syria.aspx>.

²¹³ S/2017/172, *supra* note 210, ¶¶ 4, 14.

²¹⁴ Debates around the proposed resolution are available here: U.N. SCOR, 72nd sess., 7893rd mtg., U.N. Doc. S/PV.7893 (Feb. 28, 2017).

²¹⁵ Egypt, Ethiopia, and Kazakhstan abstained, so the resolution received only nine positive votes, a point noted by several of its opponents. See, e.g., *id.* at 11 (statement of Bolivia).

²¹⁶ *Id.* at 9 (statement of China).

situation, preserve the current ceasefire, and ultimately find a political solution to the conflict, implying that imposing sanctions would run counter to these concerns. China also decried certain states' "[u]nprovoked and distorted attacks against the solemn position of other members" of the Council.²¹⁷

The pre-designation of individuals and entities to be sanctioned also drew more broad-based criticism within the Council. Russia complained that the JIM's reports provided no basis for the imposition of targeted sanctions, which would only weaken the international counter-terrorism effort if implemented.²¹⁸ Egypt echoed a version of this point, noting that past practice was to establish a sanctions committee that would make designations into the sanctions program following a more individualized investigation. It insisted that it supported the notion of justice and accountability but opposed "the levelling of arbitrary accusations against specific individuals and entities on issues that could amount to being war crimes." Ethiopia agreed, concluding that the JIM's conclusions were not firm enough to individualize sanctions. Italy countered that simply "identifying which party is responsible is not enough; those who planned, ordered and executed the attacks must face justice." It insisted that the Council must uphold the work of the JIM and ensure meaningful follow-up in terms of holding responsible individuals and entities accountable.

On April 4, 2017, the town of Khan Sheikhoun in Idlib province experienced a devastating chemical attack—the deadliest since Ghouta—with a sarin-like substance. Days later, the Trump Administration unilaterally launched cruise missiles against Syria's Sahyrat airbase from which the attack was thought to have been unleashed. The Council called an emergency meeting at which time Russia vetoed (its eighth) a draft resolution initiated by the United States that would have condemned the April attack, called upon all parties to grant inspectors delay-free and full access to relevant sites, expressed the Council's determination that those responsible be held accountable, and obliged Syria to provide the FFM and JIM with flight plans and access to relevant personnel and airbases.²¹⁹ Bolivia joined Russia in rejecting the measure; China, Ethiopia and Kazakhstan abstained, with China emphasizing the importance of preserving unity within the Council and expressing regret that consensus could not be reached.²²⁰ The language did not purport to assign responsibility for the attack, although it did place special cooperation obligations on the Assad regime.

Nonetheless, in its explanation of vote, Russia criticized a "distorted" draft, which "designated the guilty party prior to an independent and objective investigation." Russia linked its veto to the U.S. strikes, insisting that voting in favor of the U.S. resolution would "have meant legitimizing those illegal actions." The United Kingdom indicted Russia for choosing to "protect the perpetrators of those attacks rather than work with the rest of the international community to condemn them." France expressed support for the United States' operation as a "legitimate response to a mass crime that could not go unpunished." Many other states repeated the call for accountability for the use of chemical weapons.

The JIM was extended twice, although these votes were delayed at times, which undermined the continuity of its work and led to staff departures. Even this effort eventually lost

²¹⁷ *Id.* at 10.

²¹⁸ *Id.* at 7-8. Bolivia also took note of the fact that the OPCW did not play a role in generating the annexes to the draft resolution, which in its estimation violated the due process rights of the designees. *Id.* at 11.

²¹⁹ France, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, U.N. Doc. S/2017/315 (Apr. 12, 2017).

²²⁰ The debates are here: U.N. SCOR, 72nd sess., 7922nd mtg., U.N. Doc. S/PV.7922 (Apr. 12, 2017).

the support of Russia, demonstrating the fragility of multilateral arrangements that require a Council vote to continue their operations.²²¹ Russia used its next two vetoes to reject subsequent resolutions that would have extended the JIM's work for a third time, once on the theory that the extension was premature because the JIM's report on Khan Sheikhoun was imminent²²² and once because it objected to the Mechanism's working methods.²²³ Russia had criticized both the OPCW FFM and the JIM for their failure to visit the sites of certain attacks, notably Khan al-Assal which was under the government's control at the time, and for accepting "dubious testimony from the opposition groups and even terrorists."²²⁴ Russia raised the Iraq intervention in justifying its stance, accusing the United States of deliberately misleading international community to establish grounds for intervention in 2003. Bolivia, a non-permanent member, also voted against the measure the first time it was brought to a vote; China and Kazakhstan abstained. In their explanations of vote, some delegations issued a plea for greater unity within the Council and argued that the resolution should not have been tabled knowing it would garner Russia's veto. Other delegations expressed deep disappointment at the demise of the JIM, noting that there were still some 60 cases of alleged chemical weapons use being examined by the OPCW that could be referred to the JIM and that the failure to extend the mechanism would lead to further impunity.

Through some procedural machinations, Bolivia then submitted for a vote a Russian draft resolution to extend the JIM's mandate under different terms. It had not been subject to consultations and received a meager four votes in its favor.²²⁵ This draft resolution implicitly criticized the FFM for operating in "remote mode," not pursuing "all possible leads and scenarios without exception," and not respecting the chain of custody. It also requested the JIM to take environmental samples at the Shayrat airbase, the target of President Trump's airstrikes, to verify allegations that sarin had been stored there, and to focus on chemical-related acts by non-state actors. Russia reiterated these criticisms of the JIM in its intervention in support of the resolution.²²⁶ The United States suggested that the draft would allow Russia or even Syria to micromanage the JIM, thus undermining its independence. Ambassador Haley also warned that the United States would continue to defend the international taboo against chemical weapons use, as it did in April 2017. Russia deployed its eleventh veto in connection with a draft technical resolution by Japan, issued on the final day of the JIM's mandate, to extend the process for a mere 30 days.²²⁷ This marked the definitive dissolution of the JIM. All told, the JIM issued seven reports allocating responsibility to Syrian forces and ISIL. Russia and friends continued to criticize the work of the JIM, focusing in particular on the methodology employed and the decision of the

²²¹ S.C. Res. 2314, U.N. Doc. S/RES/2314 (Oct. 31, 2016); S/RES/2319, *supra* note 189.

²²² Albania et al.: draft resolution, U.N. Doc. S/2017/884 (Oct. 24, 2017) (proposal to renew the JIM for one year). Bolivia joined Russia in vetoing the draft. China and Kazakhstan abstained.

²²³ France, Italy, Japan Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland, and the United States of America: draft resolution, U.N. Doc. S/2017/962 (Nov. 16, 2017). Bolivia also vetoed the measure. In this draft, the Security Council would have called for the FFM and JIM to collaborate closely so that the latter could quickly investigate any incident that the FFM determined involved the use of chemical weapons. It also called upon the Mechanism to conduct its investigations according to high methodological standards and evidentiary levels. U.N. Doc. S/2017/962, *supra*, ¶¶ 6-8. All parties would have been mandated to facilitate the unfettered access of both investigative processes. *Id.* ¶ 9.

²²⁴ These debates are available here: U.N. SCOR, 72nd sess., 8105th mtg., U.N. Doc. S/PV.8105 (Nov. 16, 2017). Right as U.N. inspectors were slated to visit the Khan al-Assal governorate, the 2013 Ghouta attacks took place, preventing the visit.

²²⁵ Plurinational State of Bolivia: draft resolution, U.N. Doc. S/2017/968 (Nov. 16, 2017).

²²⁶ S/PV.8105, *supra* note 224, at 17.

²²⁷ Japan: draft resolution, U.N. Doc. S/2017/970 (Nov. 17, 2017).

experts not to go to certain on-site visits for security reasons and because the attacks occurred too long in the past.²²⁸ In particular, Russia criticized the conclusion of the “pseudo-investigation” that an unguided missile had been dropped from the air in Khan Sheikhoun.²²⁹

Apparent chemical weapons attacks in Syria continued throughout early 2018, notably in Douma—the last rebel-held town in Eastern Ghouta. Russia claimed to have conducted an investigation in Douma and found no evidence of chemical weapon use, although OPCW inspectors were initially blocked from the site, leading to speculation it had been scrubbed.²³⁰ These events inspired an emergency meeting of the Security Council and a trifecta of failed resolutions.²³¹ With the first, the United States and allies attempted to launch a new “independent, impartial and transparent investigation” called the United Nations Independent Mechanism of Investigation (UNIMI), which could identify responsible parties and undertake site visits where security conditions allowed.²³² The draft also provided Security Council support for the OPCW FFM, which remained operational. Its backers argued the resolution responded to Russia’s criticism of the JIM and was drafted in a spirit of unity.²³³

Nonetheless, this resolution was vetoed by Russia—its twelfth involving Syria and its sixth in connection with chemical weapon use. Russia justified its *nyet* by the fact that the draft was simply attempting to resurrect the discredited JIM, which in Russia’s estimation had already proved itself to be a “puppet of anti-Damascus forces [that] covered itself with shame when it issued a guilty verdict for a sovereign State without credible evidence.” China abstained, noting that while the draft contained “elements of consensus,” it did not fully consider “some of the major concerns of certain Security Council members on improving the mechanism’s working methods and ensuring an objective and impartial investigation.” The rest of the Council except Bolivia voted in favor. Bolivia justified its “no” vote as a response to the threats to use force unilaterally in violation of the Charter that had been issued following the attack. Sure enough, the United States, the United Kingdom, and France later responded to the Douma attack with airstrikes on SSRC sites presumed to be part of Syria’s chemical weapons program.²³⁴ Syria later accused the P-3 of “staging” the chemical attacks to justify the airstrikes that followed.²³⁵ Russia made similar allegations in the Security Council chamber, arguing that the rebels had evacuated Douma by the time of the attack so only they stood to benefit from the “provocation” in order to receive “support from the United States and other Western countries.”²³⁶ It also accused the JIM of tailoring conclusions to justify Western airstrikes on Al-Shayrat airbase.

²²⁸ S/PV.8105, *supra* note 224, at 10 (statement of China).

²²⁹ *Id.* at 17.

²³⁰ *How We Created a Virtual Crime Scene to Investigate Syria’s Chemical Attack*, N.Y. TIMES, Jun. 24, 2018; Richard Pérez-Peña & Rick Gladstone, *Chemical Arms Experts Blocked from Site of Syria Attack*, N.Y. TIMES, Apr. 16, 2018.

²³¹ See U.N. SCOR, 73rd sess., 8228th mtg., U.N. Doc. S/PV.8228 (Apr. 10, 2018).

²³² Albania et al.: draft resolution, U.N. Doc. S/2018/321 (Apr. 10, 2018). *Vis-à-vis* the FFM, the draft resolution would have demanded that all parties in Syria accord it “unhindered and safe access to any sites deemed relevant.” *Id.* ¶ 5.

²³³ S/PV.8228, *supra* note 231, at 2-3 (statement of France); 3, 9-10 (statements of the United States); 9 (statement of the United Kingdom).

²³⁴ For a discussion of the legal theories undergirding the attacks, see Jennifer Trahan, *The Narrow Case for the Legality of Strikes in Syria and Russia’s Illegitimate Veto*, OPINIO JURIS (Apr. 23, 2018).

²³⁵ *Bashar al Assad: The UK and US are Prolonging Syria’s Civil War*, SKYNEWS, June 10, 2018.

²³⁶ S/PV.8228, *supra* note 231, at 13 (statement of Russia). Russia also claimed its specialists confirmed that no such incident took place in Douma. S/PV.8233, *supra* note 183, at 4.

A competing draft circulated by Russia also failed, with only six votes in favor (Bolivia, China, Equatorial Guinea, Ethiopia, Kazakhstan, and Russia).²³⁷ This resolution was superficially similar to the United States' draft. It would have created a UNIMI and blessed the work of the OPCW FFM. It contained a number of provisions directing the UNIMI and the FFM to utilize rigorous investigative standards, including on-site visits, and to consider information provided by the Syrian Arab Republic pertaining to the activities of non-state actors. However, what proved fatal was that it limited UNIMI to identifying “beyond a reasonable doubt facts which may lead to the attribution *by the Security Council*” (emphasis added) of chemical weapon use.²³⁸ Elsewhere, the draft would have invited

the UNIMI to engage relevant regional States in pursuit of its mandate, including in order to identify beyond reasonable doubt facts which may lead to the attribution by the Security Council of the involvement of any individuals, entities or groups associated with ISIL (Da'esh) or ANF in the use of chemicals as weapons in the Syrian Arab Republic.²³⁹

The states that voted in favor of both resolutions expressed their support for the revival of an independent investigative mechanisms to establish accountability for chemical weapon use.²⁴⁰ Russia's “beyond a reasonable doubt” standard drew criticism from other members of the Council. In this regard, the United Kingdom noted that the draft:

moves the parameters on access and imparts a quasi-judicial standard—“beyond a reasonable doubt”—that is inappropriate for the type of investigation that the Council wishes to establish. If the Russians want a criminal investigation, they could always suggest that we refer the matter to the International Criminal Court.²⁴¹

Russia was also accused of trying to exert control over who would staff the mechanism and what findings would be made public because its draft appeared to give veto power over these issues to the Council.

Russia quickly submitted a pared down version of the latter resolution,²⁴² which would have merely condemned the attacks, expressed support for the OPCW, and demanded that the FFM be given access to Syria. After quick consultations, the new draft also failed, this time with only five votes in favor (Equatorial Guinea abstained along with Côte d'Ivoire, Kuwait, the Netherlands, Peru, and Sweden). The P-3 and Poland rejected the draft, explaining that the work of the FFM needed to be enhanced by an investigative mechanism that could ascribe responsibility for attacks. The United Kingdom stated, “we are not able to support the text. It would be like watching a fire, identifying that there was a fire, and doing nothing to put it out.”²⁴³ The United States accused Russia of trying to micromanage the FFM and controlling its investigators. The Netherlands raised concerns that the resolution implied that the FFM needed Council approval to operate when in fact it already has the mandate for on-site visits. Ethiopia could not find fault with the “matter-of-fact and uncomplicated” draft and argued the FFM could have used the Council's

²³⁷ Russian Federation: draft resolution, U.N. Doc. S/2018/175 (Apr. 10, 2018).

²³⁸ *Id.* ¶ 6.

²³⁹ *Id.* ¶ 22.

²⁴⁰ S/PV.8228, *supra* note 231, at 11 (statement of Ethiopia); *id.* at 12 (statement of Kazakhstan).

²⁴¹ *Id.* at 9 (statement of the United Kingdom).

²⁴² Russian Federation: draft resolution, U.N. Doc. S/2018/322 (Apr. 10, 2018).

²⁴³ S/PV.8228, *supra* note 231, at 14-15 (statement of the United Kingdom).

support and that it would have been an achievement simply to confirm chemical weapon use in Douma, especially in light of Russia's denial.

With the expiration of the JIM, states parties to the OPCW voted overwhelmingly in June 2018 to empower the Secretariat to “put in place arrangements to identify the perpetrators of the use of chemical weapons” in Syria and elsewhere in the world.²⁴⁴ The Secretariat established an Investigations & Identification Team to follow up on the work of the FFM and JIM. In addition, several less-robust mechanisms remain focused on chemical weapon use: the original OPCW FFM (which is not empowered to attribute responsibility); the OPCW Declaration Assessment Team, which is still examining—and finding fault with—the accuracy of Syria's original declarations; and the U.N. Commission of Inquiry, which looks at international crimes broadly but does not have specialized expertise when it comes to this set of weapons. The latter has examined a number of attacks and attempted to attribute responsibility based upon its operative standard of proof.²⁴⁵ Russia continued to contest the conclusions of the FFM and the OPCW, staging an Arria-formula meeting in January 2020.²⁴⁶

Sanctions

As sanctions for Syria were under consideration in the Council, the United Nations had fifteen sanctions regimes in place—the highest number in history—which together cost only about \$30 million per year to support.²⁴⁷ Smart sanctions have proven themselves to be a useful tool against recalcitrant states. When in place, they can starve a regime of resources and isolate key personnel. On the flip side, sanctions relief also offers an effective lever during negotiations.

Notwithstanding the fact that sanctions had become a tool deployed repeatedly by the Council, efforts to establish comprehensive sanctions regimes in connection with the current Syrian crisis all failed,²⁴⁸ either because they were negotiated out of the draft text²⁴⁹ or subject to a double Russian/Chinese veto.²⁵⁰ Although comprehensive sanctions devoted to Syria eluded the Council, it was able to get certain individuals associated with terrorist groups operating in Syria designated onto pre-existing Al Qaida sanctions programs, notwithstanding the operational and ideological independence between Al Qaida and ISIL.²⁵¹ It also extended the Al Qaida arms embargo to the situation in Syria, with particular concern expressed for man-portable air-defense

²⁴⁴ OPCW, Decision Addressing the Threat from Chemical Weapons Use, C-SS-4/DEC.3, ¶ 10 (June 27, 2018).

²⁴⁵ See Chemical Weapons Attacks Documented by the Independent International Commission of Inquiry on the Syrian Arab Republic (Jan. 2018),

https://www.ohchr.org/SiteCollectionImages/Bodies/HRCouncil/IICISyria/COISyria_ChemicalWeapons.jpg.

²⁴⁶ *Arria-Formula Meeting on Syria Chemical Weapons*, WHAT'S IN BLUE (Jan. 20, 2020). Arria-formula meetings, named after the former Ambassador to Venezuela who first conceptualized the concept in 1992, are informal and do not require the support of a majority of the Council to proceed.

²⁴⁷ See S/PV.7323, *supra* note 44, at 2.

²⁴⁸ Syrian officials had been under earlier U.N. sanctions following the assassination of former Lebanese Prime Minister Rafik Hariri and the release of the report by the International Independent Investigation Commission (UNIIC), established by the Security Council in 2005. See S.C. Res. 1636, U.N. Doc. S/RES/1636 (Oct. 31, 2005) (establishing sanctions regime for individuals mentioned in the UNIIC's report).

²⁴⁹ S/PV.7116, *supra* note 66, at 11 (statement of Nigeria expressing regret that there was no paragraph barring arms transfers) and 12-13 (statement of Rwanda expressing regret that amendments on the responsibility of states supplying weapons to the Syrian parties were not included in the final version of the resolution).

²⁵⁰ See S/2017/172, *supra* note 210.

²⁵¹ S/RES/2170, *supra* note 67, ¶¶ 18-20, Annex. See also S.C. Res. 2161, U.N. Doc. S/RES/2161 (June 17, 2014) (updating Al Qaida asset freeze, travel ban, and arms embargo); S.C. Res. 2253, ¶ 1, U.N. Doc. S/RES/2253 (Dec. 17, 2015) (renaming the Al Qaida Sanctions List to include ISIL (Da'esh)).

missiles (ManPADs).²⁵² Sanctions were also aimed at disrupting the oil trade as a source of financing for ISIL, the Nusra Front, and other Al Qaida-affiliated terrorist groups.²⁵³ In the same resolution, the Council called upon all member states to take appropriate measures to prevent the trade in Iraqi and Syrian cultural property²⁵⁴ and refrain from paying ransoms for kidnappings or hostage-takings. All states were to ensure that any person who participates in the financing, preparation, or perpetration of terrorist acts is brought to justice under appropriate provisions of domestic law.

In the absence of multilateral U.N. sanctions, it has fallen to individual states and regional institutions to impose sanctions. The Arab League,²⁵⁵ the European Union,²⁵⁶ the United States,²⁵⁷ Canada,²⁵⁸ France,²⁵⁹ and Turkey,²⁶⁰ among others, have thus imposed a mix of economic and travel sanctions on Syrian individuals (including members of the Assad family) and entities. A month into the conflict, the Arab League suspended Syria's membership in the organization and, in a move without precedent, froze all Syrian assets in member countries.²⁶¹ The United States long ago designated Syria a "state sponsor of terrorism" in connection with Syria's historical support for terrorist groups, its occupation of Lebanon, and its pursuit of weapons of mass destruction, which severely limited bilateral interactions²⁶² and paved the way for the imposition of broad-based sanctions.²⁶³ Additional sanctions have been levied since the current crisis, including on the energy sector.²⁶⁴ Since 2012, a number of emergent armed groups (including the Nusra Front) have been designated "Foreign Terrorist Organizations" by the United States, which

²⁵² S/RES/2199, *supra* note 64, ¶¶ 24-27. In February 2018, during the battle for Aleppo, a Russian jet was shot down by a ManPAD. Elias Groll, *Russian Jet Shot Down Over Syria; Israeli Targeted Killings*, FOREIGN POLICY, Feb. 5, 2018.

²⁵³ S/RES/2199, *supra* note 64, at pmb1, ¶¶ 1-14.

²⁵⁴ *Id.* ¶¶ 15-17. This resolution effectively extended the ban on Iraqi cultural goods to Syria.

²⁵⁵ Neil MacFarquhar & Nada Bakri, *Isolating Syria, Arab League Imposes Broad Sanctions*, N.Y. TIMES, Nov. 27, 2011.

²⁵⁶ See Council Decision 2011/273/CFSP concerning restrictive measures against Syria [2011] OJ L 121; Council Decision 2013/255/CFSP concerning restrictive measures against Syria [2013] OJ L 147.

²⁵⁷ See Caesar Syria Protection Act of 2019, H.R. 31, <https://www.congress.gov/bill/116th-congress/house-bill/31> (bolstering U.S. sanctions regimes).

²⁵⁸ Global Affairs Canada, Canadian Sanctions Related To Syria, <http://www.international.gc.ca/sanctions/countries-pays/syria-syrie.aspx?lang=eng>.

²⁵⁹ Décrets, Arrêtés, Circulaires, Ministère de l'Économie et Des Finances, *Arrêté du 18 janvier 2018 portant application des articles L. 562-3 du code monétaire et financier*, Journal Officiel de la République Française (Jan. 23, 2018).

²⁶⁰ *Turkey Imposes Economic Sanctions on Syria*, BBC, Nov. 30, 2011.

²⁶¹ *Syria Suspended from Arab League*, THE GUARDIAN, Nov. 12, 2011.

²⁶² See U.S. Department of State, State Sponsor of Terrorism, <https://www.state.gov/j/ct/list/c14151.htm>. The designation, which dates from December 1979, opens Syria up to suit under the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605, an opportunity which the family of slain war correspondent Marie Colvin availed itself (see chapter 7).

²⁶³ The 1977 International Emergency Economic Powers Act (IEEPA) allows the U.S. President to declare a national emergency with respect to a foreign threat to national security or foreign policy and impose sanctions to respond to that threat. 50 U.S.C. § 1701, et seq. Invoking this authority, President George W. Bush originally imposed sanctions on Syria (including an arms embargo). See Exec. Order No. 13338, 60 Fed. Reg. 93 (May 13, 2004).

²⁶⁴ In serial Executive Orders President Obama, blocked the assets individuals associated with human rights abuses in Syria. See Exec. Order No. 13572, 76 Fed. Reg. 85 (Apr. 29, 2011); Exec. Order No. 13573, 76 Fed. Reg. 98 (May 18, 2011); Exec. Order No. 13582, 76 Fed. Reg. 172 (Aug. 17, 2011); Exec. Order No. 13606, 77 Fed. Reg. 79 (Apr. 22, 2012); Exec. Order No 13608, 77 Fed. Reg. 86 (May 1, 2012).

brings them into pre-existing omnibus terrorism sanctions regimes.²⁶⁵ The task of identifying groups and individuals to sanction is complicated by the constant merging, splitting, and rebranding of armed groups in the Syrian theater. The United States will expand upon its sanctions once the Caesar Syria Civilian Protection Act becomes law.²⁶⁶

In response to this sanctions blockage at the Council, France introduced a new initiative—the International Partnership Against Impunity for the Use of Chemical Weapons—that it anticipates will “supplement the international mechanisms to combat the proliferation of chemical weapons”²⁶⁷ through coordinated and publicized sanctions regimes, evidence gathering, information sharing, and prosecutions. Russia did not attend the inaugural session. In addition to gathering information on chemical weapons use, the consortium will publish the names of individuals, entities, and governments that have been subject to sanctions. By coordinating sanctions programs, the new partnership is meant to replicate, or at least approach, what U.N. sanctions might have achieved through the Council. It remains to be seen whether France’s new initiative will knit these various unilateral and regional efforts together into a comprehensive regime.

Promoting Accountability & The ICC

It is against this contentious backdrop that the Security Council considered options to promote justice in Syria. While the Security Council did occasionally speak with one voice in condemning the violence in Syria, its undifferentiated demands for accountability soon lost all meaning in the absence of concrete advancements towards justice. This is even though the Council acknowledged an express link between impunity and continued violence in Resolution 2191:

Noting with grave concern that impunity in Syria contributes to widespread violations and abuses of human rights and violations of international humanitarian law, stressing the need to end impunity for these violations and abuses, and re-emphasizing in this regard the need that those who have committed or are otherwise responsible for such violations and abuses in Syria must be brought to justice.²⁶⁸

This nexus has been repeatedly emphasized by individual member states. Italy, for example, reasoned: “there is a need to fight impunity. So long as no one is held accountable and faces tangible consequences for war crimes and crimes against humanity, the incentive will remain to continue to commit them.”²⁶⁹ Nonetheless, and although it has promoted justice elsewhere to varying degrees, the Security Council has utterly failed when it comes to achieving even a measure of justice for the victims of international crimes committed in and around Syria. Most significant from the perspective of international justice is the double veto of a French draft resolution to refer the situation to the ICC. Furthermore, a number of other justice options were available to the Council, but these were not pursued.

²⁶⁵ U.S. State Department, Foreign Terrorist Organizations, <https://www.state.gov/j/ct/rls/other/des/123085.htm>.

²⁶⁶ H.R. 1677, Caesar Syria Civilian Protection Act of 2018, <https://www.congress.gov/bill/115th-congress/house-bill/1677> (declaring U.S. policy to use all diplomatic and economic means to compel Assad to end abuses and work toward a democratic government).

²⁶⁷ Chemical Weapons No Impunity!, <https://www.noimpunitychemicalweapons.org/-en-.html#participants> (last visited Aug. 30, 2019).

²⁶⁸ S/RES/2191, *supra* note 117; *see also* Resolution 2258, *supra* note 117, at pmbl.

²⁶⁹ S/PV.7922, *supra* note 220, at 5.

Early in the conflict, it was clear that events in Syria would easily surpass the Court's gravity threshold. As Syria is not a party to the treaty establishing the ICC, the only way the full conflict can come before the Court at the moment is via a Security Council referral. Even before a concrete referral proposal emerged, many states began to express their support for an ICC referral in their Council interventions.²⁷⁰ As such, the Council came under considerable pressure to refer the situation to the Court, particularly as detailed information about the commission of international crimes began to emerge from multiple authoritative sources.

Starting in Geneva, the Human Rights Council first created a Fact-Finding Mission (FFM) dedicated to Syria in 2011.²⁷¹ The FFM concluded there were patterns of human rights violations that may amount to crimes against humanity.²⁷² The violence was such that the armed conflict threshold had not yet been crossed, so war crimes were not at issue. This FFM was soon upgraded to a COI charged with documenting the full range of human rights abuses and international criminal law violations being committed in Syria.²⁷³ Still in operation, its mandate, like the mandate of many prior COIs, is to identify crimes and lay the groundwork for accountability including through the identification of potentially responsible individuals. Neither institution enjoyed the backing or endorsement of the Security Council, which resulted in the Syrian government (and its allies) having no legal obligation to cooperate, even though the Council has created, and provided operational and rhetorical support to, such documentation exercises in the past.²⁷⁴ In its *seriatim* reports, in addition to cataloging the range of international crimes in Syria, the COI repeatedly encouraged the Council to refer the situation in Syria to the ICC or to establish an *ad hoc* tribunal.²⁷⁵

Elsewhere in the United Nations system, the U.N. Secretary-General and the then-U.N. High Commissioner for Human Rights, South African Navanethem Pillay, concluded that both crimes against humanity and war crimes were being committed in Syria;²⁷⁶ the latter also advocated for an ICC referral²⁷⁷ whereas the former “welcome[d] the debate triggered by the call” for a referral.²⁷⁸ Despite being called a “lunatic” by Syria’s U.N. ambassador, Pillay kept up the call through the end of her tenure²⁷⁹ when it was picked up by her successor, Prince Zeid Ra’ad Zeid al-Hussein of Jordan.²⁸⁰ Indeed, as the Syrian crisis unfolded, the “High Commissioner has

²⁷⁰ See, e.g., S/PV.7116, *supra* note 66, at 4 (statement of Australia) and 12 (Chile).

²⁷¹ Human Rights Council, The Current Human Rights Situation in the Syrian Arab Republic in the Context of Recent Events, U.N. Doc. A/HRC/S-16/1 (Apr. 29, 2011).

²⁷² Report of the Fact-Finding Mission on Syria Pursuant to Human Rights Council Resolution S-16/1, ¶ 72.

²⁷³ Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. Resolution S-17/1, ¶ 13 (Aug. 23, 2011).

²⁷⁴ See, e.g., S.C. Res. 2226 (2015), ¶ 17, U.N. Doc. S/RES/2226 (June 25, 2015) (instructing the U.N. mission in Côte d’Ivoire to coordinate with the Independent Expert working in country); S.C. Res. 1975, ¶ 8, U.N. Doc. S/RES/1975 (Mar. 30, 2011) (calling on all sides to cooperate with investigations in Côte d’Ivoire); S.C. Res. 2134, ¶ 19, U.N. Soc. S/RES/2143 (Jan. 28, 2014) (same for the Central African Republic).

²⁷⁵ See, e.g., Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/31/68, ¶ 161 (Feb. 11, 2016).

²⁷⁶ Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic, U.N. Doc. A/HRC/18/53, ¶ 69 (Sept. 15, 2011).

²⁷⁷ *UN Human Rights Chief Renews Call on Security Council to Refer Syria to ICC*, UN NEWS, July 2, 2012.

²⁷⁸ United Nations Secretary-General Ban Ki-moon, *Secretary-General’s Remarks to Security Council Open Debate on the Protection of Civilians in Armed Conflict* (Feb. 12, 2013).

²⁷⁹ Michelle Nichols, *U.N. Rights Chief says Syria Government Abuses ‘Far Outweigh’ Rebels*, REUTERS, Apr. 8, 2012.

²⁸⁰ *‘Syria must be Referred to the ICC’—UN Human Rights Commissioner*, AMN, Mar. 3, 2018.

taken on increasingly visible tasks as investigator, reporter, advocate, and voice of outrage.”²⁸¹ NGOs echoed these sentiments.²⁸² Although the Human Rights Council was active in promoting accountability, its pronouncements fell just short of calling for the Security Council to effectuate a referral. Specifically, it

Emphasize[d] the need to ensure that all those responsible for violations of international humanitarian law or violations and abuses of human rights law are held to account through appropriate fair and independent domestic or international criminal justice mechanisms, in accordance with the principle of complementarity, stresse[d] the need to pursue practical steps towards this goal, and for that reason encourage[d] the Security Council to take appropriate action to ensure accountability, noting the important role that the International Criminal Court can play in this regard.²⁸³

In January 2013, Switzerland began pushing formally for an ICC referral by circulating a letter with more than 50 sovereign signatories calling for the Council to refer the matter to the Court. The letter emphasized that although

accountability is primarily a national responsibility and that the role of international criminal justice is complementary, ... the Syrian Arab Republic has, so far, not reacted to repeated calls from the international community to ensure accountability through a national procedure that needs to be credible, fair and independent in order to bring all perpetrators of alleged crimes to justice. Without accountability ... there will be no sustainable peace in Syria.²⁸⁴

Absent a referral, the Swiss suggested the Council could “at the very least” announce its intention to refer the situation to the Court unless an accountability process is established “in a timely manner.” Russia responded with a statement criticizing the Swiss letter as “ill-timed and counterproductive.”²⁸⁵ The United States did not join the letter, but is not on record opposing the campaign either. Incidentally, later that year, the former Prosecutor of the ICC, Argentine Luis Moreno Ocampo, similarly suggested the Security Council should refer the Syrian situation to the ICC with jurisdiction to begin in 2014. His theory was that the Court could use the threat of prosecution as a “Sword of Damocles” that would incentivize the parties to bring their conduct into compliance with international law and buy some time for a negotiated settlement. Importantly, he stressed that any referral would have to be supported by a credible threat of robust arrest operations—a profound weakness of the ICC system.²⁸⁶

In August 2013, chemical weapons were used in Rif Damascus. France initiated a draft resolution that would have condemned the attack; obliged Syria to dismantle its chemical weapons

²⁸¹ David A. Kaye, *Human Rights Prosecutors? The United Nations High Commissioner for Human Rights, International Justice, and the Example of Syria* 3 (U.C. Irvine School of Law Research Paper No. 2013-83), <https://ssrn.com/abstract=2196550> (compiling statements coming from the OHCHR).

²⁸² See Amnesty International, *Dozens of Countries Call on UN to Refer Syria to International Criminal Court* (January 14, 2013) (noting Amnesty call in April 2011).

²⁸³ Human Rights Council, *Situation of Human Rights in the Syrian Arab Republic*, U.N. Doc. A/RES/72/191, ¶ 35 (Jan. 23, 2018).

²⁸⁴ See Letter to H.E. Mr. Mohammad Masood Khan, President of the Security Council for the month of January 2013, from the Permanent Mission of Switzerland to the United Nations (Jan. 14, 2013).

²⁸⁵ *Russia Opposed Syria Crisis War Crimes Court Referral*, REUTERS, Jan. 15, 2013.

²⁸⁶ Luis Moreno Ocampo, *The ICC as the Sword of Damocles*, JUST SECURITY (Sept. 23, 2013).

program under international supervision (a scheme containing many of the elements that would later appear in Russia's chemical weapons Framework Agreement); imposed a chemical, biological, and nuclear weapons embargo; and referred the situation to the ICC.²⁸⁷ That draft did not move forward, and the international community instead embraced Russia's disarmament plan. In January 2014, the so-called Caesar photos, which documented the commission of industrial-grade torture in Syrian prisons (discussed more fully in chapter 8), came to light. In April 2014, members of the Security Council viewed the Caesar photos in an informal setting organized by France.²⁸⁸ The horror depicted in those photos re-galvanized the ICC referral movement. France again grasped the pen. At the time its renewed resolution was being considered, the war in Syria was in its fourth year, and had devolved into a full-scale humanitarian catastrophe. France's initiative earned strong international support from many states and civil society actors.²⁸⁹ The draft referral boasted 65 sovereign co-sponsors by the time it went to a vote—almost a third of U.N. membership.²⁹⁰

The United States originally demurred, taking note of the impulse to trigger the ICC and expressing sympathy for the objectives that animate such calls.²⁹¹ It urged accountability in vague language, but refrained from endorsing any referral proposals or foreclosing any options. The United States had also quietly floated ideas about various alternative frameworks for accountability, such as an *ad hoc* hybrid tribunal or dedicated war crimes chamber that could be stood up on the periphery of the conflict or in a liberated zone. Even as it advanced these measures, the United States emphasized that the Syrian people should have “a,” but not necessarily “the,” leading voice in any accountability exercise.

To a certain degree, U.S. reticence toward ICC action in Syria was a reflection of lingering ambivalence towards the institution that traced its roots to the Bush Administration's overt hostility to the Court. Ever present was the fear of an impending investigation into events in Afghanistan, an ICC member state, that would implicate U.S. personnel in custodial abuses. At the same time, some in the United States had more principled reasons for being cautious about an ICC referral. These concerns included the vexing questions of whether a mid-conflict referral would help restore international peace and security in the region and be in the best interests of the Syrian people and a hoped for new Syrian regime. Expressing this concern, Ambassador Power queried: “What could the International Criminal Court really do, even if Russia or China were to allow a referral? Would a drawn-out legal process really affect the immediate calculus of Assad and those who ordered chemical weapons attacks?”²⁹² Others noted that the ICC would be overwhelmed if the Syrian conflict were added to its docket. As one commentator has noted:

Given the way the situation in Syria has developed, with atrocities being reported on various sides of the conflict, the fact that the situation has not been referred to the ICC is actually a blessing for the court as it means the Office of the Prosecutor (OTP) does not have to grapple with decisions under political pressure about whom

²⁸⁷ French Draft Resolution on Chemical Weapons in Syria, *available at* <https://docs.google.com/file/d/0ByLPNZ-eSjJdX29vd2Y3WINxQWc/view>.

²⁸⁸ Louis Charbonneau & Michelle Nichols, *U.N. Security Council Members View Graphic Photos of Syria Dead*, REUTERS, Apr. 15, 2014.

²⁸⁹ See HUMAN RIGHTS WATCH, SYRIA: GROUPS CALL FOR ICC REFERRAL (May 15, 2014) (listing NGO supporters).

²⁹⁰ For a list of state co-sponsors see S/PV.7180, *supra* note 81, at 2.

²⁹¹ See Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INTL L. 525, 540 (2013).

²⁹² Max Fisher, *Samantha Power's Case for Striking Syria*, WASH. POST, Sept. 7, 2013.

to prosecute and whose reputations to leave unblemished to facilitate their involvement in later negotiations.²⁹³

Notwithstanding these and other hesitations related to its support for Israel,²⁹⁴ the United States ultimately joined the co-sponsors of the French draft.²⁹⁵

As the Council considered the draft resolution, U.N. Deputy-Secretary-General Jan Eliasson spoke first on behalf of the Secretary-General to urge the Council to pass the resolution or risk more bloodshed and the erosion of the credibility of the Council and the United Nations as a whole.²⁹⁶ Once the resolution was put to a vote, it garnered the support of 13 Council members. Dozens of other non-voting states requested to participate in the session without a vote. As luck would have it, nine of the ten elected members happened to be ICC members as well (all but Rwanda).²⁹⁷ Russia explained the fourth exercise of its veto by invoking the ghost of Libya, arguing that the draft resolution was a thinly-veiled attempt to engage in another armed intervention. Russia also insisted that putting the resolution to a vote threatened to undermine P-5 unity, which was already at a new low.

China—in exercising its fourth double veto—also cried procedural foul. In its explanation of vote, China expressed its long-held reservations about referring situations to the Court and urged states to recommit to seeking a political solution to the crisis. It warned of the risk of undermining the peace process: “to [f]orcibly refer the situation in Syria to the Court in the current environment is not conducive either to building trust among all parties in Syria or to an early resumption of the negotiations in Geneva.” Other delegates insisted there was no peace process underway to undermine. Syria was invited to speak and invoked the privilege of complementarity, arguing the government was adequately prosecuting war crimes domestically—a laughable claim as discussed in chapter 6 on domestic cases. The Syrian permanent representative also complained that the draft resolution was political, discriminatory, and interventionist and “contrasted starkly with the Council’s repeated affirmations of its strong commitment to Syria’s sovereignty, independence, unity and territorial integrity, as well as the call for a political solution.”

Knowing that Russia would veto the resolution, as it had all prior texts imposing any real consequences on the Assad regime, no doubt made it easier for the United States to join the proposed referral. Additionally, the French draft contained a number of protections that the United States had insisted upon in the prior referral resolutions, so its equities were adequately protected. Although it proved to be a purely symbolic exercise, the draft ICC referral was not without import or impact. For one, Russia’s inevitable exercise of the veto gave the United States and its allies another opportunity to shame Russia for its support for the Syrian regime—not that Russia appears

²⁹³ Kirsten Ainley, *The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis*, 91(1) INT’L AFF. 37, 47 (2015).

²⁹⁴ One sticking point involved the Golan Heights, occupied by Israel since the 1967 Six-Day War, which while generally quiet could easily have embroiled Israel in the war in neighboring Syria. See David Bosco, *Justice for Assad Can Wait*, FOREIGN POLICY, Feb. 22, 2012; Fionnuala Ní Aoláin, *Why the US Failure to Support an ICC Referral for Syria does not Protect Israel (or American Interests)*, JUST SECURITY (Oct. 13, 2013).

²⁹⁵ Colum Lynch, *Exclusive: U.S. to Support ICC War Crimes Prosecution in Syria*, FOREIGN POLICY, May 7, 2014.

²⁹⁶ The debates are captured here: S/PV.7180, *supra* note 81. For a rich description, see Carrie Booth Walling, *Syria and the Responsibility to Prosecute: Norm Promotion in the United Nations Security Council*, in ACCESSING AND IMPLEMENTING HUMAN RIGHTS AND JUSTICE (Kurt Mills & Melissa Labonte eds., 2018).

²⁹⁷ These were: Argentina, Australia, Chad, Chile, France, Jordan, Lithuania, Luxembourg, Nigeria, Republic of Korea, Rwanda, United Kingdom, and the United States. See S/PV.7180, *supra* note 81.

at all ashamed by its conduct.²⁹⁸ Given the Trump Administration’s articulated hostility towards the Court, particularly following the revival of the Office of the Prosecutor’s investigation into crimes in Afghanistan, it is unlikely that the United States would support this effort again.²⁹⁹

The General Assembly next issued its own resolution, regretting the failure of the French draft.³⁰⁰ In particular, the Assembly emphasized:

the need to ensure that all those responsible for violations of international humanitarian law or violations and abuses of human rights law are held to account through appropriate fair and independent, national or international, criminal justice mechanisms in accordance with the principle of complementarity, and stress[ed] the need to pursue practical steps towards this goal, and for this reason encourage[d] the Security Council to take appropriate action to ensure accountability, noting the important role that the International Criminal Court can play in this regard.³⁰¹

Although clearly supportive of the ICC, the text fell a bit short of explicitly calling on the Council to effectuate a referral. The next year, the General Assembly went a bit farther with respect to North Korea by recommending the Council consider referring the situation to the Court.³⁰² The Council continued to debate propriety of a referral in subsequent sessions, but no formal resolution emerged.³⁰³

Implications for Security Council Reform

As the situation in Syria unfolded, many non-permanent Council members, other U.N. members, and NGOs expressed mounting frustration at the lack of action by the Council on Syria. Indeed, the Ghouta attacks occurred during Argentina’s presidency of the Security Council in August 2013. President Cristina Fernandez appeared in the Council chamber in lieu of the country’s permanent representative to argue that the veto, which she conceded had proven its utility in preventing a nuclear holocaust during the Cold War, had outlived its value and become an instrument of dysfunction.³⁰⁴ Australia next took over the rotating presidency. Although Syria was on the Council’s agenda, Australia’s permanent representative Gary Quinlan indicated it was not productive to host formal discussions because they would lead nowhere. He expressed hope

²⁹⁸ See Saira Mohamed, *Shame at the Security Council*, 90 WASH. L. REV. 1191 (2013) (discussing efforts to shame permanent members into responding to world crises and the factors that impact the success or failure of such efforts).

²⁹⁹ In a press statement, Secretary of State Pompeo described the Court as “an unaccountable political institution, masquerading as a legal body.” Michael R. Pompeo, *ICC Decision on Afghanistan* (Mar. 5, 2020), <https://www.state.gov/icc-decision-on-afghanistan/>.

³⁰⁰ G.A. Res. 69/189, pmbi, U.N. Doc. A/RES/69/189 (Dec. 18, 2014) (“noting the repeated encouragement by the High Commissioner for the Security Council to refer the situation to the International Criminal Court, and regretting that a draft resolution was not adopted despite broad support from Member States”) (citations removed).

³⁰¹ *Id.* ¶ 22. The resolution enjoyed 127 votes in favor, 13 against, and 48 abstentions.

³⁰² G.A. Res. 70/172, ¶ 10, U.N. Doc. A/RES/70/172 (Dec. 17, 2015) (“Encourages the Security Council to continue its consideration of the relevant conclusions and recommendations of the commission of inquiry and take appropriate action to ensure accountability, including through consideration of referral of the situation in the Democratic People’s Republic of Korea to the International Criminal Court”). This resolution garnered 119 votes in its favor.

³⁰³ See, e.g., U.N. SCOR, 70th sess., 7419th mtg., U.N. Doc. S/PV.7419 (Mar. 27, 2015) (debating the protection of minorities in the Middle East).

³⁰⁴ *Security Council Veto Power Attacked*, AP (Aug. 6, 2013) (quoting Fernandez: “and we can’t deal with the problems in this new world with old instruments and old methods”).

that the upcoming G20 meetings in St. Petersburg would be more productive.³⁰⁵ Also unprecedented was the rejection by Saudi Arabia of its elected seat on the Security Council in October 2013, ostensibly in protest of the Council's perceived blunders in the Middle East (citing Syria, Palestine, and the failure to free the Middle East of weapons of mass destruction). The Saudi Ministry of Foreign Affairs stated:

The failure of the Security Council to make the Middle East a zone free of all weapons of mass destruction, whether because of its inability to subject the nuclear programmes of all countries in the region, without exception, to international control and inspection or to prevent any country in the region from possessing nuclear weapons, is additional irrefutable evidence and proof of its inability to carry out its duties and honour its responsibilities. Allowing the ruling regime in Syria to kill and burn its people with chemical weapons while the world stands idly by, without applying deterrent sanctions against the Damascus regime, is also irrefutable evidence and proof of the inability of the Security Council to carry out its duties and responsibilities.³⁰⁶

The Syria deadlock has helped galvanize the age-old U.N. reform movement, which has always contained a number of interlocking strands.³⁰⁷ These include arguments that the P-5 no longer represent an exclusive nucleus of power in the global community, that the P-5 cannot be trusted to manage matters of international peace and security on an even-handed basis; and that the Council should be more geographically representative.³⁰⁸ Germany, Japan, India, and Brazil (the Group of Four (G-4)) have led the expansion charge on the assumption that each would be accorded a permanent seat on the Council. Calling themselves "Uniting for Consensus," other states wary of granting any of the G-4 a veto, have advocated for the enlargement of the non-permanent members.³⁰⁹ Finally, the Ezulwini Consensus seeks two permanent seats with veto power and additional rotating seats for states on the African continent.³¹⁰ The Council's inaction on Syria has contributed to the growing belief that the veto is outdated, incompatible with the Council's Charter-based duty to maintain international peace and security, and fundamentally inequitable and "undemocratic," because it allows any P-5 member to block an initiative irrespective of how much support it has among other U.N. members, even for purely self-interested reasons. These concerns have given rise to a number of gatherings devoted to considering the

³⁰⁵ Press Release, *Press Conference by Australia's Security Council President on Work Programme for September*, U.N. Information Centre Canberra (Sept. 5, 2013).

³⁰⁶ *Statement of the Ministry of Foreign Affairs on Saudi Arabia's Apology for not Accepting Security Council Membership*, Annex to the letter dated 12 November 2013 from the Permanent Representative of Saudi Arabia to the United Nations addressed to the Secretary-General, U.N. Doc A/68/599 (Nov. 14, 2013). See Beth Van Schaack, *This One Goes to Eleven: The ICC and the Security Council*, JUST SECURITY (Dec. 9, 2013).

³⁰⁷ See generally Kirsten Ainley, *The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis*, 91 INT'L AFFAIRS 37 (2015) (discussing reform proposals).

³⁰⁸ See Global Policy Forum, *Security Council Reform*, <https://www.globalpolicy.org/un-reform/un-reform-topics/reform-of-the-security-council-9-16.html>; Jakob Silas Lund, *Pros and Cons of Security Council Reform*, Center for UN Reform Education (Jan. 19, 2010) (outlining the "five key cluster areas" considered by many to be ripe for reform, including questions of membership, regional representation, the veto power, the working methods, and the relationship with the General Assembly).

³⁰⁹ Press Release, *'Uniting For Consensus' Group of States Introduces Text on Security Council Reform to General Assembly*, U.N. Doc. GA/10371 (July 26, 2005), available at <https://www.un.org/press/en/2005/ga10371.doc.htm>.

³¹⁰ See The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus", African Union Executive Council, Ext/EX.CL/2 (VII) (Mar. 7-8, 2005).

Council’s “working methods” with an eye towards reform on a number of fronts, including with respect to the ICC.³¹¹ Although each of the P-5 has at one point or another supported a proposal for expanding the Council, no tangible progress has been made on this or other reform measures that would require an amendment to the Charter. In any case, the window for formal reform is now closed given the current acrimony in the Council chamber.

Even prior to the Syria crisis, U.N. member states expressed support for reform measures aimed at preventing or discouraging permanent members of the Council from exercising their veto in the face of atrocity crimes or where the Responsibility to Protect is implicated.³¹² This veto-restraint proposal found early expression in the report by the Secretary-General’s High-Level Panel on Threats, Challenges, and Change issued on the eve of the 2005 World Summit in parallel with the emergence of the Responsibility-to-Protect doctrine. In particular, the report stated:

[A]s a whole the institution of the veto has an anachronistic character that is unsuitable for the institution in an increasingly democratic age and we would urge that its use be limited to matters where vital interests are genuinely at stake. We also ask the permanent members, in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.³¹³

At that time, a group of states calling themselves the Small Five (S-5)—Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland—took up the cause and have similarly proposed that the P-5 should agree to refrain from using the veto in cases of genocide, crimes against humanity, and serious breaches of IHL,³¹⁴ perhaps through the enactment of a rule of procedure pursuant to Article 30 of the Charter.

Similar proposals have also been included as part of a new Security Council-reform initiative initiated by Switzerland in 2013 known as Accountability, Coherence, and Transparency (ACT). Among other proposals, the ACT group advocated for the adoption of a voluntary Code of Conduct whereby Security Council members—permanent and rotating—would voluntarily pledge not to obstruct draft resolutions that seek to address the commission of crimes against humanity, genocide, and war crimes.³¹⁵ Supportive states have also argued that any member state invoking its veto in response to an atrocity situation should be required to explain how its vote is consistent with the U.N. Charter and international law. Finally, states have proposed that the Council develop a non-veto “no” vote, enabling states to cast a negative vote that would not operate as a formal veto within the meaning of Article 27 of the Charter. Supportive states argue that the proposed restraint on the use of the veto is based on states’ treaty commitments (such as to the four Geneva Conventions and their Protocols, which prohibit violations of IHL and mandate prosecutions, and the Genocide Convention, which contains an amorphous duty of prevention) as well as the

³¹¹ See, e.g., U.N. SCOR, 69th sess., 7285th mtg., U.N. Doc. S/PV.7285 (Oct. 23, 2014).

³¹² See also International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* 68 (Dec. 2001) (calling on the P-5 adopt a code of conduct that would oblige them to refrain from using their veto in R2P situations).

³¹³ A MORE SECURE WORLD, *supra* note 17, at 68.

³¹⁴ Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, *Improving the Working Methods of the Security Council*, Agenda Item 115 (Mar. 20, 2012).

³¹⁵ Explanatory Note on a Code of Conduct regarding Security Council Action against Genocide, Crimes Against Humanity or War Crimes (Sept. 1, 2015).

commitments emerging from the 2016 World Humanitarian Summit.³¹⁶ Over 110 states³¹⁷ have signed the Code of Conduct, and a number of NGOs³¹⁸ have expressed support.³¹⁹ States have invoked these pledges in connection with the Syria crisis. For example, in its explanation of vote in connection with the failed sanctions resolution, Uruguay noted that “[a]s a signatory to the code of conduct regarding Security Council action against genocide, crimes against humanity and war crimes, Uruguay is committed to preventing and putting an end to such horrendous crimes. In that regard, we can only lament the use of the veto in the case of this draft resolution.”³²⁰

France was the first P-5 member to openly support the initiative, including in connection with Syria.³²¹ Indeed, France and Mexico subsequently launched a similar proposal calling on the P-5 to pledge to suspend the veto in the case of mass atrocities. Under this scheme, the Secretary-General—acting within the spirit of Article 99 of the U.N. Charter—would determine the nature of the crimes in progress, which would trigger the applicability of the pledge in circumstances in which atrocity crimes were underway, unless the state could argue that “vital national interests” were in jeopardy. France explained its veto-restraint initiative as follows:

Our suggestion is that the five permanent members of the Security Council—China, France, Russia, Britain and the United States—themselves could voluntarily regulate their right to exercise their veto. The Charter would not be amended and the change would be implemented through a mutual commitment from the permanent members. In concrete terms, if the Security Council were required to make a decision with regard to a mass crime, the permanent members would agree to suspend their right to veto. The criteria for implementation would be simple: at the request of at least 50 member states, the United Nations secretary general would be called upon to determine the nature of the crime. Once he had delivered his opinion, the code of conduct would immediately apply.³²²

France expressed confidence that such a pledge could be accomplished through a formal rule of procedure, a voluntary or informal code of conduct, or a statement of intent by the Council without the need to amend the Charter.³²³ The Political Statement on Suspension of Veto Powers in Cases

³¹⁶ See generally Outcome of the World Humanitarian Summit, U.N. Doc. A/71/353 (Aug. 23, 2016).

³¹⁷ Global Centre for the Responsibility to Protect, *UN Security Council Code of Conduct*, http://www.globalr2p.org/our_work/un_security_council_code_of_conduct (last visited Sept. 7, 2019).

³¹⁸ A group of NGOs expressed their support for the proposal after the ICC referral failed. See Joint NGO Statement on the Use of the Veto, available at <http://www.globalr2p.org/media/files/joint-ngo-statement-on-the-use-of-the-veto.pdf>.

³¹⁹ Supportive comments on veto restraint are compiled here: Global Center for the Responsibility to Protect, *References on the Need for Veto Restraint by the UN Security Council in Mass Atrocity Situations*, <http://www.globalr2p.org/media/files/veto-restraint-references-4.pdf>.

³²⁰ See S/PV.7893, *supra* note 214, at 9. Kuwait made similar expressions of support in connection with the trifecta of failed resolutions following the Douma chemical weapon attack.

³²¹ S/PV.7922, *supra* note 220, at 4 (statement of France) (noting in connection with another Russian veto that the proposal “is aimed at precisely situations of this kind. It is now clearly more topical than ever and reflective of our concerns”).

³²² See Laurent Fabius, *A Call for Self-Restraint at the U.N.*, N.Y. TIMES, Oct. 4, 2013 (op-ed by France’s Minister of Foreign Affairs calling on the P-5 to voluntarily refrain from exercising the veto).

³²³ *Why France Wishes to Regulate the Use of the Veto in the United Nations Security Council*, FRANCE DIPLOMATIE, <https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/france-and-the-united-nations/article/why-france-wishes-to-regulate-use#>.

of Mass Atrocity has received the support of almost 100 U.N. member states.³²⁴ The United Kingdom eventually joined France in calling for this veto restraint.³²⁵ Several states mentioned these efforts in connection with France's failed ICC referral. Kuwait, for example, expressed its support for "the code of conduct whereby the States members of the Security Council would commit to not opposing draft resolutions dealing with crimes against humanity, genocide and war crimes" and "the French-Mexican initiative on abstention in the use of the veto in cases of human rights violations."³²⁶

It was not clear how such a requirement might be imposed on the Council short of an amendment to the U.N. Charter, which would require the support of two-thirds of the General Assembly's membership as well as the assent of the P-5 according to Article 108 of the U.N. Charter.³²⁷ In 2012, in the face of intense pressure from the P-5,³²⁸ the S-5 ultimately withdrew a draft General Assembly resolution, entitled "Enhancing the Accountability, Transparency and Effectiveness of the Security Council,"³²⁹ after the then-United Nations Legal Counsel and Under-Secretary-General for Legal Affairs, Patricia O'Brien, advised that the resolution concerned "important questions," which would likely require a two-thirds majority vote of the General Assembly to pass, rather than the simple majority vote required to pass other resolutions.³³⁰ The proposed Resolution would have recommended that the P-5

19. Explain[] the reasons for resorting to a veto or declaring its intention to do so, in particular with regard to its consistency with the purposes and principles of the Charter of the United Nations and applicable international law. A copy of the explanation should be circulated as a separate Security Council document to all members of the Organization.

³²⁴ See Political Statement on the Suspension of the Veto in Case of Mass Atrocities, presented by France and Mexico, Open to Signature to the Members of the United Nations, available at <http://www.global2p.org/media/files/2015-07-31-veto-political-declaration-final-eng.pdf>.

³²⁵ Richard Dicker, *As ICC Caseload Expands, UN Security Council's Support Lags Far Behind*, INTERNATIONAL CRIMINAL JUSTICE TODAY (Dec. 10, 2015), <https://www.international-criminal-justice-today.org/arguendo/as-icc-caseload-expands-un-security-councils-support-lags-far-behind/>.

³²⁶ See S/PV.8228, *supra* note 231, at 11.

³²⁷ *But see* JENNIFER TRAHAN, LEGAL LIMITS TO THE USE OF THE VETO POWER IN THE FACE OF ATROCITY CRIMES (forthcoming 2020). Trahan articulates the legal limits on the exercise of the veto derived from *jus cogens* norms, the obligation of the Council to act in accordance with the purposes and principles of the U.N. Charter, and human rights treaties.

³²⁸ William Pace, *21 Member States Launch New Initiative to Improve the Working Methods of the Security Council*, Center for UN Reform Education (May 12, 2013), <http://www.centerforunreform.org/?q=node/541>; *Putting Down their Cards: Limiting the Veto in RtoP Cases* (Oct. 28, 2013). See also S/PV.7285, *supra* note 311, at 9 ("we wish to reiterate in this context that Chile favours a serious debate in the General Assembly on the French proposal to limit the veto in cases of crimes that involves the responsibility to protect, and to strengthen the preventative role [of the] Security Council") (statement of Chile). Australia, Lithuania, Jordan, Luxembourg, France, Switzerland, Costa Rica, and Liechtenstein all spoke in favor of these initiatives to reform the use of the veto in mass atrocities situations. *Id.*

³²⁹ Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: revised draft resolution, Enhancing the Accountability, Transparency and Effectiveness of the Security Council, U.N. Doc. A/66/L.42/Rev.2 (May 15, 2012). See *Switzerland Withdraws Draft Resolution in General Assembly Aimed at Improving Security Council's Working Methods to Avoid 'Politically Complex' Wrangling*, U.N. Doc. GA/11234 (May 16, 2012).

³³⁰ See Letter from Patricia O'Brien to Dr. Mutlaq Al-Qahtani, Chef de Cabinet, office of the President of the General Assembly (May 14, 2012), available at <http://www.innercitypress.com/OLA2PGAs5May.pdf>.

20. Refrain[] from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity.³³¹

None of these initiatives, which many consider compelled by the Responsibility-to-Protect imperative,³³² has yet resulted in any concrete action by the Council, however, and is unlikely to do so in the heat of a live controversy such as Syria. The paradox that members of the P-5 have shown a willingness to go around the Security Council rather than work towards its reform has not been lost on observers.³³³

Conclusion

Although the Security Council's Syria proceedings are largely a study of dysfunction, and the perils of subjecting justice initiatives to a political veto, the Syria situation has generated a few new developments that serve as precedent, or provide lessons learned, for future work within the Council. For one, the Council has been able to agree on a robust counter-terrorism platform, but is unable to agree on who the terrorists are—a problem that extends well beyond the Council chamber. As a result, ceasefires that carve out exceptions for kinetic operations against “terrorist groups” provide cover for the parties to continue to use force and undermine the ability to institute a genuine cessation of hostilities. On the flip side, the presence of ISIL (and to a lesser extent Al Qaida) also forged a strange tripartite alliance between Russia, the West, and the Assad regime that occasionally laid a foundation for collective action. The presence of terrorist elements within the battlespace also inspired the Council to issue strong accountability language, directly linking the pervasive impunity in Syria with the continued use of violence in violation of international law. The Council also produced important pronouncements on the illegality of siege warfare, the use of starvation as a weapon of war, the neutrality of medical personnel and journalists, and the deployment of indiscriminate weapons, such as barrel bombs, that may advance international law. The Council proved willing to mandate the provision of humanitarian assistance even absent the territorial state's consent (although Assad ultimately maintained significant control over how this aid was distributed). Finally, members also confirmed that any use of chemical weapons triggers Chapter VII as a threat or breach of international peace and security. This rhetoric did not translate into concrete support for accountability, however; besides the failure of the ICC referral, the Council could not even garner the necessary votes to backstop the United Nations' own COI or impose sanctions on regime actors.

Beyond the forceful denunciations of abuses and the enunciation of norms, all other concrete proposals to place real constraints on the Syrian regime have been blocked by the failure of the Council to garner the necessary P-5 consensus. And many of the initiatives that did move forward—the demise of the JIM offers a case in point—were in constant jeopardy of being terminated by virtue of Russia's veto. This history exemplifies the risks of making multilateral policy through the Council and the fragility of institutions subject to the veto.

As discussed elsewhere in this text, this recurrent paralysis in the Council created fruitful openings for other institutions—within and without the United Nations—to step in and find ways

³³¹ U.N. Doc. A/66/L.42/Rev.2, *supra* note 329, at Annex.

³³² This is the rationale behind the European Parliament's support for the Code of Conduct. *See* European Parliament Recommendation to the Council of 18 April 2013 on the UN Principle of the “Responsibility to Protect,” 2012/2143(INI).

³³³ Matt Cannock, *International Justice Trends in Microcosm at the OPCW—Three Observations as States Adopt ‘Attribution Mechanism,’* AMNESTY INTERNATIONAL (July 27, 2018).

to constrain Assad and address the accountability gap. The result has been an inventive upwelling of new institutions dedicated to promoting accountability or at least to preserving evidence for when there is a court—domestic, hybrid, or international—capable of exercising jurisdiction. Most importantly, in December 2016, as the Council dithered over the localized crisis in Aleppo, a large contingent of states opposed to Assad overcame obvious collective action problems in the General Assembly to adopt Resolution 71/248, establishing the International, Impartial, and Independent Mechanism (IIIM) to assist in the investigation and prosecution of international crimes being committed in Syria,³³⁴ a development taken up in chapter 8.

³³⁴ G.A. Res. 71/248, U.N. Doc. A/RES/71/248 (Jan. 11, 2017).

The Voting Patterns and Exercise of the Veto in the Security Council in Connection with the Conflict in Syria							
Draft Resolution	Sponsor(s)	Date	Focus	China	Russia	P-3	Other No Votes
S/2011/612	France, Germany, Portugal & the United Kingdom	Oct. 4, 2011	Denounced violence and called for a political process	1	1		
S/2012/77	Bahrain et al. (19 co-sponsors)	Feb. 4, 2012	Encouraging a peaceful resolution of the crisis	2	2		
S/2012/538	France, Germany, Portugal, the United Kingdom & the United States	July 19, 2012	Creating a political process in keeping with Annan's 6-point plan	3	3		
S/2014/348	Albania et al. (64 co-sponsors)	May 22, 2014	ICC referral	4	4		
S/2016/846	Andorra et al. (45 co-sponsors)	Oct. 8, 2016	End violence in Aleppo	Abstain	5		Venezuela
S/2016/847	Russia	Oct. 8, 2016	Calling on the opposition forces to cease operations with terrorists			France, U.K., U.S.	
S/2016/1026	Egypt, New Zealand & Spain	Dec. 5, 2016	Calling for an end to violence and Aleppo	5	6		Venezuela
S/2017/172	Albania et al. (41 co-sponsors)	Feb. 28, 2017	Condemning chemical weapon use and imposing sanctions	6	7		Bolivia
S/2017/315	France, the United Kingdom & the United States	Apr. 12, 2017	Condemning chemical weapon attack in Khan Sheikoun and calling for support for the JIM	Abstain	8		Bolivia
S/2017/884	Albania et al. (40 co-sponsors)	Oct. 24, 2017	Extending the JIM for a year	Abstain	9		Bolivia
S/2017/962	France, Italy, Japan, Sweden, Ukraine, the United Kingdom & the United States	Nov. 16, 2017	Extending the JIM	Abstain	10		Bolivia

S/2017/970	Japan	Nov. 17, 2017	Extending the JIM	7	11		Bolivia
S/2018/321	Albania et al. (25 co-sponsors)	Apr. 10, 2018	Establishing a new independent, impartial and transparent investigation into chemical weapon use	Abstain	12		Bolivia
S/2018/175	Russia	Apr. 10, 2018	Empowering the Security Council to attribute chemical weapon use			France, U.K., U.S.	Netherlands, Peru, Poland, Sweden
S/2018/322	Russia	Apr. 10, 2018	Condemning chemical weapon attacks			France, U.K., U.S.	Poland
S/2018/355	Russia	Apr. 14, 2018	Condemning airstrikes in Syria as acts of aggression			France, U.K., U.S.	Côte d'Ivoire, Kuwait, Netherlands, Poland
S/2019/756	Belgium, Germany & Kuwait	Sept. 19, 2019	Imposing a ceasefire in Idlib	8	13		
S/2019/757	China & Russia	Sept. 19, 2019	Calling on parties to maintain a ceasefire in Idlib & refrain from supporting terrorists			France, U.K., U.S.*	Belgium, Dominican Republic, Germany, Kuwait, Peru & Poland*
S/2019/961	Germany, Belgium & Kuwait	Dec. 19, 2019	Extend cross-border humanitarian aid	9	14		
S/2019/962	Russia	Dec. 19, 2019	Extend cross-border humanitarian aid but with reduced checkpoints			France, U.K., U.S.	Dominican Republic, Peru, Poland
Total Vetoes/ Failed Resolutions				9	14	5	

* This resolution did not garner the necessary 9 votes in favor and so failed on that ground.

* * *