

Revisiting Veto Power in the Context of Atrocity Crimes: the Syrian Conflict as a Case Study

Dr. Sharefah Ahmad Al-Muhana

Assistant Professor

Kuwait International Law School

Abstract

The excessive, abusive use of veto power during the war in Syria has prompted the international community to seek ways to overcome this veto power, mainly when doing so is necessary to prevent atrocities. The use of veto power to advance the national or regional interests as well as the economic, political, or strategic interests of a Security Council's permanent member state on a way that impair a vital humanitarian interest of a state under conflict or the international community as a whole, undermines the Security Council's role to maintain the international peace and security. This usage may also affect other states' compliance with the veto power. In other words, the veto system could eventually lose its effectiveness if the international community continues to find justifications to non-compliance with the veto.

This paper sheds light on events that have occurred during the Syrian war that give rise to Grotian Moments, or have the potential to do so, to create new customary international law rules governing the use of the veto power. Furthermore, this paper sorts out the principles invoked during those events as legal justifications to restrict or overthrow the veto power. Moreover, this paper identifies legal circumstances to facilitate any discussions regarding setting limitations on or obstructions to veto power in the context of atrocities.

This research stresses the importance of determining a pro-

per environment to overcome the veto power. This environment consists of unified, clear, and fair circumstances acceptable to all states, regardless of whether they are permanent or non-permanent members of the Security Council. Therefore, this proposal seeks to advance the legal system governing the use of the veto power for fighting brutality.

Keywords: International criminal law, human rights law, universal jurisdiction, veto, customary international law, international organizations.

I. INTRODUCTION

The right of the veto, established under the United Nations Charter, has long been understood to be an absolute power in the hands of the five permanent members of the United Nations Security Council (China, France, Russia, the United Kingdom, and the United States), which has enabled them to block any decision in substantive matters from being taken including decisions necessary to investigate, prosecute, prevent, and alleviate atrocity crimes (genocide, crimes against humanity, and war crimes).⁽¹⁾

However, Jennifer Trahan argues that existing international law and voluntary veto restraint initiatives constitute a legal basis to set limitations or restrictions on permanent members' usage of veto power, particularly when there are ongoing atrocities.⁽²⁾ Additionally, Michael Scharf, Milena Sterio, and Paul Williams argue that limitations on or obstructions to veto power in the context of atrocities have been recognized as part of binding customary international law.⁽³⁾ Such recognition is rapidly formulated as the war in Syria is ongoing, according to Scharf et al.⁽⁴⁾ The literature of Trahan and Scharf et al. will be presented more extensively in the second section of the introduction.

(1) Jennifer Trahan, Questioning Unlimited Veto Use in Face of Atrocity Crimes, 52 Case W. Res. J. Int'l L. 73-100, 73 (2020) Available at: <https://scholarlycommons.law.case.edu/jil/vol52/iss1/7> (last visited Jul 14, 2020).

(2) Id.

(3) Michael P. Scharf et al., *The Syrian Conflict's Impact on International Law* (Cambridge University Press) (2020).

(4) Id.

The recognition of atrocities as a legal justification to limit or obstruct the veto power means that the veto is not an absolute power that can paralyze the international community to act towards atrocities.⁽⁵⁾ Therefore, literature that identifies the legal circumstances justifying limiting or obstructing veto power in the context of atrocities is needed.

Although this paper is mainly concerned with the conflict in Syria, which began in 2011 and lasts to this day, I encourage other scholars to examine the circumstances that this paper identifies as legal justifications to curb UN Security Council veto power by confirming the applicability of such circumstances on past and/or future cases where veto power has been challenged or probably will be challenged.

A. Statement of Objectives

This study has the following objectives:

1. To identify the legal bases and circumstances justifying limiting or obstructing veto power in the context of atrocities.
2. To highlight several events during the Syrian war that have changed, is changing, or should change our understanding of the veto power and the capability of the permanent members of the Security Council in using the veto.
3. To provide insights into how the worsened humanitarian conditions in Syria brought on by the COVID-19 pandemic may affect the use of veto power in the future.
4. To address the legal and political challenges to the veto system.
5. To demonstrate the importance of re-evaluating the veto system to prevent chaos in the international order.

B. A Survey of the Literature

The goal of this paper is to reflect the development of international law, particularly in the field of international criminal law, and how the Syrian war has contributed to this development. The right of veto was intended to mean that only the five permanent members of the UN Se-

(5) How the Syrian conflict has changed international law, YouTube, <https://www.youtube.com/watch?v=zs4FnMNHBDY> (last visited Jun 19, 2020).

curity Council have the final say concerning any decision related to the maintenance of international peace and security. However, scholars such as Jennifer Trahan and Scharf et al. have revealed through their scholarship the existence of legal bases in international law that justifies restrictions and obstructions on this veto power, particularly in the context of atrocity crimes. Therefore, it would be beneficial to recommend a set of circumstances that represent a legal justification for challenging the veto power of the Security Council to avoid any potential conflict regarding the legitimacy of the measures undertaken by a state or several states to address atrocities and thus to avoid state culpability.

Trahan argues that clear limits on the use of the veto should be established, particularly when there are ongoing atrocities.⁽⁶⁾ Therefore, Trahan's literature provides an answer for what in international law legitimizes limitations on veto power to face atrocities. According to Trahan, the legal bases for setting limitations on veto use in the face of atrocities include atrocities as *jus cogens*, obligations determined by numerous international instruments, and state practice. First, atrocity crimes are *jus cogens* that are binding on all subjects of international law, including the UN and all its organs; therefore, the permanent members of the Security Council should refrain from using the veto if such usage would result in a violation of a *jus cogens* norm.⁽⁷⁾ Second, using a veto to prevent actions necessary to combat atrocities is inconsistent with the UN's purposes and principles defined in the United Nations Charter, which created the right of veto, and decides limitation on the power of the Security Council in Article 24(2).⁽⁸⁾ Furthermore, the permanent members are state parties to treaties that oblige them to prevent atrocities,⁽⁹⁾ such as the Genocide Convention⁽¹⁰⁾ and the four 1949 Geneva Conventions.⁽¹¹⁾ Third, the voluntary veto restraint initiatives and the calls for not vetoing decisions that are meant to confront atrocities in

(6) Trahan, *supra* note 1, at 100.

(7) *Id.* At 91-95.

(8) *Id.* At 95.

(9) *Id.* At 97.

(10) Convention on the Prevention and Punishment of the Crime of Genocide OHCHR, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx> (last visited Jul 14, 2020).

(11) THE GENEVA CONVENTIONS OF 12 AUGUST 1949, <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf> (last visited Jul 14, 2020)

the context of humanitarian intervention or, as is also known the doctrine of the “Responsibility to Protect” (“R2P”).⁽¹²⁾ However, Trahan’s literature is not sufficient to confirm the existence of a binding custom, particularly in that the formation of a customary international law requires the fulfillment of two classic elements: state practice and *opinio juris*. The literature of Scharf et al. concerning the phenomenon of the accelerated formation of customary international law supports Trahan’s arguments. Altogether, the two studies are beneficial for confirming that veto power can be legally limited or overthrown, for the purpose of facing atrocities.

According to *The Accelerated Formation of Customary International Law*, customary international law in times of fundamental changes can be formed rapidly without the need for the traditional requirements of a long period of time, and many states accept this practice as *opinio juris*.⁽¹³⁾ During these times of change, Scharf et al. describe as Grotian Moments,⁽¹⁴⁾ the formation of customary international law is possible with little or no state practice as long as there is a clear expression of *opinio juris*.⁽¹⁵⁾ One of the examples, provided by Scharf et al., includes the rapid creation of the law of continental shelf.⁽¹⁶⁾ Following United States President Truman’s proclamation in 1945 that the United States has sovereignty rights over the resources of the continental shelf near its territorial sea, many coastal states claimed their own similar rights over natural resources on their continental shelves.⁽¹⁷⁾ By 1969, in *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), the ICJ ruled that the Truman Proclamation reflects a development that has occurred within a relatively short period of time and led to the creation of the legal regime of the continental shelf.⁽¹⁸⁾

(12) Trahan, *supra* note 1, at 86-90.

(13) SCHARF ET AL, *supra* note 3, at 1.

(14) *Id.*

(15) Patrick Kelly, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*. By Michael P. Scharf. Cambridge, New York: Cambridge University Press, 2013. Pp. 220. Index. \$103., 111 *American Journal of International Law*, 805–811, at 806 (2017).

(16) SCHARF ET AL, *supra* note 3, at 26.

(17) *Id.* At 26.

(18) *North Sea Continental Shelf Cases*, I.C.J. paras. 47 and 100 (1969), <https://www.icj-cij.org/files/case-related/52/052-19690220-JUD-01-00-EN.pdf> (last visited Jul 14, 2020).

In the book *The Syrian Conflict's Impact on International Law*, Scharf et al. refer to several occurrences throughout history when states took actions to prevent atrocities without UN Security Council authorization on the grounds of self-defense and humanitarian intervention, among other grounds.⁽¹⁹⁾ Notwithstanding, Scharf et al. emphasize that the situation in Syria is unprecedented in terms of the number of states and organizations supporting the measures undertaken against atrocities and the clarity of the language used by the states emphasizing the importance of taking firm actions, despite a veto decision, to combat and prosecute atrocities.⁽²⁰⁾ Thus, due to the war in Syria, there is a clear expression of *opinio juris* setting limitations on or obstructions to veto power in the context of atrocities, which set the basis for the formation of a binding customary international law.⁽²¹⁾

C. Methodology

This is a theoretical and practical paper. Thus, it proceeds by surveying the literature that discusses how and why veto power is changing in the context of atrocities. The paper then highlights several events during the Syrian war where veto power has been or could be challenged based on different legal bases. Drawing on the legal bases of all events and the existing literature, this paper determines the legal circumstances of when an action inconsistent with veto power undertaken by a state would be considered legal and just.

In a rapidly changing world and particularly when the UN Security Council fails to act against atrocity crimes, all states can play a role in the maintenance of international peace and security. This evolution in international law has been reflected in several incidents that involved challenges to veto power during the war in Syria. In the absence of clear circumstances to justify challenging the Security Council veto power to fight atrocities, states may rely on their own judgment, which might lead to chaos in the international order.⁽²²⁾ Therefore, this paper demonstrates the urgency of addressing this gap in international law and suggests some circumstances that justify actions inconsistent with veto

(19) SCHARF ET AL., *supra* note 3, at 64-65.

(20) How the Syrian conflict has changed international law, *supra* note 5.

(21) *Id.*

(22) *Id.*

power. Determination of such circumstances is necessary until further voluntary action is hopefully undertaken by the Security Council's permanent members, applying reforms on their veto power, as conditioned by chapter XVIII of the UN Charter.⁽²³⁾

This paper supports existing literature on the importance of setting limitations on and obstructions to veto power particularly to fight atrocities. Additionally, this paper agrees with the literature alleging that such limitations on and obstructions to veto power can be developed rapidly as part of customary international law. The Syrian conflict introduces significant applications in this field. This paper aims to contribute to the advancement of the literature concerning the identification of limitations on and obstructions to veto power, in the context of atrocities, by uncovering the legal circumstances under which such limitations on and obstructions to veto power should be discussed. To put it differently, this paper answers the question: what are the set of circumstances that trigger concerns regarding the legitimacy of using veto power and thus launch a discussion about the limitations on or obstructions to veto power?

D. Research Paper Outline

This paper has four parts. The first part is this introduction, which is divided into four sections. In the beginning, there is a brief explanation of how this work relates to prior work on the recognition of atrocities as a legal justification to limit or obstruct the veto power, why the study problem was chosen, and how this study may influence research on the field. The first section of the introduction includes a statement of the study objectives. The second section is a review of literature. The third section describes the methodology of this study, and this last section of the introduction provides a detailed outline of the parts. The second part highlights the significant events during the Syrian war, during which firm actions have been undertaken by states and other subjects of international law to face atrocities, despite a veto, which could constitute Grotian Moments for the rapid creation of customary international rules governing veto power, namely, determining the restrictions and obstructions on veto power in the context of atrocities. The second part also includes a discussion about the potential impact of

(23) Id. Also, UN Charter, United Nations, <https://www.un.org/en/sections/un-charter/un-charter-full-text/> (last visited Jul 14, 2020).

the COVID-19 pandemic on the advancement of new customary rules governing the use of veto power. The third part provides an analysis of the events included in the second part and determines the circumstances justifying limiting or obstructing veto power in the context of atrocities. The fourth part is the conclusion.

In short, this paper is divided into four parts. Part I is the introduction; part II discusses events during the Syrian war where veto power has been or could be challenged; part III provides the legal circumstances justifying limiting or obstructing the veto power; and part IV offers the conclusion.

II. Events During the Syrian War When the Veto Power Has Been or Could be Challenged

There are several instances, during the war in Syria, when the international community has undertaken actions, inconsistent with a veto, to face atrocities. Examples include the UN General Assembly investigation of atrocity crimes committed in Syria since March 2011; the European national trials of individuals responsible for atrocities committed in Syria on the basis of universal jurisdiction; and the 2018 airstrikes by the United States, France, and United Kingdom in response to the Syrian regime use of chemical weapons.

This part sheds light on those events. Then, it concludes with a discussion about the Russian Chinese vetoes of 20 December 2019 and 8 July 2020 to block cross-border humanitarian aid deliveries to people in Syria. Specifically, how a response from the international community in the context of a humanitarian intervention during a pandemic could constitute a Grotian Moment for the formation of a customary international law establishing restrictions or obstructions on the use of veto power for the purpose of fighting atrocities.

A. The UN General Assembly Investigation of Atrocity Crimes Committed in Syria Since March 2011

Russia and China have vetoed several Security Council resolutions on the Syrian conflict.⁽²⁴⁾ In total, Russia has vetoed fifteen resolutions, while

(24) THE VETO: UN SECURITY COUNCIL WORKING METHODS, <https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php> (last visited Jul 14, 2020).

China has vetoed nine resolutions.⁽²⁵⁾ Most of these vetoes were meant to bar the UN Security Council from taking steps to hold the Syrian government accountable for atrocities committed in Syria since the start of the civil war in 2011. For example, on 22 May 2014, Russia and China vetoed a Security Council resolution referring the situation in Syria to the ICC.⁽²⁶⁾

As a response to the Security Council failure to take appropriate action to ensure accountability in Syria and despite an objection by Russia, the UN General Assembly adopted on 21 December 2016, resolution 71/248, establishing an international, impartial and independent mechanism, known as “the Mechanism” or “IIIM”, to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011. Most of the states in the General Assembly have voted in favor of the establishment of this investigative mechanism, which has been determined as essential to collect evidence of violations of international humanitarian law and human rights law so that the United Nations could facilitate possible prosecutions by “national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”⁽²⁷⁾

B. The European National Trials of Individuals Responsible of Atrocities Committed in Syria, Based on Universal Jurisdiction

The absence of any accountability mechanisms and the massive number of Syrian refugees in Europe have prompted European countries to exercise universal jurisdiction by authorizing national courts to inves-

(25) Id. Also, Humanitarian aid to Syrians threatened as Russia and China veto proposals at U.N. The Washington Post, https://www.washingtonpost.com/national-security/humanitarian-aid-to-syrians-threatened-as-russia-and-china-veto-proposals-at-un/2020/07/10/96c87a0c-c2d4-11ea-b178-bb7b05b94af1_story.html (last visited Jul 14, 2020)

(26) The Rule of Law: Retreat from Accountability, Security Council Report, <https://www.securitycouncilreport.org/research-reports/the-rule-of-law-retreat-from-accountability.php>, 13 (last visited Jul 15, 2020)

(27) Id. At 15-16. And, Scharf et al, *supra* note 3, at 92. See also, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, Mandate, <https://iiim.un.org/mandate/> (last visited Jul 15, 2020).

tigate and prosecute atrocities committed in Syria.⁽²⁸⁾ The wave started shortly after the outbreak of the Syrian war in 2011 when the German War Crimes Unit initiated several investigations of atrocities committed in Syria.⁽²⁹⁾ Later, other European states, including France, Sweden, Austria, and Switzerland, joined Germany in investigating, prosecuting, and issuing international arrest warrants to bring Syrian perpetrators to justice.⁽³⁰⁾

In pursuing universal jurisdiction over the atrocities in the Syrian conflict, the authorities in Europe have relied on information and material evidence provided by Syrian refugees and asylum seekers, non-governmental groups engaged in the documentation of the atrocities in Syria, United Nations entities, and other European countries.⁽³¹⁾

In June 2018, the German Federal Court of Justice issued an international arrest warrant against Jamil Hassan, a high-ranking official in Syrian President Bashar Al-Assad's regime, accusing him of war crimes and crimes against humanity. In February 2019, while Hassan was visiting Lebanon, Germany issued a formal extradition request to Lebanon demanding Hassan's surrender. The government of the United States has explicitly expressed its support of the exercise of universal jurisdiction by Germany.⁽³²⁾

In April 2020, the Higher Regional Court in Koblenz, Germany started the first criminal trial worldwide concerning state torture in Syria. The defendants are Anwar R. and Eyad A., former officials of Assad's government, who were in Germany at the time of their arrest.⁽³³⁾

(28) Scharf et al, *supra* note 3, at 105-108.

(29) *Id.* At 106.

(30) *Id.* At 107. See, National courts lead the way in prosecuting Syrian war crimes, News | Al Jazeera, <https://www.aljazeera.com/news/2019/10/national-courts-lead-prosecuting-syrian-war-crimes-191030090727180.html> (last visited Jun 29, 2020).

(31) "These are the Crimes we are Fleeing" Human Rights Watch, <https://www.hrw.org/report/2017/10/04/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts> (last visited Jun 29, 2020).

(32) Scharf et al, *supra* note 3, at 107. See, Support for Germany's Request for Lebanon to Extradite Syrian General Jamil Hassan - Press Statement, U.S. Department of State, <https://www.state.gov/support-for-germanys-request-for-lebanon-to-extradite-syrian-general-jamil-hassan/> (last visited Jul 15, 2020).

(33) First criminal trial worldwide on torture in Syria Before a German Court, ECCHR, <https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/> (last visited Jun 29, 2020). Also, Germany: First Criminal Trial Worldwide on State Torture in Syria Begins | Global Legal Monitor, <https://www.loc.gov/law/foreign-news/article/germany-first-criminal-trial-worldwide-on-state-torture-in-syria-begins/> (last visited Jun 29, 2020).

C. The Airstrikes of the United States., France, and United Kingdom in Response to the Syrian Regime’s Use of Chemical Weapons, Based on Humanitarian Intervention

Since the beginning of the war in Syria in 2011, an increasing number of reports have alleged that Assad’s regime had used chemical weapons against the Syrian population.⁽³⁴⁾ As a result, on October 20, 2012, United States President Barack Obama declared that the use of chemical weapons in Syria would be a “red line for us.”⁽³⁵⁾ Since then, Obama every so often threatened an American military engagement in Syria.⁽³⁶⁾ Nevertheless, due to the lack of support from Congress and international allies, Obama never took military action.⁽³⁷⁾ In September 2013, a Russian-American deal was undertaken.⁽³⁸⁾ Under this deal, the Assad regime agreed to work with international inspectors towards the surrender and destruction of its chemical weapons.⁽³⁹⁾ The deal provides that “...in the event of non-compliance, including unauthorized transfer, or any use of chemical weapons by anyone in Syria, the UN Security Council should impose measures under Chapter VII of the UN Charter.”⁽⁴⁰⁾ The Syrian regime failed to fulfill its obligations under the deal, and reports of the Assad regime using chemical weapons against the people in Syria continued.⁽⁴¹⁾ On February 28, 2017, Russia and China vetoed a Security Council resolution that would have imposed sanctions against the Syrian government for using chemical weapons.⁽⁴²⁾

(34) Timeline of Syrian Chemical Weapons Activity, 2012-2020, <https://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity> (last visited Jul 17, 2020).

(35) Scharf et al, *supra* note 3, at 59. See, Remarks by the President to the White House Press Corps National Archives and Records Administration, <https://obamawhitehouse.archives.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps> (last visited Jul 17, 2020).

(36) *Id.*

(37) *Id.*

(38) *Id.* At 59-61. See, Framework for Elimination of Syrian Chemical Weapons, U.S. Department of State, <https://2009-2017.state.gov/r/pa/prs/ps/2013/09/214247.htm> (last visited Jul 2, 2020).

(39) *Id.*

(40) Framework for Elimination of Syrian Chemical Weapons, *supra* note 37.

(41) Timeline of Syrian Chemical Weapons Activity, 2012-2020, *supra* note 33.

(42) Russia, China block Security Council action on use of chemical weapons in Syria, UN News, <https://news.un.org/en/story/2017/02/552362-russia-china-block->

After that, the Assad regime continued the use of chemical weapons against the Syrian population on several occasions.⁽⁴³⁾ Russia continued the use of its veto power to halt international action on Syria and shield the Syrian regime from accountability.⁽⁴⁴⁾ Following the veto of February 2017, Russia has vetoed Security Council resolutions concerning the use of chemical weapons in Syria on 12 April 2017, 24 October 2017, 16 November 2017, 17 November 2017, and 10 April 2018.⁽⁴⁵⁾

On 14 April 2018, the United States, France, and the United Kingdom launched airstrikes against Assad's regime in response to the apparent use of chemical weapons in a major attack against civilians on 7 April 2018, in Douma, a suburb outside Damascus, Syria.⁽⁴⁶⁾

Russia described the airstrikes as an act of "aggression against the Syrian Arab Republic by the US and its allies".⁽⁴⁷⁾ Furthermore, Russia introduced a draft Security Council resolution that condemned the airstrikes; however, it failed to pass because it only received three votes in favor, eight against, and four abstentions.⁽⁴⁸⁾ Although several states have expressed concerns regarding the legality of these airstrikes under international law, the strikes received broad political support.⁽⁴⁹⁾

The United Kingdom asserted that the legal basis for the airstrikes was "humanitarian intervention".⁽⁵⁰⁾ France stressed the legality of the airstrikes and that "they serve the law and our political strategy to put

security-council-action-use-chemical-weapons-syria (last visited Jul 2, 2020).

(43) Timeline of Syrian Chemical Weapons Activity, 2012-2020, supra note 33.

(44) Russia vetoes U.N. resolution to continue Syria chemical weapons investigation, The Washington Post, https://www.washingtonpost.com/world/middle_east/russia-vetoes-un-resolution-to-continue-syria-chemical-weapons-investigation/2017/10/24/63e52470-b8c6-11e7-9b93-b97043e57a22_story.html (last visited Jul 3, 2020).

(45) The Veto, supra note 24.

(46) Timeline of Syrian Chemical Weapons Activity, 2012-2020, supra note 33. See, Scharf et al, supra note 3, at 62. See also, United States Bombs Syrian Government Facilities in Response to Chemical Weapons Use, 112 *American Journal of International Law*, 522–527, 522 (2018).

(47) Timeline of Syrian Chemical Weapons Activity, 2012-2020, supra note 33.

(48) Scharf et al, supra note 3, at 62.

(49) Id. And, United States Bombs Syrian Government Facilities, supra note 46, at 524.

(50) Syria action – UK government legal position, GOV.UK, <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> (last visited Jul 17, 2020).

an end to the Syrian tragedy.”⁽⁵¹⁾ The United States representative, in a speech to the Security Council, said, “[W]e acted to deter the future use of chemical weapons by holding the Syrian regime responsible for its atrocities against humanity ... The responses were justified, legitimate, and proportionate.”⁽⁵²⁾

Humanitarian intervention has been a debatable legal basis for the use of force in international law for a long time.⁽⁵³⁾ However, in the context of the 2018 airstrikes in Syria, it was widely accepted.⁽⁵⁴⁾ The unprecedented circumstances of the Syrian conflict are probably responsible for this development.⁽⁵⁵⁾ Some of these circumstances include the following: first, the conflict in Syria has lasted for many years, and thus, there is a strong desire to end it as soon as possible; second, the interest behind the airstrikes—the preservation of peace and human rights—was clear, and was supported by the fact that the airstrikes were undertaken collectively by a group of states; third, the participating states explicitly emphasized the legality of the airstrikes; fourth, the aim of the airstrikes was to prevent the regime from using chemical weapons against civilians (*jus cogens* norm), so the targets of the airstrikes were well defined such as the facilities for chemical weapon production and storage; and finally, many states expressed their support for the airstrikes.⁽⁵⁶⁾

D. The Block of Cross-Border Aid Deliveries to Syria and the COVID-19 Pandemic: Humanitarian Intervention as a Legal Basis for Overcoming the Veto

Interestingly, Russia and China vetoed, on 20 December 2019 and 8 July 2020, a Security Council resolution to block cross-border aid deliveries from Turkey and Iraq intended for civilians in Syria.⁽⁵⁷⁾ In both instances, the remaining 13 members of the Security Council voted in favor of the resolutions.⁽⁵⁸⁾ These vetoes represent an escalation in the

(51) Scharf et al, *supra* note 3, at 79-80.

(52) *Id.* At 80

(53) How the Syrian conflict has changed international law, *supra* note 5.

(54) Scharf et al, *supra* note 3, at 86.

(55) *Id.*

(56) *Id.* At 86-89.

(57) The Veto, *supra* note 24. Also, Humanitarian aid, *supra* note 25.

(58) *Id.*

abuses in the use of veto power. Now, the five permanent members of the Security Council not only use the veto to shield individuals and governments from being held accountable but also to assist and enable them to commit atrocities. Several states have expressed their condemnation of the Russian and Chinese vetoes.⁽⁵⁹⁾ For example, Britain's UN Ambassador, Karen Pierce, said Russia and China "gave no credible explanation for their veto"⁽⁶⁰⁾. Canada also expressed that it was "deeply disappointed" by the veto.⁽⁶¹⁾

The situation in Syria for civilians became harder after the COVID-19 crisis. Restrictions on aid deliveries have prevented food as well as medical supplies and personnel necessary to contain COVID-19 from reaching two million people in northeast Syria, according to Human Rights Watch.⁽⁶²⁾ Therefore, HRW urged the Security Council to reverse the veto and reauthorize the passage of humanitarian aid.⁽⁶³⁾ Additionally, HRW urged the Syrian government to ease its longstanding restrictions on aid deliveries from Damascus to northeast Syria.⁽⁶⁴⁾ The American ambassador to the United Nations, Kelly Craft, said "What we're really focused on in the Council is the outcome, and that is saving lives, that's reaching over 4 million Syrians. And if we don't, the COVID outbreak is going to ... I hate to say this ... it's going to be mass graves of very innocent people."⁽⁶⁵⁾

The situation in Syria casts doubts regarding the legality of exercising the right of humanitarian intervention to protect the lives of the threatened population by ensuring the continuity of humanitarian aid deliveries. The doubts came from the fact that an action to intervene

(59) Canada joins international condemnation of Russia, China over UN veto of Syria aid, CBC News, <https://www.cbc.ca/news/world/canada-condemnation-russia-china-syria-aid-un-1.5406180> (last visited Jul 17, 2020).

(60) Id.

(61) Id.

(62) Syria: Aid Restrictions Hinder Covid-19 Response, Human Rights Watch, <https://www.hrw.org/news/2020/04/28/syria-aid-restrictions-hinder-covid-19-response> (last visited Jul 3, 2020).

(63) Id.

(64) Id.

(65) UN Ambassador Craft warns of 'mass graves' if Russia won't back down in Syrian aid impasse, Fox News, <https://www.foxnews.com/politics/un-craft-russia-syria-border> (last visited Jul 4, 2020)

will require the intervening state or states to bump up against the veto. However, with the existence of *opinio juris* against such use of veto power alongside the COVID-19 outbreak, with all the unprecedented challenges associated with it that worsen the already tragic humanitarian conditions in Syria, a humanitarian intervention to enable aid deliveries to the affected regions might be excused. Hence, if the international community decides on humanitarian intervention, such an event might be qualified to give rise to a Grotian Moment for the creation of a customary international law permitting limitations on or obstructions to veto power when it used in a way that promotes violations of international humanitarian law and human rights law, particularly during times of large-scale health emergencies.

The following part provides an analysis of the events included in this part and determines the circumstances justifying limiting or obstructing veto power in the context of atrocities.

III. The Legal Circumstances Justifying Limiting or Obstructing Veto Power

In light of the events identified in the last part, this part determines the circumstances that legalize state actions undertaken to combat atrocities when veto power is in use and represents an obstacle to accomplishing accountability or furthering crimes or violations of human rights. This part provides an analysis of the bases invoked by states and other subjects of international law as legal justifications to overcome veto power, namely, the investigation and documentation of atrocities, the universal jurisdiction, and humanitarian intervention. The analysis will examine each basis by breaking it down into its main elements. Then, by putting those elements altogether, this part identifies the legal circumstances for limiting or obstructing veto power in the context of atrocities.

The investigations and documentation of atrocities is the basis invoked by the UN General Assembly to justify the establishment of the IIIM. This basis does not require much analysis since the objective of this basis is straightforward: to collect and keep safe information, data, and other evidence that might be useful for facilitating any future accountability. Therefore, the circumstances that induced the internatio-

nal community through the General Assembly to act contrary to the veto power of the Security Council are the following: first, possible ongoing atrocities against civilians in a region under conflict; and second, the lack of any mechanism to investigate, document, and prosecute perpetrators.

The universal jurisdiction is the basis invoked by the European states to justify the national trials of individuals accused of atrocities in Syria. There is no uniform system governing the application of the universal jurisdiction. However, the premises underlying universal jurisdiction are the following: first, grave crimes threatening the interest of all humanity, such as crimes involving violations of humanitarian and human rights law; and second, crimes occurring in place beyond the national jurisdiction of any state or in a territory under the jurisdiction of a specific state, but the territorial state and the nationality state of the accused are unlikely to exercise jurisdiction.⁽⁶⁶⁾

The humanitarian intervention is the basis invoked by the United States, France, and United Kingdom to justify their airstrikes in response to the Assad regime use of chemical weapons. According to the United Kingdom, the circumstances of a lawful humanitarian intervention have been met, and they are the following: “(i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim (i.e., the minimum necessary to achieve that end and for no other purpose).”⁽⁶⁷⁾

However, the circumstances justifying humanitarian intervention in the context of the use of chemical weapons may differ from the circumstances that justify humanitarian intervention in the context of blocking cross-border aid during pandemics such as COVID-19. Therefore, I will add the following to the previous circumstances: it does not matter whether atrocities and humanitarian suffering were a direct

(66) Scharf et al, supra note 3, at 96-98.

(67) Syria action – UK government legal position, supra note 50.

or indirect result of a state act or omission and whether they are a result of a human activity, natural disaster, or health outbreak.

In sum, the circumstances justifying limiting or obstructing veto power in the context of atrocities are the following:

1. Serious crime or human suffering, in terms of nature and scope, threatens international peace and security, including crimes that constitute violations of international humanitarian law and/or human rights law as well as natural and health disasters.
2. The crime or suffering is a result of a state act or omission.
3. There is past, present, or future crime or suffering. The invoked legal basis determines whether the act undertaken shall be extended to a past, present, or future crime or suffering. For example, the universal jurisdiction is a proper legal basis to be invoked by a state to justify national trials for atrocities committed in the past or atrocities still ongoing. On the other hand, the humanitarian intervention considers a proper legal ground to be invoked by a state to justify the use of power to stop ongoing atrocities or suffering as well as to prevent future possible atrocities or potential humanitarian suffering.
4. Civilians are the victims.
5. The crime or suffering occurred in a region under conflict.
6. There is a lack of any international, regional, or national mechanism to investigate, document, and prosecute perpetrators.
7. There is strong evidence of the crime or the resultant suffering.
8. There is *opinio juris* concerning the validity of the evidence of the crime or suffering as well as the urgency of taking immediate relief measures.
9. The use of force should only be used as a last resort when other alternatives to save lives have been exhausted or are unattainable.
10. The purpose of any measure is to save lives. The measures should not have the aim of accomplishing economic, political, strategic, or any other gain.

11. There is proportionality of the measures, where the reaction does not outweigh the action. For example, in the case of humanitarian intervention, using the minimum force necessary to accomplish the goal of saving lives.
12. The measures should be targeted. They should be specific in terms of the humanitarian objective(s), approach, scope, location, and duration.

IV. Conclusion

This research paper suggests a set of legal circumstances justifying limiting or obstructing veto power in the context of atrocities. This discussion is essential as the abuses of veto power regarding the Syrian war escalate. Therefore, the international community and legal scholars have sought to set limitations on and obstructions to the use of veto power to fight impunity and support relief efforts.

The veto power has been used in unprecedented ways on several occasions during the war in Syria. This research paper highlights those events and uses them as bases to identify the general circumstances required for lawfully overcoming the veto power.

This paper draws attention to Russian Chinese vetoes of 20 December 2019 and 8 July 2020 to block cross-border humanitarian aid deliveries to some parts in Syria. This paper argues that a response from the international community in the context of a humanitarian intervention during a large-scale health emergency, such as COVID-19 pandemic, could lead to the creation of a customary international law establishing restrictions or obstructions on the use of veto power for fighting atrocities.

Finally, I hope that the circumstances identified by this paper will be useful for establishing principles for limiting and obstructing veto power in the context of atrocities.

References

- “These are the Crimes we are Fleeing” Human Rights Watch, <https://www.hrw.org/report/2017/10/04/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts> (last visited Jun 29, 2020).
- Canada joins international condemnation of Russia, China over UN veto of Syria aid, CBC News, <https://www.cbc.ca/news/world/canada-condemnation-russia-china-syria-aid-un-1.5406180> (last visited Jul 17, 2020).
- Convention on the Prevention and Punishment of the Crime of Genocide OHCHR, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx> (last visited Jul 14, 2020).
- First criminal trial worldwide on torture in Syria Before a German Court, ECCHR, <https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/> (last visited Jun 29, 2020).
- Framework for Elimination of Syrian Chemical Weapons, U.S. Department of State, <https://2009-2017.state.gov/r/pa/prs/ps/2013/09/214247.htm> (last visited Jul 2, 2020).
- Germany: First Criminal Trial Worldwide on State Torture in Syria Begins | Global Legal Monitor, <https://www.loc.gov/law/foreign-news/article/germany-first-criminal-trial-worldwide-on-state-torture-in-syria-begins/> (last visited Jun 29, 2020).
- How the Syrian conflict has changed international law, YouTube, <https://www.youtube.com/watch?v=zs4FnMNHBDY> (last visited Jun 19, 2020).
- Humanitarian aid to Syrians threatened as Russia and China veto proposals at U.N. The Washington Post, https://www.washingtonpost.com/national-security/humanitarian-aid-to-syrians-threatened-as-russia-and-china-veto-proposals-at-un/2020/07/10/96c87a0c-c2d4-11ea-b178-bb7b-05b94af1_story.html (last visited Jul 14, 2020).
- International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, Mandate, <https://iiim.un.org/mandate/> (last visited Jul 15, 2020).

- Jennifer Trahan, Questioning Unlimited Veto Use in Face of Atrocity Crimes, 52 Case W. Res. J. Int'l L. 73-100 (2020) Available at: <https://scholarlycommons.law.case.edu/jil/vol52/iss1/7> (last visited Jul 14, 2020).
- Michael P. Scharf et al., *The Syrian Conflict's Impact on International Law* (Cambridge University Press) (2020).
- National courts lead the way in prosecuting Syrian war crimes, News | Al Jazeera, <https://www.aljazeera.com/news/2019/10/national-courts-lead-prosecuting-syrian-war-crimes-191030090727180.html> (last visited Jun 29, 2020).
- North Sea Continental Shelf Cases, I.C.J. paras. 47 and 100 (1969), <https://www.icj-cij.org/files/case-related/52/052-19690220-JUD-01-00-EN.pdf> (last visited Jul 14, 2020).
- Patrick Kelly, Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments. By Michael P. Scharf. Cambridge, New York: Cambridge University Press, 2013. Pp. 220. Index. \$103., 111 American Journal of International Law, 805–811 (2017).
- Remarks by the President to the White House Press Corps National Archives and Records Administration, <https://obamawhitehouse.archives.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps> (last visited Jul 17, 2020).
- Russia vetoes U.N. resolution to continue Syria chemical weapons investigation, The Washington Post, https://www.washingtonpost.com/world/middle_east/russia-vetoes-un-resolution-to-continue-syria-chemical-weapons-investigation/2017/10/24/63e52470-b8c6-11e7-9b93-b97043e57a22_story.html (last visited Jul 3, 2020).
- Russia, China block Security Council action on use of chemical weapons in Syria, UN News, <https://news.un.org/en/story/2017/02/552362-russia-china-block-security-council-action-use-chemical-weapons-syria> (last visited Jul 2, 2020).
- Support for Germany's Request for Lebanon to Extradite Syrian General Jamil Hassan - Press Statement, U.S. Department of State, <https://www.state.gov/support-for-germanys-request-for-lebanon-to-extradite-syrian-general-jamil-hassan/> (last visited Jul 15, 2020).

- Syria action – UK government legal position, GOV.UK, <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> (last visited Jul 17, 2020).
- Syria: Aid Restrictions Hinder Covid-19 Response, Human Rights Watch, <https://www.hrw.org/news/2020/04/28/syria-aid-restrictions-hinder-covid-19-response> (last visited Jul 3, 2020).
- The Geneva Conventions of 12 August 1949, <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf> (last visited Jul 14, 2020).
- The Rule of Law: Retreat from Accountability, Security Council Report, <https://www.securitycouncilreport.org/research-reports/the-rule-of-law-retreat-from-accountability.php> (last visited Jul 15, 2020).
- The Veto: UN Security Council Working Methods, <https://www.security-councilreport.org/un-security-council-working-methods/the-veto.php> (last visited Jul 14, 2020).
- Timeline of Syrian Chemical Weapons Activity, 2012-2020, <https://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity> (last visited Jul 17, 2020).
- UN Ambassador Craft warns of ‘mass graves’ if Russia won’t back down in Syrian aid impasse, Fox News, <https://www.foxnews.com/politics/un-craft-russia-syria-border> (last visited Jul 4, 2020).
- UN Charter, United Nations, <https://www.un.org/en/sections/un-charter/un-charter-full-text/> (last visited Jul 14, 2020).
- United States Bombs Syrian Government Facilities in Response to Chemical Weapons Use, 112 *American Journal of International Law*, 522–527 (2018).

إعادة النظر في حق الفيتو في مجال الجرائم الوحشية: النزاع في سوريا كدراسة حالة

د. شريفة أحمد المهنا

ملخص الدراسة

يعد الاستخدام المفرط وغير المنضبط لحق النقض أثناء الحرب السورية أحد الأسباب التي دفعت المجتمع الدولي إلى البحث عن طرق لتجاوز هذا الحق، خاصة عندما يكون هذا التجاوز ضرورة لمنع جرائم وحشية. كما أن استخدام حق النقض لتعزيز المصالح الوطنية، الإقليمية، المصالح الاقتصادية، السياسية أو الاستراتيجية لدولة عضو دائم في مجلس الأمن على نحو يضر بمصالح إنسانية لدولة أخرى في حالة صراع، إنما يعد تقويضاً لدور مجلس الأمن في صيانة السلم والأمن الدوليين. كما يؤثر الاستخدام غير السليم لحق النقض على مدى امتثال الدول. عليه، يفقد نظام حق النقض فعاليته إذا استمرت الدول في إيجاد مبررات لعدم الامتثال.

يركز هذا البحث على أحداث وقعت خلال الحرب السورية والتي يعتقد أنها أدت إلى تكوين ما يعرف بـ «لحظات جروشن» في إشارة إلى وقائع تؤدي إلى استحداث أعراف دولية جديدة تحكم استخدام حق النقض. كما يهدف البحث إلى تحديد المبادئ التي تم الاستشهاد بها أثناء تلك الأحداث باعتبارها مبررات قانونية لتقييد حق النقض أو الإطاحة به. من ثم، يقدم هذا البحث تعريفاً بالظروف القانونية المحيطة التي إذا ما وجدت يكون النقاش مستحقاً حول إمكانية تقييد حق النقض أو تجاوزه في سياق الجرائم الوحشية.

عليه، يشدد البحث على أن تجاوز حق النقض يجب ألا يتم إلا في بيئة ملائمة تتوافر فيها ظروف محددة، واضحة، عادلة ومقبولة لدى جميع الدول الدائمة وغير دائمة العضوية في مجلس الأمن. من ثم، فإن المقترح الذي يقدمه هذا البحث يسعى للمساهمة في تعزيز النظام القانوني الذي يحكم استخدام حق النقض وذلك عن طريق إتاحة تجاوز هذا الحق أو تقييده إذا كان الأمر لازماً لغرض محاربة الجرائم الوحشية.