

LYSANNE B. ROBERGE

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Supervised by

Roland Paris

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Graduate School of Public and International Affairs

University of Ottawa

Seeking Justice after War

An analysis of criminal mechanisms to prosecute individuals responsible for violations of international human rights and humanitarian law in Syria

Abstract

In most of the conflict zones today, violations of international humanitarian and human rights law occur in total impunity and without an effective response from the international community. Although a comprehensive international criminal law framework has been developed after the Nuremberg and Tokyo Trials and applied by the United Nations, it appears that this system faces major challenges in ensuring an effective application of global justice in contemporary conflicts. In Syria alone, starvation and rape slavery are used as weapons of war; civilians are deliberately and indiscriminately killed; child soldiers are being recruited and used in combat action; hospitals, schools, cultural and religious sites, as well as other civilian objects, are the targets of constant attacks; crimes against humanity, war crimes and genocide have been perpetrated by states and non-state actors. Yet, even if these crimes represent grave breaches of international law, perpetrators are left unpunished and justice is still missing.

In this regard, how can the parties to the conflict be held responsible for the crimes they have committed in Syria? What options of international criminal law exist to ensure that the perpetrators of these heinous atrocities are effectively brought to justice? Ultimately, is justice achievable in Syria?

Looking at the violations of international law committed by both state and non-states actors during the ongoing war in Syria, this paper will identify the means and instruments by which the international community may or may not be able to prosecute war criminals under international criminal law.

Keywords

Syrian Civil War; international humanitarian law; human rights; criminal responsibility; violations of international law; crimes against humanity; war crimes; United Nations; transitional justice.

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List of Acronyms

APII	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIL	Customary International Law
COI (Syria)	Independent International Commission of Inquiry on the Syrian Arab Republic
CRC	Convention on the Rights of the Child
ECCC	Extraordinary Chambers in the Courts of Cambodia
FSA	Free Syrian Army
HRC	Human Rights Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Person
IHL	International Humanitarian Law
IIIM	International, Impartial and Independent Mechanism
INGO	International Non-Governmental Organization
ISIS	Islamic State of Iraq and Al-Sham
OHCHR	Office of the United Nations High Commissioner for Human Rights
SDF	Syrian Democratic Forces
SNHR	Syrian Network for Human Rights
SSSC	Supreme State Security Court
UDHR	Universal Declaration of Human Rights

UNGA United Nations General Assembly

UNSC United Nations Security Council

YPG Popular Protection Units

INTRODUCTION

The Syrian conflict has become one of the worst humanitarian crises of the past 50 years. According to the latest data published by the Syrian Observatory for Human Rights in March 2018, at least 511,000 people had been killed in the war since it began seven years ago.¹ An estimated 11 million have fled their homes, of which 4.8 million have gone to Turkey, Lebanon, Jordan, Egypt and Iraq, and another 6.6 million are currently internally displaced within Syria.² The main reason for these alarming displacements is obviously the extreme violence perpetrated by all parties to the conflict against the civilian population. In fact, countless reports from the United Nations (UN), non-governmental organizations and research institutes found government forces, non-state armed groups, terrorist organizations and Kurdish groups guilty of war crimes, crimes against humanity and genocide. While the international community stands by, most of these horrible crimes go unpunished and their perpetrators free from any charge. Since the current state of impunity is a clear hindrance to achieving peace and long-term stability in Syria, the international community bears the responsibility to fight with words in response to what is currently fought with arms. To quote Kenneth Roth, executive director of Human Rights Watch, the possibility of criminal prosecution is a powerful means to achieve justice, because “an international indictment profoundly discredits even a ruthless, dictatorial leader.”³

In light of these horrible crimes and violations of human rights, how can the parties to the conflict be held responsible for the crimes they have committed in Syria? What are the means

¹ Syrian Observatory for Human Rights. “During 7 consecutive years... about 511 thousand people killed since the start of the Syrian revolution in 2011”, (March 12, 2018), online: <http://www.syriahr.com/en/?p=86573>

² United Nations High Commissioner for Refugees (UNHCR). “Syria emergency”, Emergencies, online: <http://www.unhcr.org/syria-emergency.html>

³ Human Rights Watch. “Human Rights and Armed Conflict”, *World Report*, 2004, p. 25, <http://pantheon.hrw.org/legacy/wr2k4/download/wr2k4.pdf>

available under criminal law that can ensure that the perpetrators of these heinous atrocities are effectively brought to justice? Ultimately, is justice achievable in Syria? Given the involvement of foreign powers which have conflicting interests and positions within the conflict, it appears difficult to envision any prosecution through traditional international justice mechanisms. In addition to that, the fact that the Syrian government plays a central role in the perpetration of violence and crimes makes the establishment of any judicial instrument even more difficult. The international community is therefore confronted with a double impasse: on the one hand, the apparent return of the East-West divide is preventing any coercive action from the UN Security Council and on the other hand, the Syrian national authority, itself directly implicated in the conflict, cannot legitimately contribute to the fight against impunity. In order to circumvent these challenges and ultimately obtain a certain level of justice in Syria, it seems imperative to try to find innovative alternatives based on past initiatives.

The purpose of this paper is to evaluate judicial options for bringing the individuals responsible for these crimes to justice. This analysis requires not only an understanding of the principles of international law, but also awareness of the limitations of its application in practice. It is thus not only a matter of presenting the law as it is today (or how it should be), but of considering the particular situation in Syria in order to find creative ways that would maximize the application of the law. At the heart of this quest for justice lies a simple human responsibility: to ensure that the lives of innocent people are protected and that individuals who commit horrific crimes are held responsible. This objective is also highly embedded in the broader context of the Syrian peace process and transitional justice. “As justice and peace promote and sustain one another,

accountability for atrocity crimes can serve not only as a strong deterrent, but also as a key to successful reconciliation processes and the consolidation of peace in post-conflict [in Syria].”⁴

Research Methodology

This paper uses comparative qualitative methods to evaluate various options to apply international law to perpetrators in Syria. Specifically, I describe each option, identify the practical challenges of applying each option in the Syrian case, and then draw conclusions about the feasibility and desirability of different approaches.

I rely on secondary sources for this research. Since the paper’s main objective is not to question the nature of the Syrian conflict, the applicable laws or the violations committed (presented as facts), but rather to analyze transitional justice tools, the use of secondary data was necessary. Indeed, it allowed the project to build on the existing legal and factual framework and to deepen the conflict analysis by proposing innovative solution mechanisms supported by the literature. Special attention was thus given to the choice of sources in order to base this research on credible scientific evidence that would later serve to respond to the research question. First, the expertise of the United Nations and its specialized agencies and bodies in the field of human rights and international justice has been more than valuable. On the one hand, the numerous reports of the UN General Assembly, the UN Security Council, the Human Rights Council and the Independent International Commission of Inquiry on the Syrian Arab Republic, among others, have provided a high level of details and legitimacy to the description of the crimes committed. On the other hand, the broad and well-established UN legal framework (conventions, treaties, tribunals, etc.) have allowed this study to be based on a solid and internationally

⁴ United Nations Office on Genocide Prevention and the Responsibility to Protect. “Accountability”, *Atrocity Crimes*, online: <http://www.un.org/en/genocideprevention/accountability.html>

recognized legal corpus. As a matter of fact, jurisprudence from international tribunals, such as the International Criminal Court (ICC), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Extraordinary African Chambers (EAC), has been used to compare existing initiatives and suggest new mechanisms that would build on past successes.

Moreover, the active and up-to-date field works of International Non-Governmental Organizations like Amnesty International, Human Rights Watch and the Violations Documentation Center (VDC) have provided a complementary lens to that of the United Nations by collecting primary data on certain groups of people (non-state armed groups, the Yazidi minority, child soldiers) or on specific themes (air strikes, chemical weapons, conditions of detention). In this regard, the extensive study of international customary law published by the International Committee of the Red Cross (ICRC) in 2005 has been essential to establish the applicable customary rules in the context of a non-international armed conflict. A literature review was also conducted to identify state practices in international and transitional justice.

Research Limitations

Due the limited resources and scope of this project, many elements and actors involved in the conflict have been left out on purpose. For example, the paper does not consider possible violations of international law committed by foreign powers in Syria. Although very relevant to the present case, its inclusion would have added another level of complexity and therefore probably diluted the concision and depth of the analysis. Moreover, for the sake of brevity, certain legislation, jurisprudence, international conventions and treaties, as well as violations of international law had to be voluntarily omitted. While Part I attempted to include as many violations as possible, there are still many of them that have not been analyzed. In this regard, the choice of the crimes and violations that were to be included was based on the frequency with

which they were committed, as well as on their severity. It would have been interesting to carry out field research to ascertain the opinion and needs of the Syrian population, and to develop mechanisms that really correspond to their aspirations and traditional practices, but this type of data-collection was not feasible. It must also be recognized that this research approaches international justice from a broadly Western standpoint that may not always correspond to the needs, desires and practices of the local population.

Outline

Starting with a brief historical overview of the war in Syria, Part I aims at providing a general picture of the conflict dynamics, the different actors involved and the consequences on the civilian population and the affected neighboring countries. It also describes the scope of crimes that have allegedly taken place in Syria. Part II turns to the analysis of domestic and international legal frameworks in order to provide an applicable set of rules that could potentially be used to prove the criminal responsibility of certain individuals. Part III then provides a rigorous analysis of the different criminal options to prosecute individuals who have taken part in grave violations of international law. Based on a set of evaluation criteria, such as the political feasibility of implementing the proposed mechanisms, their independence and impartiality, their compliance with international standards of justice, as well as the level of inclusion of all parties to the conflict, this section evaluates the feasibility of implementing these mechanisms. In light of this analysis, the concluding observations will serve as a final assessment of the proposed instruments and suggests those who could be most easily implemented in the near future.

PART. I THE SYRIAN WAR

Given the current magnitude and consequences of the Syrian war, it is perhaps surprising to recall that the conflict began when peaceful protesters marched down the street in the southern city of Deraa, in March 2011, in reaction to the arrest and torture of fifteen children⁵ who had painted anti-government graffiti on a school wall in support of the Arab Spring.⁶ Surprising, indeed, considering that since then, around 511,000 Syrians have died, more than 5.5 million have sought refuge abroad, over 6.7 million have been internally displaced and an estimated 714,345 are still living in besieged areas.⁷

One of the main factors that contributed to the quick escalation of the violence from a mere protest calling for democratic change to an internationalized civil war was the strong and violent reaction from the government forces. During the March 18th 2011 protests that broke out in four Syrian cities, six people were killed and hundreds injured after security forces cracked down on demonstrators.⁸ Noticing that the civil society movement was slowly shifting towards a call to overthrow the Syrian government, President Bashar al-Assad announced several plans to appease citizens, such as lifting Syria's 48 year state of emergency, licensing new political parties, reforming the constitution, and raising state employees' salary. However, these measures were not enough. The population was asking for a real and lasting change; but the government replied

⁵ One of the boys, Hamza al-Khateeb, 13 years old, was killed after having been brutally tortured. See Macleod, Hugh, and Annasofie Flamand. "Tortured and killed: Hamza al-Khateeb, age 13", *Al Jazeera*, (May 31, 2011), online: <https://www.aljazeera.com/indepth/features/2011/05/201153185927813389.html>

⁶ Rodgers, Lucy, Gritten, David, et al. "Syria: The story of the conflict", BBC News, (March 11, 2016), online: <http://www.bbc.com/news/world-middle-east-26116868>

⁷ See Supra note 1; Internal Displacement Monitoring Centre. "Syria", online: <http://www.internal-displacement.org/countries/syria>; and PAX and the Syria Institute (TSI). "Siege Watch - Ninth Quarterly Report on Besieged Areas", (2018), p.6, <https://siegewatch.org/wp-content/uploads/2015/10/pax-tsi-siegewatch-9.pdf>

⁸ The New York Times. "In Syria, Crackdown After Protests", Middle East, (March 18, 2011), online: <https://www.nytimes.com/2011/03/19/world/middleeast/19syria.html>

with violence one more time. By June 2011, only three months after the first demonstration, over 500 people had been killed and thousands of Syrian residents had fled into Turkey, marking the beginning of the biggest refugee and displacement crisis of our time.⁹ Sadly, the number of people killed has escalated dramatically as the conflict persisted, reaching 90,000 in June 2013 and 250,000 in August 2015. As these numbers demonstrate, the level of violence rapidly escalated as the conflict began to grow and by September 2011, organized rebel militias were regularly engaging in combat with government troops in cities across Syria.¹⁰ While the International Committee of the Red Cross (ICRC) acknowledged the existence of an armed conflict in May 2012 and publicly confirmed the conflict's initiation in an operational update in July 2012, other organizations such as the Independent International Commission of Inquiry on the Syrian Arab Republic (COI) went on to say as early as February 2012 that the international humanitarian law threshold was crossed.¹¹ Additionally, an expert assessment released by Chatham House set the turning point at March 2012, whereas Human Rights Watch concluded that war crimes were being committed in April 2012.¹² From these previous sources, it can be estimated that the situation in Syria turned into a full-blown armed conflict in Spring/Summer 2012.

The first two years of the conflict saw swift responses from states and the United Nations to try to contain the violence and put an end to the civil war, as well as to punish the Assad regime for

⁹ Ferris, Elizabeth, and Kemal Kirisci. *The Consequences of Chaos: Syria's humanitarian crisis and the failure to protect*, The Marshall Papers, Washington, D.C., Brookings Institution Press, (2016), p. 14.

¹⁰ Encyclopedia Britannica. "Syrian Civil War", online: <https://www.britannica.com/event/Syrian-Civil-War/Civil-war>

¹¹ Human Rights Council. "Report of the independent international commission of inquiry on the Syrian Arab Republic", Twenty-fifth session, (February 12, 2014), submitted to the UN General Assembly, A/HRC/25/65, Annex II, par. 5, p. 31.

¹² Van Schaack, Beth. "Mapping the Law That Applies to War Crimes in Syria", (February 1, 2016), online: <https://www.justsecurity.org/29083/mapping-law-applies-war-crimes-syria/>

the brutal violence perpetrated against the civilian population. States began using financial, economic and political sanctions in an attempt to put pressure on the Syrian regime. In 2011, the United States imposed sanctions against President Bashar al-Assad and six other senior government officials, blocking access to their properties in the U.S. and any transactions with them.¹³ A few months later, the American government barred Americans from making new investments in Syria and prohibited any U.S. transactions relating to Syrian petroleum products. The European Union, Syria's biggest trading partner, as well as Turkey, have also imposed travel bans and asset freezes on individuals and companies. The EU further prohibited the import of Syrian oil and blocked trade in gold, precious metal and diamonds between the Syrian authorities and the European Central Bank. In addition to these countries, regional bodies such as the Arab League and the Organization of Islamic Cooperation suspended Syria's membership, while imposing economic sanctions on the import of non-oil products and Syrian banks.

In terms of the United Nations efforts, countless mechanisms have been attempted to ease tensions and bring a truce to Syria, again, without much success. In February 2012, former UN Secretary General Kofi Annan was appointed as the Joint Special Envoy of the United Nations and the League of Arab States in Syria, and presented his six-point peace plan to the UN Security Council.¹⁴ After only six months in office, the latter resigned, blaming the latent negotiations and the impossibility of securing a lasting ceasefire. Interestingly, Kofi Annan noted as early as 2012 that the “persistent divisions” within the Security Council, which have themselves become an

¹³ Lee Myers, Steven, and Anthony Shadidmay. “U.S. Imposes Sanctions on Syrian Leader and 6 Aides”, *the New York Times*, (May 18, 2011), online: <https://www.nytimes.com/2011/05/19/world/middleeast/19syria.html>

¹⁴ United Nations. “Kofi Annan Appointed Joint Special Envoy of United Nations, League of Arab States on Syrian Crisis”, *Press release*, SG/SM/14124, (February 23, 2012), online: <https://www.un.org/press/en/2012/sgsm14124.doc.htm>

obstacle to diplomacy, make the work of any mediator vastly more difficult.¹⁵ These divisions will effectively persist for the next six years and become one of the main reasons for the absence of a peace settlement in Syria. Whereas twenty-three UN Security Council resolutions were adopted since 2011, at least eight others were vetoed by Russia and/or China.¹⁶ The latter often consisted of statements expressing grave concern at the situation in Syria, of condemnations of widespread human rights violations by the Syrian authorities, of referrals to the International Criminal Court, as well as of calls for cease-fire, unimpeded humanitarian access, sanctions on parties involved and international investigations.¹⁷ Other initiatives include, among others, the Vienna agreement, the Four Towns Agreement, and numerous rounds of diplomatic talks led by the UN (Geneva I-VII talks)¹⁸ and by Russia, Turkey and Iran (Astana I-VI talks)¹⁹. Their success remains ambiguous.

Conflict Dynamics

Characterized as deeply fragmented and localized, the situation in Syria has become one of the most complex wars of the 21st century. Although this paper does not intend to cover all of the ethnic, religious, social, economic and geopolitical components of the Syrian Civil War, as well as its links with other ongoing conflicts, this section briefly describes some of the conflict dynamics in order to better understand the different actors involved and to assess their respective

¹⁵ United Nations. "Kofi Annan resigns as UN-Arab League Joint Special Envoy for Syrian crisis", *UN News*, (August 2, 2012), online: <https://news.un.org/en/story/2012/08/416872-kofi-annan-resigns-un-arab-league-joint-special-envoy-syrian-crisis>

¹⁶ United Nations. "Syria", *UN News*, online: <https://news.un.org/en/focus/syria>

¹⁷ McKirdy, Euan. "8 times Russia blocked a UN Security Council resolution on Syria", *CNN News*, (April 13, 2017), online: <https://www.cnn.com/2017/04/13/middleeast/russia-UNSC-syria-resolutions/index.html>

¹⁸ Supra note 16.

¹⁹ Al Jazeera. "Syria diplomatic talks: A timeline", Middle East, (September 15, 2017), online: <https://www.aljazeera.com/news/2017/09/syria-diplomatic-talks-timeline-170915083153934.html>

legal responsibilities under international law. For a clear geographical perspective, see the map of Syria in Appendix.

On the one hand, numerous Syrian groups have been and are still taking part in the hostilities, either as supporters of the government or as its opponents. Besides the Syrian Arab Army (SAA), different pro-government paramilitary and militia groups, such as the National Defence Forces, the Baath party battalions, tribal militias, popular committees and *shabiha* groups are engaged in support of the Assad regime on a regular basis.²⁰ As a matter of fact, an estimated 125,000 soldiers are taking part in the regular army troops, whereas pro-government militias consist of approximately 150,000 members, including around 50,000 Shiite foreign fighters.²¹ While pro-government forces are not exclusively composed of Alawites, the minority Shiite sect to whom the Assad family belongs, they have represented a majority in the government security forces such as the *shabiha* militia. On the opposition side, many Sunni rebel groups have joined the fighting either against the Assad regime or to promote their own agenda, gradually transforming the conflict from a rebellion against an oppressive regime, into a sectarian civil war.²² Indeed, as the conflict began, many regime opponents were inspired by a democratic transition, but the growing infiltration of Islamic groups gave Bashar al-Assad an opportunity to allege terrorism (supported by Iran and Hezbollah) in order to legitimize his brutal approach. To

²⁰ Lister, Charles. "Dynamic Stalemate: Surveying Syria's Military Landscape", *Brookings Doha Center*, Policy Briefing, Qatar, (May 2014), pp. 3 and 11, <https://www.brookings.edu/wp-content/uploads/2016/06/Syria-Military-Landscape-English.pdf>

²¹ Balanche, Fabrice. "Status of the Syrian Rebellion: Numbers, Ideologies, and Prospects", the Washington Institute, (November 22, 2016), <http://www.washingtoninstitute.org/policy-analysis/view/status-of-the-syrian-rebellion-numbers-ideologies-and-prospects>

²² Supra note 9, p. 17.

illustrate this complex landscape, the Commission of Inquiry has classified the non-state armed groups into four broad, non-exclusive umbrellas²³:

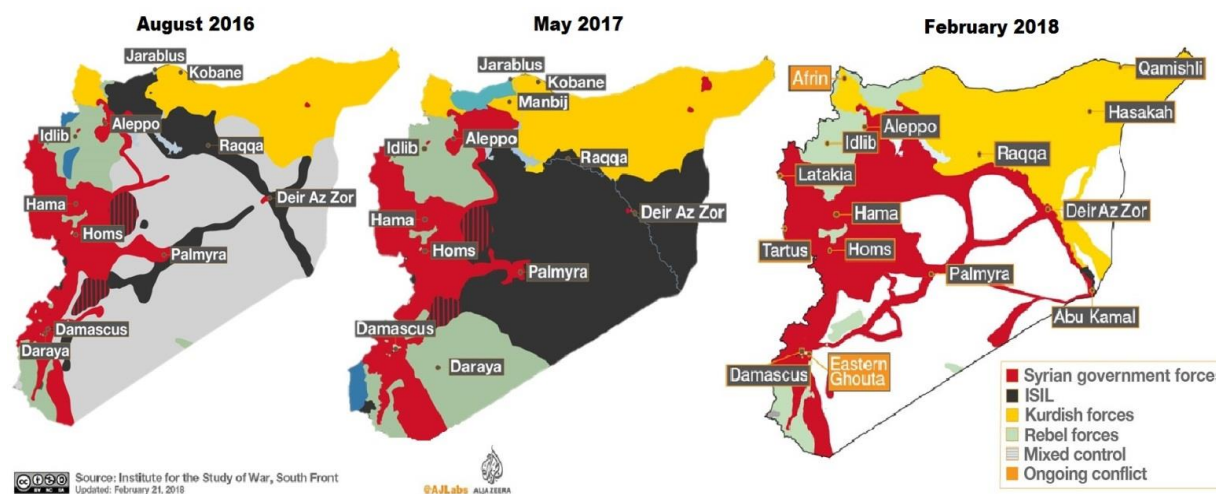
- 1) The Syrian moderate nationalists, who organized in a conglomeration of armed groups affiliated to the Supreme Military Council, the internationally-backed military organization created in 2012 to fight the Government and advocate for a democratic and pluralistic State. This group includes the Free Syrian Army (FSA), the National Unity Brigades, moderate Islamic groups and armed groups with local agendas limited to their communities' aspirations.
- 2) The Syrian Islamic armed groups, mainly under the Islamic Front, who brought together Sunni rebel fighters aiming at ousting the Government and militating for the institution of sharia law as the framework of an Islamic State in Syria. This category encompasses fighters from a wide Islamic ideological spectrum and includes coalitions such as Jaysh al-Islam, Ahrar al-Sham and Ansar al-Sham.
- 3) Radical Jihadist groups, including the two major Al-Qaieda affiliates, Jabhat Al-Nusra and the Islamic State of Iraq and Al-Sham (ISIS), who have been recruited from Salafi jihadist fighters and largely supported by foreign fighters. Divisions have grown between the two groups, as the former remained engaged alongside other rebel groups in fighting government forces, while ISIS prioritized the consolidation of its territorial control in Syria and Iraq.
- 4) Kurdish armed groups, who have taken charge of protecting and governing Kurdish regions. Benefiting from a unified command, disciplined members, as

²³ Supra note 11, p. 6.

well as popular and international support, these groups have reinforced their control in northern Syria after engaging in combat against other armed groups, in particular Al-Qaida affiliates in Aleppo, Al Raqqah and Al Hasakah governorates. The Syrian Democratic Forces (SDF), an alliance of predominantly Kurdish, but also Arab, Turkmen, Assyrian and Armenian militias, fall under this group and is mainly composed of the Popular Protection Units (YPG).

Figure 1 below illustrates the territorial influence of the different groups involved and the major shifts over the recent years.

Figure 1 Territorial Distribution in Syria 2016-2018



On the one hand, the conflict has involved various foreign countries, financially and logistically supporting belligerents to influence the outcome of the war in line with their respective interests. First, external support for the government has mainly come from the Russian Federation, selling

weapons and deploying direct military force on the ground.²⁴ Military equipment as well as personnel and advisory support were also provided to the government and pro-government militia groups by Iran.²⁵ The Assad regime also benefited from the support of foreign combat units, including Hezbollah and Iraqi militia, particularly in critical operations.²⁶

Second, the Free Syrian Army (FSA), a rebel group composed of defectors from the Syrian army, received external training and political support from Turkey and likely Jordan, the former having provided sanctuary to the leadership of the FSA since July 2011 and permitted the free movement of FSA fighters across the border. While Qatar and Saudi Arabia likely funded and armed the Islamic armed groups, the European Union and the United States have been, in theory, supplying the moderate Syrian opposition and the FSA with non-lethal military aid and technical assistance (such as body armor, night-vision goggles and advanced communications equipment).²⁷

Third, the Syrian Democratic Forces (SDF) have been backed by the US-led coalition since October 2015 mainly to fight ISIS in northern Syria.²⁸ Support provided to the SDF has ranged from assault rifles, mortars and ammunition, to joint military trainings and operations.²⁹

²⁴ Quinn, Ben. "Russia's military action in Syria – timeline", *The Guardian*, (March 14, 2016), online: <https://www.theguardian.com/world/2016/mar/14/russias-military-action-in-syria-timeline>

²⁵ Fulton, Will, Holliday, Joseph and Sam Wyer. "Iranian Strategy in Syria", Institute for the Study of War, (May 1, 2013), <http://www.understandingwar.org/sites/default/files/IranianStrategyinSyria-1MAY.pdf>

²⁶ Supra note 20, pp. 3-4.

²⁷ BBC News. "EU paves way for Syrian opposition aid", Middle East, (February 18 2013), online: <http://www.bbc.co.uk/news/world-middle-east-21500837>; US Department of State. "US government assistance to Syria", Press Release, (May 9, 2013), online: <https://2009-2017.state.gov/r/pa/prs/ps/2013/05/209197.htm>

²⁸ Casagrande, Genevieve. "The Road to ar-Raqqah: Background on the Syrian Democratic Forces", Institute for the Study of War (ISW), (November 22, 2016), p.1, online: <http://www.understandingwar.org/sites/default/files/The%20Road%20to%20ar-Raqqah%20ID.pdf>

²⁹ Gutman, Roy. "U.S. begins airdrops of weapons to Kurdish forces in northern Syria", *McClatchy DC*, (October 12, 2015), <https://web.archive.org/web/20151013115202/http://www.mcclatchydc.com/news/nation-world/world/middle-east/article38868126.html>

Finally, the United States-led international coalition formed in September 2014 to defeat ISIS led the U.S. to send around 2,000 troops to Syria.³⁰

In sum, the participation of foreign countries in the Syrian war is illustrative of the fact that many private donors and regional intermediaries have played a significant role in supporting armed groups. In this regard, the use of social media to promote, fundraise, exchange tactics and even direct attacks has been instrumental in fueling the war. An example of this is the al-Ajmi network, a Gulf-based private fund run by two young Kuwaiti religious sheikhs supporting Syrian rebel groups, whose 120,000 Twitter followers are frequently encourage to donate.³¹ The phenomenon of foreign combatants has also strongly fueled the sectarian dimension of the conflict and allowed the various groups to significantly expand their armed forces and, most importantly, to make lasting imprints on the world's collective imagination. Finally, this complex proxy war has had devastating effects on the ground, but has also deeply divided the international community, and especially the UN Security Council, on how to resolve it. The numerous cases where Russia and China vetoed UNSC resolutions aiming at imposing sanctions on the Syrian regime are just one mere example.

International Displacements and the Refugee Crisis

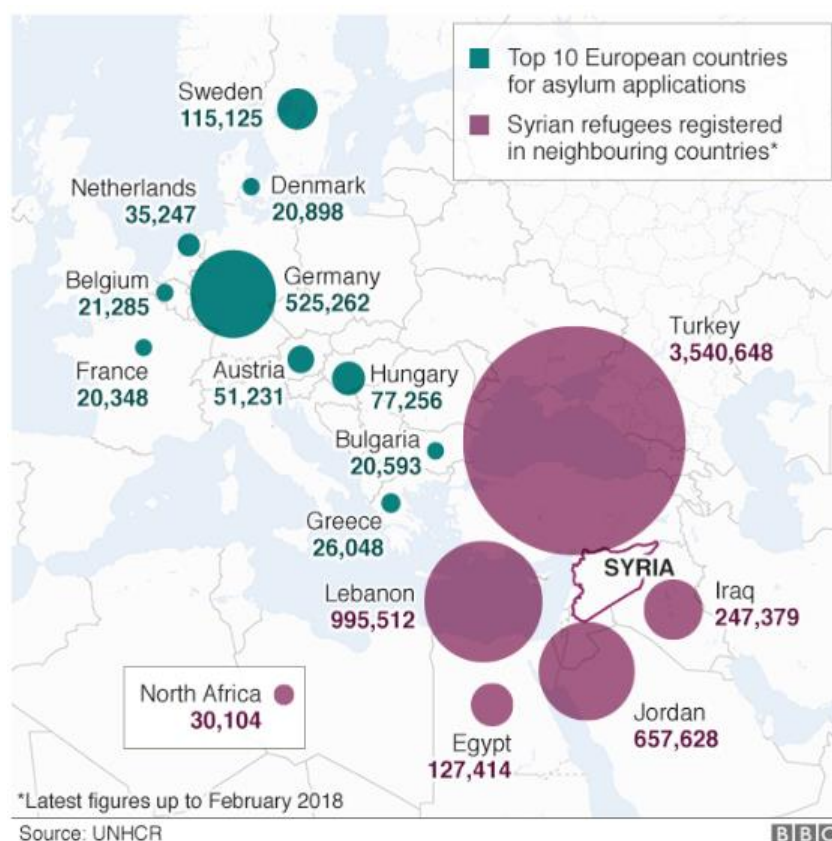
The Syrian refugee crisis is a broad issue that deserves a more in-depth analysis in a separate paper. It is however relevant to briefly mention its disastrous impact on the lives of millions of citizens. As mentioned above, the war in Syria has caused 5.6 million people to flee their home to seek refuge in neighboring countries such as Lebanon, Turkey and Jordan, or in other parts of

³⁰ Reuters, Thomson. "Turkey tells U.S. to end support for Syrian Kurd militia or risk confrontation", CBC News, (January 25, 2018), online: <http://www.cbc.ca/news/world/turkey-syria-kurds-us-1.4503855>

³¹ Bernman, Asher. "Syrian Rebel Use of Social Media", Foreign Policy Research Institute, Philadelphia, (October 31, 2012), <https://www.fpri.org/article/2012/10/syrian-rebel-use-of-social-media/>

Syria. Many major Syrian cities have witnessed countless waves of internally displaced people. As of late 2015, Aleppo was the city with the highest number of internally displaced people (1.2 million), followed by rural Damascus (1.269 million) and Idlib (705,000).³² As illustrated by Ferris and Kirisci, ‘while governments or the UNHCR have established systems to register refugees in all the neighboring countries, the Syrian government has no such registration mechanism inside the country’, leaving millions of people vulnerable and often without access to humanitarian relief.³³ Figure 2 below presents the alarming numbers of Syrian refugees in neighboring countries and in Europe.

Figure 2: Regional Distribution of Syrian Refugees



³² Supra note 9, p. 75.

³³ Ibid.

Disastrous Consequences of the War

Today, the conflict in Syria is infamous for the atrocities committed against the civilian population. The Independent International Commission of Inquiry on the Syrian Arab Republic stated in its 2015 report:

‘Government forces have committed atrocious violations of human rights, as well as the war crimes of murder, torture, rape, sexual violence and targeting civilians. Government forces disregarded the special protection accorded to hospitals and medical personnel... Anti-government armed groups have committed the war crimes of murder, execution without due process, torture, hostage-taking and attacking protection objects... the litany of abuses listed here captures only part of the trauma experienced by Syrian civilians, as the world stands witness.’³⁴

Although different mechanisms to end the conflict have been envisioned and applied without much success, many options of criminal prosecutions and transitional justice are still at the disposal of the international community to ensure the long term stability and security of the country. As suggested by Ferris and Kirisci, ‘there is a very real danger that quick fix (as if possible) will contain the seeds of the next conflict. If there are large-scale retributions, if the rule of law cannot be ensured, if those responsible for dropping barrel bombs remain in power, then further conflict and displacement are likely.’³⁵

³⁴ Human Rights Council. “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic”, Thirtieth session, (August 13, 2015), submitted to the UN General Assembly, A/HRC/30/48, par. 169, p. 21.

³⁵ Supra note 9, p. 117.

This brief overview did not aim at covering all the events and details surrounding the conflict in Syria, but rather to set the stage for the following analysis on the application of international law and the potential mechanisms for bringing about justice in Syria.

Violations of human rights and humanitarian law in Syria

Grave crimes that amount to war crimes, crimes against humanity and genocide have been committed in Syria by various parties. For the purpose of this study, the latter have been classified under the four umbrella groups presented above, mainly pro-government forces, opposition armed groups, terrorist organizations and Kurdish groups. Although some crimes have been perpetrated invariably by all four groups at different levels (indiscriminate attacks against the civilian population, starving the population under besieged areas, enforced disappearance, recruiting and using children in hostilities, willful killings, torture, rape and sexual violence), for brevity reasons, the following section ascribes the violations to the group mainly responsible for their commission. The list provided is not exhaustive and represents only a small portion of all the atrocities that were committed. However, it bears witness to the horror experienced by thousands of Syrians across the country. Finally, it is important to note that crimes committed by foreign countries on Syrian soil are outside the scope of this analysis, but would deserve a separate and careful investigation.

Violations committed by Government Forces and pro-Government militias

The Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (COI), published in March 2014, does not mince words when describing the government's horrible actions against its own population since 2011:

“Government forces and pro-government militia continue to conduct widespread attacks on civilians, systematically committing murder, torture, rape and enforced disappearance as crimes against humanity. Government forces have committed gross violations of human rights and the war crimes of murder, hostage-taking, torture, rape and sexual violence, recruiting and using children in hostilities and targeting civilians in sniper attacks. Government forces disregarded the special protection accorded to hospitals, medical and humanitarian personnel and cultural property. Aleppo was subjected to a campaign of barrel bombing that targeted entire areas and spread terror among civilians. Government forces used incendiary weapons, causing superfluous injury and unnecessary suffering, in violation of international humanitarian law. Indiscriminate and disproportionate aerial bombardment and shelling caused large-scale arbitrary displacement. Government forces and pro-government militia perpetrated massacres.”³⁶

Deliberate and Indiscriminate Air Strikes on Civilians

According to the Syrian Observatory for Human Rights, a British-based human rights organization founded in May 2006, about 85% of the 511,000 people who died during the war were killed by Al-Assad's regime forces and their allies of Russians, Iranians, Hezbollah, and the local and non-Syrian militiamen.³⁷ In an investigation conducted in 2013, Human Rights Watch had already identified 59 unlawful air strikes carried out by government fighter jets and

³⁶ Supra note 11, p. 1.

³⁷ Supra note 1.

helicopters against cities, towns and neighborhoods under the control of opposition forces.³⁸ By directly targeting bakeries, hospitals, and schools, and by using unguided bombs thrown from fighter jets and high-flying helicopters, the Syrian Air Force carried out deliberate attacks against civilians and indiscriminate air strikes with knowledge of their indiscriminate effect, therefore constituting violations of international humanitarian law. According to the Violation Documentation Center in Syria, 35,026 civilians were killed by aerial attacks since 2011.³⁹

Enforced Disappearances

Since it denies the very existence of its victims and places them outside the protection of the law⁴⁰, enforced disappearance is prohibited under international law. According to a list compiled by the Syrian Network for Human Rights, over 100,000 people have been arrested or have forcibly disappeared in Syria since the beginning of the conflict.⁴¹ After taking into account the geographic spread and the consistent manner in which arrests were carried out by government forces, the UN Human Rights Council revealed in its 2014 report that enforced disappearances have been part of a widespread and systematic attack against the civilian population in Syria, and therefore amount to a crime against humanity.⁴² While the most frequent practice has been to take wounded civilians perceived to be affiliated with the opposition into military hospitals (to be later tortured or executed), the practice of enforced disappearance was also used against the military as a means of reprisal and punishment. In fact, a former army conscript, who operated in the town of Tseel in Dara'a in November 2011, revealed that four of his fellow soldiers were

³⁸ Human Rights Watch. "Death from the Skies: Deliberate and Indiscriminate Air Strikes on Civilians", *Report*, 2013, p.1, <http://www.hrw.org/reports/2013/04/10/death-skies>

³⁹ Violation Documentation Center. "VDC Infographs", online : <https://vdc-sy.net/vdc-infographs/>

⁴⁰ And often leads to other offences such as torture, deprivation of fundamental rights to due process, etc.

⁴¹ Loveluck, Louisa, and Zakaria Zakaria. "'The hospitals were slaughterhouses': A journey into Syria's secret torture wards", *The Washington Post*, (April 2, 2017), online: https://www.washingtonpost.com/world/middle_east/the-hospitals-were-slaughterhouses-a-journey-intosyrias-secret-torture-wards/2017/04/02/90ccaa6e-0d61-11e7-b2bb-417e331877d9_story.html?noredirect=on&utm_term=.0c50df0ab5bf

⁴² Supra Note 11, Annex IV.

arrested by their superiors after they refused to open fire on a group of peaceful demonstrators.⁴³ The HRC reported that the interviewee never saw them again, suggesting that insubordination was punished by disappearance.

Torture and unlawful killings in custody

According to the Human Rights Data Analysis Group, at least 17,723 people were killed in government custody between March 2011 and December 2015, an average of 300 deaths per month.⁴⁴ The Independent International Commission of Inquiry on the Syrian Arab Republic documented numerous methods of torture used by government forces, such as mock executions, electric shocks applied to sensitive parts of the body (including genitals), cigarettes burns, fingernails or toenails being ripped off, as well as beating with electric cables, whips, metal and wooden sticks, and rifle butts.⁴⁵ Additionally, the Commission found that detainees were placed into prolonged stress positions (shabeh) and that their hands and feet were held by vehicle tires in uncomfortable positions (dulab) while beatings were administered.⁴⁶ Although Human Rights Watch collected evidence of torture and ill-treatment in detention facilities controlled by the Syrian Democratic Forces (SDF) as well, the widespread and systematic approach used in government detention facilities across the country testifies of the Syrian government's direct involvement in the perpetration of these war crimes. The infamous Saydnaya Military Prison, in which Syrian authorities have quietly and methodically organized the killing of thousands of people in their custody, is a case of horror among many others. As Amnesty International's research has shown, the murders, torture, enforced disappearances and exterminations carried out

⁴³ Ibid.

⁴⁴ Price, Megan, Gohdes, Anita, and Patrick Ball. "Technical Memo for Amnesty International Report on Deaths in Detention", *Human Rights Data Analysis Group*, (August 17, 2016), 20 p., <https://hrdag.org/wp-content/uploads/2016/08/HRDAG-AI-memo-2.pdf>

⁴⁵ Supra Note 11, Annex V, p. 46.

⁴⁶ Ibid.

at Saydnaya since 2011 have been widespread, systematic and perpetrated in accordance with state policy, leading the organization to conclude to crimes against humanity.⁴⁷

Use of Chemical Weapons

As mentioned earlier, the use of chemical weapons is prohibited at all time by international law. However, between March 2013 and March 2017, the Commission of Inquiry documented 25 incidents of chemical weapons use in the Syrian Arab Republic, of which 20 were perpetrated by government forces and used primarily against civilians.⁴⁸ More recently, the Fact-Finding Mission of the Organization for the Prohibition of Chemical Weapons (OPCW) confirmed that chlorine and sarin gas had been used as chemical weapons in three consecutive attacks in the city of Al-Latamneh in March 2017, which further violates the Chemical Weapons Convention.⁴⁹ On April 7, 2018, over 40 people died following alleged chemical bomb attacks in Douma, the last rebel-held town in the Eastern Ghouta region. Although the presence of chemical agents has not yet been confirmed by the OPCW (investigations underway), various rescue organizations reported that patients showed signs of "respiratory distress, central cyanosis (blue skin or lips), excessive oral foaming, corneal burns, and the emission of chlorine-like odor".⁵⁰ It is also worth noting that the UN-OPCW's joint investigation into the use of chemical weapons in Syria has

⁴⁷ Amnesty International. "Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison, Syria", 2017, p. 6, <https://www.amnesty.org/download/Documents/MDE2454152017ENGLISH.PDF>

⁴⁸ Human Rights Council. "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", Thirty-sixth session, (September 2017), submitted to the UN General Assembly, A/HRC/25/65, A/HRC/36/55, p. 14.

⁴⁹ Agence France-Presse. "Du sarin et du chlore utilisés dans deux attaques en Syrie", *La Presse*, (June 13, 2018), online : <http://www.lapresse.ca/international/dossiers/crise-dans-le-monde-arabe/guerre-civile-en-syrie/201806/13/01-5185646-du-sarin-et-du-chlore-utilises-dans-deux-attaques-en-syrie.php>

⁵⁰ BBC News. "Syria war: What we know about Douma 'chemical attack'", *Middle East*, (April 16, 2018), online: <https://www.bbc.com/news/world-middle-east-43697084>

previously confirmed that ISIS has used chemical weapons, specifically sulfur mustard gas, against civilians.⁵¹

The Syrian government publicly acknowledged that it possesses chemical weapons in July 2012. Following a series of chemical attacks allegedly committed by the government and the rising international threats of retaliation that followed, the Assad regime finally signed a legislative decree providing the accession of Syria to the Chemical Weapons Convention in September 12, 2013.⁵² A few days later, the adoption of UNSC Resolution 2118, which called, among others, for the destruction of the Syrian Arab Republic's chemical weapons program, gave hope of seeing an end to chemical attacks against the Syrian population.⁵³ However, the facts presented above show that violations are still being committed in total impunity.

Violations Committed by Non-State Armed Groups and the Islamic Front

As illustrated in the previous section, armed groups are obligated to abide by international humanitarian law when participating in NIACs. In Syria, many of the atrocious crimes committed by non-state armed groups also amount to war crimes and crimes against humanity, including murder, execution without due process, torture, hostage-taking, enforced disappearance, rape and sexual violence, recruiting and using children in hostilities, as well as indiscriminate attacks against civilians and protected objects.⁵⁴ Moreover, medical and religious

⁵¹ Human Rights Watch. "Syria: Events of 2017", online: <https://www.hrw.org/world-report/2018/country-chapters/syria>

⁵² Kimball, Daryl, and Kelsey Davenport. "Timeline of Syrian Chemical Weapons Activity, 2012-2018", Arms Control Association, (June 2018), online: <https://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity>

⁵³ *Resolution 2118 (2013)*, United Nations Security Council, 7038th Meeting, S/RES/2118, New York, (September 27, 2013), <http://unscr.com/en/resolutions/doc/2118>

⁵⁴ *Supra* note 11, p. 2.

personnel, as well as journalists were often targeted by opposition groups. The following crimes are only a small part of all the human rights violations that have been committed.

Car bombing and Improvised Explosive Devices

Civilians living in government-controlled territory have been the target of indiscriminate attacks by opposition armed groups using various improvised explosive devices such as car bombs, locally-made rockets, homemade grenade, mortars, missiles, landmines and even military vehicles.⁵⁵ As documented by Human Rights Watch (HRW), between January 2012 and April 2014, seventeen car bombings and other improvised explosive device attacks occurred in Jaramana, one in central Damascus, six in the Homs neighborhoods of al-Zahra and Akrama, and one in the village of Thabtieh in the Homs countryside.⁵⁶ By being amateurish and inevitably imprecise in nature, these improvised weapons have indiscriminately killed and injured thousands of civilians and destroyed civilian infrastructure in violation of the laws of the war. Moreover, in all of the car bomb attacks HRW investigated, witnesses said there were no Syrian government military targets anywhere near the site.⁵⁷ This technique was therefore mainly used to spread terror among the civilian population, again, in violation of international law.

Indiscriminate Shelling of Civilian Areas

Cases of indiscriminate attacks committed by non-state armed groups frequently occurred in Damascus and Homs, where schools, universities, school buses, shelter facilities, markets and central residential areas have been targeted. On November 4, 2013, as Human Rights Watch was visiting the city of Jaramana, ten mortar shells struck residential areas, a mosque, a shelter for

⁵⁵ Taylor, Allan. "DIY Weapons of the Syrian Rebels", The Atlantic, (February 20, 2013), online: <http://www.theatlantic.com/infocus/2013/02/diy-weapons-of-the-syrian-rebels/100461>

⁵⁶ "Human Rights Watch. He Didn't Have to Die: Indiscriminate Attacks by Syrian Opposition Groups", (2015), p. 2, https://www.hrw.org/sites/default/files/reports/syria0315_ForUpload.pdf

⁵⁷ Ibid.

internally displaced people (IDPs), and a facility run by the Syrian Arab Red Crescent, killing two civilians, including a UN employee, and injuring several others.⁵⁸ Human Rights Watch did not observe any military targets near the areas struck or Syrian military activity in the city, indicating that the attacks were indiscriminate.⁵⁹ A similar incident occurred on April 29, 2014, when two mortar shells struck the Badr el-Din Hussaini educational complex situated in a pro-government area in Damascus. As reported by HRW, 17 children, all approximately 13-years-old, were killed.⁶⁰ As it will be explained in the next section on the applicable law in Syria, any attack that treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other areas containing a similar concentration of civilians or civilian objects are prohibited by both international humanitarian and customary laws.⁶¹

Violations committed by Terrorist Organizations

ISIS and the many other terrorist organizations involved in Syria perpetrated unlawful attacks against the civilian population using car and suicide bombings, snipers and hostage-taking, recruited child soldiers, and used rape and sexual violence as a weapon of war.

Recruitment of child soldiers

The COI has found that various terrorist armed battalions, such as Ashbāl al-Zarqāwī (al-Zarqawi Cubs), Ashbāl Jabhat al-Nuṣrah (Jabhat al-Nusra Cubs) and Ashbāl al-Khilāfah (Caliphate Cubs) have recruited children aged from 5 to 15 years-old and trained them to

⁵⁸ Ibid., p. 29.

⁵⁹ Ibid.

⁶⁰ Ibid., p. 38.

⁶¹ Jean-Marie Henckaerts and Louise Doswald-Beck. Customary International Humanitarian Law, Volume I: Rules, Cambridge University Press, New York, 2005, rule 13, <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

participate in terrorist actions.⁶² For its part, the Islamic State of Iraq and Al-Sham (ISIS) has reportedly recruited around 2,000 children, called "ashbal al khilafa", the "lion cubs of the caliphate".⁶³ For example, Yazidi boys aged seven years and above were systematically separated from their family and forcibly transferred to training centres or military camps where they would be taught how to use AK47s, hand grenades, and Rocket Propelled Grenades.⁶⁴ Although children have been recruited in government forces and opposition armed groups as well⁶⁵, ISIS recruitment strategy, in which different actors conducted pre-determined assignments and cooperated to achieve the terrorist organization's immediate and transgenerational objectives, testify of a predatory, complex, structural and systematic approach.⁶⁶ In addition to violating the Convention on the Rights of the Child and its (to which Syria is a member), the participation of children under the age of 18 in hostilities and their recruitment by non-state armed groups are also recognized as a war crime under the Rome Statute of the International Criminal Court (ICC).⁶⁷

⁶² Human Rights Council. "National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 - Syrian Arab Republic", *Working Group on the Universal Periodic Review*, Twenty-sixth session, (October 31, 2016), A/HRC/WG.6/26/SYR/1, p. 14, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/215/69/PDF/G1621569.pdf?OpenElement>

⁶³ Witschge, Loes. "Cubs to lions: What's next for ISIL's child soldiers?", Al Jazeera, (November 10, 2017), online: <https://www.aljazeera.com/indepth/features/2017/11/cubs-lions-isil-child-soldiers-171109125013897.html>

⁶⁴ Human Rights Council. "They came to destroy": ISIS Crimes Against the Yazidis", Thirty-second session, (June 15, 2016), A/HRC/32/CRP.2, p. 2.

⁶⁵ Human Rights Council. "Report of the independent international commission of inquiry on the Syrian Arab Republic", Twenty-seventh session, A/HRC/27/60, (August 2014), submitted to the UN General Assembly, p. 13.

⁶⁶ Almohammad, Asaad. "ISIS Child Soldiers in Syria: The Structural and Predatory Recruitment, Enlistment, Pre-Training Indoctrination, Training, and Deployment", *International Centre for Counter-Terrorism*, The Hague, (February 2018), p. 2, <https://icct.nl/wp-content/uploads/2018/02/ICCT-Almohammad-ISIS-Child-Soldiers-In-Syria-Feb2018.pdf>

⁶⁷ See *Prosecutor v. Thomas Lubanga Dyilo* (2012), International Criminal Court, ICC-01/04-01/06, <https://www.icc-cpi.int/drc/lubanga> ; and *Prosecutor v. Charles Ghankay Taylor* (2013), Appeals Chamber of the Special Court for Sierra Leone, SCSL-03-01-A, <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>

Genocide

As defined by article II of the Genocide Convention, the crime of genocide implies an intentional destruction, in whole or in part, of a national, ethnical, racial, or religious group.⁶⁸ The means used to perpetrate genocide include killing members of the group; causing serious bodily or mental harm to members of the group; imposing measures intended to prevent births within the group; as well as forcibly transferring children of the group to another group. Aside from perpetrating crimes against humanity and war crimes against other religious minorities such as Christians, Shabaks, Sabea-Mandean, Turkomen and Shia Muslims, ISIS actions against the Yazidi community amount to the crime of genocide. Indeed, ISIS's policy of mass killing of men and teenage boys; of mass rape and sexual enslavement of women and teenage girls; of torture and inhuman and degrading treatment; of imposing measures to prevent Yazidi children from being born (including the separation of Yazidi men and women, sexual mutilation and sterilization); as well as of transferring Yazidi children from their own families to ISIS fighters' has been part of a desire to destroy in whole or in part the Yazidis of Sinjar, which compose the majority of the world's Yazidi population.⁶⁹ As explained by COI Commissioner Carla Del Ponte, "ISIS has made no secret of its intent to destroy the Yazidis of Sinjar", further noting that ISIS has publicly cited the Yazidis' faith as the basis for the 3 August 2014 attack and subsequent abuses.⁷⁰

⁶⁸ *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, vol. 78, p. 277, New York, (December 9, 1948), art. 2, https://treaties.un.org/doc/Treaties/1951/01/19510112%2008-12%20PM/Ch_IV_1p.pdf

⁶⁹ *Supra* note 64, par. 163, p. 31.

⁷⁰ Office of the UN High Commissioner for Human Rights (OHCHR). "UN Commission of Inquiry on Syria: ISIS is committing genocide against the Yazidis", News, Geneva, (June 16, 2016), <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20113>

On June 6, 2016, 19 Yazidi women and girls were burnt alive in a cage for refusing to become sex slaves of ISIS members.⁷¹ Among many other atrocities, the June 2016 report of the COI further indicates that one 13 year-old Yazidi girl was held for 11 months in ISIS-controlled territory, where she was sexually enslaved, forced to cook, clean and wash the clothes of her Syrian fighter-owner and his family, before being sold multiple times.⁷² These unimaginable crimes have been and continue to be committed in total impunity.

Violations committed by Kurdish Groups

The gravity of the abuses committed by pro-government forces, non-state armed groups and terrorist groups, presented above, have led many international organizations (UN, Human Rights Watch, Amnesty International, etc.) to call for crimes against humanity, war crimes and even genocide. Although crimes committed by Kurdish groups have generally been less barbaric and/or committed on a smaller scale, they are nonetheless serious. As demonstrated in Figure 1 of this paper, Kurdish forces exercise a well-established control in northern Syria, and more specifically in the regions of `Afrin, Ain al-`Arab and Jazira. By January 2014, the Democratic Union Party (PYD) had established an interim administration with councils, courts and a police force, and introduced a new constitutional law.⁷³ The authority exercised by the PYD over certain regions obliges the Party to grant people living in these areas (Kurds, Arabs, Syrians and others) their fundamental rights under international human rights law.

⁷¹ Osborne, Samuel. "Isis burns 19 Yazidi women to death in Mosul for 'refusing to have sex with fighters'", *the Independent*, (June 6, 2016), online: <https://www.independent.co.uk/news/world/middle-east/isis-burn-19-yazidi-women-to-death-in-mosul-for-refusing-to-have-sex-with-isis-militants-a7066956.html>

⁷² Supra note 64, p. 15.

⁷³ Human Rights Watch. "Under Kurdish Rule: Abuses in PYD-run Enclaves of Syria", (June 19, 2014), p. 1, https://www.hrw.org/sites/default/files/reports/syria0614_kurds_ForUpload.pdf

Arbitrary Arrests and Due Process Violations

Numerous cases of harassment, assaults on peaceful demonstrators, due process violations, as well as arbitrary arrests and detentions of individuals affiliated to Kurdish opposition political parties have been reported in areas controlled by Kurdish forces. In its 2015 report, the Syrian Network for Human Rights (SNHR) has documented the arrest of 612 civilians, including 19 children and 8 women, by Kurdish forces (KSM) in Al Hassaka governorate only.⁷⁴ Other evidence has shown that some arbitrarily arrested people were detained from one week to two months without being formally charged and brought before a judge. In many cases, they were not granted access to a lawyer.⁷⁵

Forced expulsions

Since 2013, systematic and widespread expulsions carried out by Kurdish forces have resulted in the displacement of about 300,000 Rojava Kurds to Iraqi Kurdistan, and of another 200,000 to Turkey.⁷⁶ In its special report published in 2017, *The Nation* shows that people living in these areas often had to submit to forced conscription and political suppression or were simply evicted from their homes at gunpoint.⁷⁷ In numerous occasions, towns were completely destroyed after Kurdish forces gained control of them, forcing its residents to leave.⁷⁸ According to Amnesty International, these instances of forced displacement constitute war crimes.⁷⁹

⁷⁴ The Syrian Network for Human Rights. "No Alternative to Return Home: Violations Committed by Kurdish-Self-Management Forces in Al Hassaka Governorate", (October 28, 2015), p. 6, http://sn4hr.org/wp-content/pdf/english/Violations_of_Kurdish_forces_in_Hasaka_en.pdf

⁷⁵ Supra note 73, p. 19.

⁷⁶ Gutman, Roy. "Have the Syrian Kurds Committed War Crimes?", *The Nation*, (February 7, 2017), <https://www.thenation.com/article/have-the-syrian-kurds-committed-war-crimes/>

⁷⁷ Ibid.

⁷⁸ See Supra note 74, pp. 7-8.

⁷⁹ Amnesty International. "We Had Nowhere to Go: Forced Displacement and Demolitions in Northern Syria", London, (2015), <https://www.amnesty.org/download/Documents/MDE2425032015ENGLISH.PDF>

Other severe violations of humanitarian and human rights law committed by Kurdish groups include, among others, torture in custody, rape and sexual violence, recruitment of child soldiers and indiscriminate attacks on civilians.⁸⁰

After this brief yet atrocious overview, one could wonder whether concrete solutions exist to punish the perpetrators of these heinous crimes and bring justice to the thousands of victims in Syria. By providing a detailed overview of the national and international legal framework applicable during the war in Syria, the following section will help to better understand the responsibilities of each group of actors under national and international laws. Part III of this paper will put the various concepts in practice and analyze the feasibility of implementing different criminal mechanisms.

⁸⁰ See Human Rights Council. ““I lost my dignity”: Sexual and gender-based violence in the Syrian Arab Republic”, Thirty-seventh session, (March 8, 2018), A/HRC/37/CRP.3, par. 53, p.13, <https://www.hrw.org/report/2014/06/19/under-kurdish-rule/abuses-pyd-run-enclaves-syria>; and Supra note 74.

PART II. THE APPLICABLE INTERNATIONAL LAW IN SYRIA

Determining the applicable law in Syria is essential to establish which crimes can be prosecuted, which tribunals might have jurisdiction, and which perpetrators are subject to charges.⁸¹ The following section intends to present some of the main legal texts protecting human rights and fundamental freedoms in times of peace and war, as well as some criminal law mechanisms, applicable in Syria. Starting by briefly presenting the domestic legal corpus, this section will then discuss Syria's international obligations resulting from the ratification of binding treaties and from international customary norms.

The Domestic law

The Constitution

The applicable constitution during the first year of the civil uprising in Syria was the Constitution of 1973, which provides for the right to assemble and demonstrate peacefully. The Syrian government's violent response to the initial peaceful protests however demonstrated that these provisions were not necessarily respected in practice. In February 2012, a new constitution was adopted. Key articles included legal protection of the rights and freedoms of the Syrian people and provisions to establish the rule of law. For example, article 33 stipulates that "Citizens shall be equal in rights and duties without discrimination among them on grounds of sex, origin, language, religion or creed."⁸² Article 38, paragraph 3, further states that "Every citizen shall have the right to move in or leave the territory of the state, unless prevented by a

⁸¹ Supra note 12.

⁸² *Constitution of the Syrian Arab Republic*, International Labor Organization, 2012, article 33.1, http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125885.pdf

decision from the competent court or the public prosecution office or in accordance with the laws of public health and safety.”⁸³ As the next section will illustrate, there were numerous instances where the constitutional right to freedom of movement was violated both in government-controlled areas and by some non-state armed groups.

The Criminal Justice System

The criminal justice system in Syria is governed by the Code of Criminal Procedure and has its own courts. Its hierarchical structure is similar to that of the civil justice system, where the Public Prosecutor is responsible for prosecuting criminal cases on behalf of the state and under the authority of the Minister of Justice.⁸⁴ Magistrates’ Courts also exist to deal with smaller offences, whose maximum punishment is imprisonment for up to one year or a fine. Although the President of the Republic is not responsible for the acts he does in carrying out his duties, article 117 of the 2012 Constitution includes an exception in case of high treason, which allows the People’s Assembly to vote and defer the case to the Supreme Constitutional Court (SCC).⁸⁵ To prove that Bashar al-Assad betrayed his country by contributing to the massacre of its population however constitutes an enormous challenge, especially if he still enjoys the support of the Assembly. On the side, the Prime Minister, his deputies, and the ministers are held responsible for their acts, from a civil and penal perspective, in accordance with the law.⁸⁶ Thus, there is theoretically a possibility for political figures to face criminal prosecution.

Prohibition of acts of violence and torture can also be found in the Syrian Constitution and Penal Code. In fact, article 53 of the 2012 Constitution states that “no one may be tortured or treated in

⁸³ Ibid., article 38.

⁸⁴ The Syrian Law Journal. “An Overview of the Syrian Court System”, (May 9, 2016), online: <http://www.syrianlawjournal.com/index.php/overview-syrian-court-system/>

⁸⁵ Supra note 82, article 117.

⁸⁶ Supra note 82, article 124(1).

a humiliating manner, and the law shall define the punishment for those who do so”.⁸⁷ Article 391 of the Penal Code further defines the punishment as follows:

1. Anyone who subjects a person to illegal acts of violence with a view to obtaining from him a confession to an offence or information pertaining thereto shall be liable to a penalty of detention for a term of three months to three years.
2. If such acts of violence cause sickness or wounds, the minimum penalty shall be one year’s detention.⁸⁸

The Syrian legal framework further includes legal protections regarding arrest, detention and fair trial. For example, article 115 of the Code of Criminal Procedure states that “Anyone arrested under the terms of a warrant must be taken, without delay, to the public prosecutor in the district of the examining magistrate who issued the warrant and the public prosecutor must provide the arresting officer with a receipt of delivery of the suspect, after which the latter is remanded in custody and the examining magistrate is duly notified.”⁸⁹ The examining magistrate must question the suspect within 24 hours of arrest. If magistrate fails to do so and there is no other competent judicial authority to question the suspect, then the person involved must be released by the public prosecutor.⁹⁰

Although it seems that the Syrian Constitution and the Code of Criminal Procedure provide carefully-prescribed procedures and safeguards, these legal texts are far from being rigorously applied in practice. The section on *Violations of human rights and humanitarian law* presented in the section above provides a concrete illustration of these violations.

⁸⁷ Ibid., article 53(2).

⁸⁸ The original source is available only in Arabic. For an English version of the articles, see: Human Rights Committee. “Consideration of Reports Submitted by States Parties under Article 40 of the Covenant”, (August 25, 2000), CCPR/C/SYR/2000/2, par. 86, pp. 18-19.

⁸⁹ Ibid., par. 100, p. 20.

⁹⁰ Ibid., par. 99, p. 20.

The Universal Protection of Human Rights

In order to protect the principles articulated in the 1919 Covenant of the League of Nations, it was imperative for the newly-formed United Nations to circumscribe those fundamental rights and freedoms into a universally-recognized document. The proposal to draft a "Declaration of Fundamental Human Rights" at the Conference of San Francisco in 1945 evolved in the years that followed to the International Bill of Human Rights. Today, this Bill comprises of the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1976), as well as the International Covenant on Civil and Political Rights (1976) and its two Optional Protocols.⁹¹ Together, they set out the fundamental human rights standards to be universally respected, protected, and applied. Although the Universal Declaration of Human Rights (UDHR) has merely a declaratory value, which does not create legal obligations, the two International Covenants that complement the International Bill of Human Rights have binding authority on signatory states.

The Syrian Arab Republic joined the United Nations on 24 October 1945 and was among the first countries who voted in favor of the adoption of the UDHR during the third session of the United Nations General Assembly in December 1948.⁹² Syria also ratified a number of human rights treaties, such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1969, the International Covenant on Civil and Political Rights (ICCPR) in 1969, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1969, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2003, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

⁹¹ United Nations. "Fact Sheet No.2 (Rev.1): The International Bill of Human Rights", Geneva, (June 1996), online: <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

⁹² *Universal Declaration of Human Rights*. UN General Assembly, Resolution 217 A (III), New York, (December 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/>

Punishment (CAT) in 2004, as well as the Convention on the Rights of the Child (CRC) and its optional protocols.⁹³ While the two international treaties presented below explicitly engage the responsibility of the signatory state, the final part of the present section outlines the legal obligations of non-state armed groups under international human rights law.

The International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights (ICCPR) entered into force on 23 March 1976 with the objective of ensuring the protection of civil and political rights. The rights protected under the Covenant include the right to life (art. 6), the freedom from torture (art. 7, the right to liberty and security of the person (art. 9), the human rights of detainees (art. 10), the freedom from arbitrary or unlawful interference (art. 17), and children’s rights (art. 24).⁹⁴ The Covenant allows for limited restrictions on certain rights during events that are seen to “threaten the life of the nation.”⁹⁵ However, any derogation of rights must be of an exceptional and temporary nature, and must be limited “to the extent strictly required by the exigencies of the situation.”⁹⁶ The right to life and the right to freedom from torture, the prohibition on arbitrary detention, the duty to ensure judicial review of detention, and the right to a fair trial can never be revoked.

The ICCPR is a legally-binding treaty, meaning that countries that have ratified the Covenant must take steps in their own jurisdictions to recognize and implement the rights protected in the

⁹³ Office of the UN High Commissioner for Human Rights (OHCHR). “Status of Ratification Interactive Board”, *Syrian Arab Republic*, online: <http://indicators.ohchr.org/>

⁹⁴ *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407, (December 16, 1966), https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf

⁹⁵ *Ibid.*, article 4.

⁹⁶ *Ibid.*

text.⁹⁷ Article 28 provides for the establishment of a Human Rights Committee responsible for monitoring the State Parties' implementation of the Covenant.⁹⁸ States are also asked to submit reports on measures used to adopt and support the rights enshrined in the ICCPR to the Committee for review.⁹⁹ Syria ratified the ICCPR on April 21, 1969 and therefore has the obligation to implement the Covenant and to report on the state of civil and political rights as per article 40 of the ICCPR. Periodic reports were submitted to the Committee in 1977, 2000 and 2004.¹⁰⁰ Although it does not entail any criminal liability for non-compliance, the reporting mechanism allows the international community to take note of the degree of implementation of the rights prescribed by the ICCPR and of the application of the Committee's recommendations. Moreover, these reports can serve as a legal precedent for claims under domestic law. For example, the Addendum of the initial report of the Syrian Arab Republic states that "any individual can institute proceedings in a competent court against any person or against the public authorities of the State, or against bodies corporate or organizations and institutions, in order to assert a claim"¹⁰¹. Two optional protocols to the ICCPR were also adopted to give additional human rights protections. The Syrian Arab Republic has not signed them yet.

The Convention on the Rights of the Child, 1989

The Convention on the Rights of the Child was ratified by the Syria on 15 July 1993. Its article 38(4) affirms that "in accordance with their obligations under [IHL] to protection the civilian population in armed conflicts, State Parties shall take all feasible measures to ensure protection

⁹⁷ Ibid., article 2(1).

⁹⁸ Ibid., article 28.

⁹⁹ Ibid., article 40.

¹⁰⁰ Office of the UN High Commissioner for Human Rights (OHCHR). "Human Rights Bodies", online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=170

¹⁰¹ Office of the UN High Commissioner for Human Rights (OHCHR). "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Initial reports of States parties due in 1977", *Human Rights Committee*, Fourth Session, (July 12, 1978), CCPR/C/I/Add.31, p. 2, online: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=170

and care of children who are affected by an armed conflict”.¹⁰² The Convention also holds Syria responsible for cooperating with the United Nations and other intergovernmental organizations to protect and assist these children¹⁰³; for ensuring the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;¹⁰⁴ and for ensuring that no child is subject to torture or other cruel, inhuman or degrading treatment or punishment, and deprived of his or her liberty unlawfully or arbitrarily.¹⁰⁵

In 2003, Syria also ratified the *Optional Protocol to the Convention on the Involvement of Children in Armed Conflict*, thus subjecting itself to the obligation to take all possible measures to prevent the enlistment and use of persons under 18 years of age, including the legal measures necessary to prohibit and penalize such practices.¹⁰⁶

Obligations of International Human Rights Law for Non-State Armed Groups

As Tilman Rodenhäuser mentions in his 2012 study, although the concept of human rights emerged as a response to the power of the sovereign State, it is questionable whether an exclusive focus on the State as the bearer of obligations serves the purpose of protecting the "inherent dignity and [...] the equal and inalienable rights of all members of the human family".¹⁰⁷ With the changing nature of contemporary armed conflicts, some tribunals and judicial bodies are starting to modernize the legal interpretations of international human rights

¹⁰² *Convention on the Rights of the Child*, United Nations, Treaty Series, vol. 1577, p. 3, New York, (November 20, 1989), https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf

¹⁰³ *Ibid.*, article 22(2).

¹⁰⁴ *Ibid.*, article 24(b).

¹⁰⁵ *Ibid.*, article 37.

¹⁰⁶ *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, United Nations, Treaty Series, vol. 2173, p. 222, New York, (May 25, 2000), art. 4, https://treaties.un.org/doc/Treaties/2000/05/20000525%2003-37%20AM/Ch_IV_11_bp.pdf

¹⁰⁷ Rodenhäuser, Tilman. "Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example", *International Humanitarian Legal Studies* 3, (2013), p. 269, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2355895

law (IHRL) and to slowly include the responsibility of non-state armed groups (NSAGs). As a matter of fact, the Independent International Commission of Inquiry on the Syrian Arab Republic found, in its February 2012 report, that opposition groups fighting against the Assad regime are bound by human rights obligations constituting peremptory norms of international law in areas where they exercise de facto control.¹⁰⁸ The Commission also found that "at a minimum, human rights obligations constituting peremptory international law (jus cogens) bind States, individuals and non-State collective entities, including armed groups. Acts violating jus cogens – for instance, torture or enforced disappearances - can never be justified."¹⁰⁹

In recent years, some human rights treaties have acknowledged the legal responsibility of NSAGs. This is the case of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, mentioned above, but also for other fundamental human rights. In fact, the jurisprudence of the Committee on Torture has expanded the application of article 1 of the CAT to include conduct by NSAGs which "exercise certain prerogatives that are comparable to those normally exercised by legitimate governments".¹¹⁰ Obligations for NSAGs to comply with IHRL were further reaffirmed in *Sadiq Shek Elmi v. Australia* case:

The Elmi case is indicative of a slow move away from a formalist approach to the application of human rights treaty obligations

¹⁰⁸ Human Rights Council. "Report of the independent international commission of inquiry on the Syrian Arab Republic", Twenty-first session, (August 16, 2012), A/HRC/21/50, Annex II, par. 10, p. 47,

https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf

¹⁰⁹ Human Rights Council. "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", Nineteenth session, (February 22, 2012), A/HRC/19/69, par. 106, p. 20.

https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf

¹¹⁰ *Sadiq Shek Elmi v. Australia (1998)*, Committee Against Torture, CAT/C/22/D/120/1998, para. 6.5, p. 77, <https://www.ohchr.org/Documents/Publications/SDecisionsCATVollen.pdf>

towards a dynamic and victim-orientated approach, where non-State actors may become directly responsible under international law for their actions.¹¹¹

The section below on customary international law further elaborates on the binding norms of customary law that apply equally to all States and parties to the conflict, whether or not they have signed international law treaties or are recognized as a state.

International Humanitarian Law

The establishment of rules governing the conduct of hostilities is based on the pragmatic reality that wars exist and will always do. As such, it is imperative to provide for limits within which it can be regulated. International humanitarian law (IHL), or the law of armed conflict, thus constitutes a commitment made between sovereign states to ensure a conduct of hostilities that minimizes the unjustifiable loss of human lives. As its name indicates, it applies solely in periods of armed conflict. Various scholars, governments, as well as international and non-governmental organizations commented on the beginning of the armed conflict in Syria. Although a clear consensus on the specific date has not been reached, the International Committee of the Red Cross (ICRC) concluded to an armed conflict in July 2012, thus subjecting the parties to the rules of international humanitarian law.¹¹²

¹¹¹ McCorquodale, Robert and Rebecca La Forgia. "Taking Off the Blindfolds: Torture by Non-State Actors", *Human Rights Law Review*, (2001), p. 218, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2088893

¹¹² The International Committee of the Red Cross (ICRC). "Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting", (July 17, 2012), online: <https://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>

The Four Geneva Conventions of 1949

The Geneva Conventions of 1949 and its 1977 Additional Protocols provide the *lex specialis* of armed conflict, that is to say the central corpus by which it is possible to engage the legal responsibility of the parties to a conflict.¹¹³ Ratified by 196 States, the four Geneva Conventions provide for the international legal protections of wounded and sick combatants on land and at sea, of prisoners of war, and introduce detailed legal protections for civilians.¹¹⁴ The Syrian Arab Republic ratified the Geneva Conventions on November 2, 1953, and the Additional Protocol I on November 14, 1983.¹¹⁵ An important principle of IHL that can be found in Common Article 2 of the Geneva Conventions is that there is no reciprocity condition in regards to the application of IHL. Indeed, a breach of a provision by one party cannot be invoked by another party to the conflict to justify its own violations of IHL. States who are parties to the Conventions must remain bound by them in their mutual relations. In the Syrian context, this means that the government has the obligation to respect the rules of IHL even if other non-state armed groups or terrorist organizations, such as the Islamic State of Iraq and Al-Sham and Al-Qaida, do not.

Syria: a Non-International Armed Conflict

International humanitarian law makes a distinction between an International Armed Conflict (IAC) that takes place between two Contracting Parties and a Non-International Armed Conflict (NIAC) that takes place between a State and one or more non-state armed group(s). The test for

¹¹³ Cubie, Dug. *The International Legal Protection of Persons in Humanitarian Crises*, Hart Publishing, Studies in International Law: volume 67, Oxford, United Kingdom, (2017), p. 180.

¹¹⁴ *The Geneva Conventions*, Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, Geneva, (August 12, 1949), (French version), https://www.icrc.org/fre/assets/files/other/icrc_001_0173.pdf

¹¹⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, (June, 8 1977), <https://ihl-databases.icrc.org/applic/ihl/dih.nsf/Treaty.xsp?documentId=CBEC955A2CE7E0D4C12563140043ACA5&action=openDocument>

armed conflict was set out by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* decision: “[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.¹¹⁶ This definition contains two key elements: (i) the intensity of the conflict¹¹⁷ and (ii) the level of organization¹¹⁸. The war in Syria is a complicated case in the sense that the government first started to fight against non-state armed groups on its territory but later witnessed the intervention of other countries, as well as several terrorist networks with links to various countries. Despite the legal complexity of defining the situation in Syria, the ICRC concluded to a non-international armed conflict opposing government forces and a number of organized armed opposition groups in July 2012.¹¹⁹ This qualification has not been contested by the Syrian government or by any other international organizations involved in Syria.

NIAC are provided for and governed by Common article 3 to the four Geneva Conventions of 1949 and by its Additional Protocol II (APII) of 1977, which contains twenty-eight articles that complete the guarantees of Common Article 3 for the victims of non-international armed

¹¹⁶ *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment) (1997)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), par. 70, <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>

¹¹⁷ The ICTY in *Boškoski & Tarčulovski (2008)* issued a list of six non-cumulative groups of indicators to determine the level of intensity. However, intensity measurement remains a case by case assessment, as there are no cumulative criteria. In a given situation, one element could be decisive; in another, the same element could be less important. See *Prosecutor v. Ljube Boškoski and Johan Tarčulovski (2008)*, IT-04-82-T, International Criminal Tribunal for the former Yugoslavia (ICTY), (July 10, 2008), par. 177- 178, http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf

¹¹⁸ *Ibid.*, par. 199-203. The ICTY also listed a number of factors, grouped into five broad categories, to assess the level of organization of an armed group. These include the presence of a command structure; the capacity to carry out operations in an organized manner; the level of logistics; the level of discipline and the ability to implement the basic obligations of Common Article 3; and the ability to speak with one voice.

¹¹⁹ *Supra* note 112.

conflicts.¹²⁰ However, the Syrian Arab Republic has not yet ratified the APII, meaning that the only legal regime of IHL applicable in Syria is provided by Common article 3 and other rules of customary international law. Common article 3 contains the minimum guarantees applicable in armed conflicts that do not have an international character. Although it does not provide any specific definition of this type of armed conflict, its negative definition aims to cover all forms of armed conflicts that cannot be qualified as international and are therefore not covered by the other provisions of the Geneva Conventions.¹²¹ More specifically, Common article 3 imposes an obligation on each Party to protect any person taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*, from torture and cruel, humiliating and degrading treatments, as well as from arbitrary arrest and detention.¹²² It is also recognized as a customary international norm, meaning that it is binding on all parties to a conflict.

The Legal Status of Non-State Armed Groups Party to a NIAC

Non-state armed groups (NSAGs) can acquire the status of parties to a non-international armed conflict if they fulfill the two cumulative conditions illustrated in the *Boškoski & Tarčulovski* case, namely the intensity of the violence and the degree of organization.¹²³ When these two conditions are met, a non-state armed group is considered a party to a conflict and is therefore compelled to comply with international humanitarian and customary laws applicable in NIAC.

¹²⁰ Doctors Without Borders. "Noninternational Armed Conflict (NIAC)", *the Practical Guide to Humanitarian Law*, online: <http://guide-humanitarian-law.org/content/article/3/non-international-armed-conflict-niac/>

¹²¹ *Ibid.*

¹²² *Supra* note 114, article 3.

¹²³ *Supra* notes 117-118.

Customary International Law

Today, many provisions of international humanitarian law have acquired a customary nature. The Statute of the International Court of Justice describes customary international law (CIL) as “a general practice accepted as law”.¹²⁴ In order to become a rule of CIL, a norm has to meet two criteria: a consistent state practice (*usus*) and a belief that such practice is required, prohibited or allowed as a matter of law (*opinio juris sive necessitatis*).¹²⁵ The specificity of CIL is that it is binding on all states, no matter whether they have ratified the Geneva Conventions or not, as well as on non-state armed groups party to a conflict. The study published by the International Committee of the Red Cross (ICRC) in 2005 provides the exhaustive list of all 161 rules of CIL and became the world-recognized reference in this regard.

Among other things, the study codified the three fundamental principles establishing the legality of an attack during an armed conflict, namely the principle of distinction, proportionality and precaution. According to the first one, civilians and civilian objects must be distinguished from combatants (or direct participants to hostilities) and military objectives.¹²⁶ Indiscriminate attacks that are of a nature to strike military objectives and civilians or civilian objects without distinction are prohibited.¹²⁷ Specific weapons have also been identified as having indiscriminate effects. These include, among others, chemical, biological and nuclear weapons, anti-personnel landmines, mines, poison, booby-traps, cluster bombs and incendiary weapons. Among those,

¹²⁴ *Statute of the International Court of Justice*. United Nations, Treaty Series (April 18 1946), Article 38(1)(b), http://legal.un.org/avl/pdf/ha/sicj/ici_statute_e.pdf

¹²⁵ *Supra* note 61, p. xxxviii.

¹²⁶ *Ibid.*, rules 1 to 10.

¹²⁷ *Ibid.*, rule 12. The ICRC Study defines indiscriminate attacks as those (a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law.

biological and chemical weapons¹²⁸, booby-traps¹²⁹, the anti-personnel use of incendiary weapons¹³⁰ and blinding laser weapons¹³¹ are strictly prohibited at all times. The second principle requires parties to a conflict to balance the potential effects of an attack with the expected military gain resulting from this attack. Rule 14 states that ‘an attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited’¹³². Finally, the third principle obliges ‘each party to the conflict to take all feasible precautions in the choice of means and methods of warfare with a view to avoiding or minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects’.¹³³ Some examples of the application of this rule include the use of precision weapons and target selection, avoiding combat in populated areas, as well as considerations about the timing of attacks.¹³⁴

Part III of the ICRC study codifies the specific methods of warfare and establishes the prohibition of a number of practices, such as the use of starvation of the civilian population as a method of warfare¹³⁵, the destruction of objects indispensable to the survival of the civilian population¹³⁶, and the blockage of humanitarian personnel and relief for civilians in need.¹³⁷

¹²⁸ The use of herbicides as a method of warfare is also prohibited if they (a) are of a nature to be prohibited chemical weapons; (b) are of a nature to be prohibited biological weapons; (d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects.

¹²⁹ *Supra* note 61, rule 80.

¹³⁰ *Ibid.*, rule 85.

¹³¹ *Ibid.*, rule 86.

¹³² *Ibid.*, rule 14.

¹³³ *Ibid.*, rule 17.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, rule 53.

¹³⁶ *Ibid.*, rule 54.

¹³⁷ *Ibid.*, rules 55 and 56.

Jus Cogens Norms of International Criminal Law

In international law, there are some rights for which no derogation is allowed. These rights have the status of *jus cogens* or peremptory norm, and their status rises above that of a customary law. Article 53 of the Vienna Conventions on the Law of Treaties states: “a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹³⁸ As articulated by Cherif Bassiouni, the non-derogable character of *jus cogens* norms therefore carries “a duty to prosecute or extradite, to prohibit its limitation and to apply the universal jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war)”.¹³⁹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1987, hereinafter the Convention against Torture (CAT), is a well-known example of a human rights treaty that evolved into becoming a *jus cogens* norm. By ratifying the Convention, states undertake the responsibility to “ensure that all acts of torture are offences under their criminal law.”¹⁴⁰ They also agree that when a person suspected of having committed acts of torture is found on their territory, they shall “submit the case to its competent authorities for the purpose of prosecution,” if it does not extradite the alleged torturer.¹⁴¹ Syria ratified the CAT in 2004, which means that it is bound by the Convention’s

¹³⁸ *Vienna Convention on the law of treaties*, United Nations, Treaty Series, vol. 1155, p. 331, Vienna, (May 23, 1969), article 53, <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

¹³⁹ Bassiouni, Cherif. “International Crimes: Jus Cogens and Obligatio Erga Omnes”, *Law and Contemporary Problems*, Vol.59, No. 4, (1996), pp. 65-66, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=lcp>

¹⁴⁰ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. United Nations, Treaty Series, vol. 1465, p. 85, New York, (June 26, 1987), art. 4, https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf

¹⁴¹ *Ibid.* art. 7.

legal obligations.¹⁴² However, even countries that have not signed the Convention must adhere to its principles and have an obligation to prosecute, given the peremptory nature of the offense. Although there is no universal agreement on which norms are considered *jus cogens*, there is a common recognition around the crimes of genocide and aggression; war crimes and crimes against humanity; piracy; torture; and slavery and human trafficking.¹⁴³

¹⁴² *Supra* note 93.

¹⁴³ *Supra* note 139, p. 68.

PART III. SEEKING JUSTICE AFTER WAR – AN EVALUATION OF OPTIONS FOR POST-CONFLICT JUSTICE IN SYRIA

“Don’t let them live their life: if anyone wants to run away, courts are waiting.” – Aisha, a refugee detained by the Syrian government who witnessed acts of torture by government forces against family members.¹⁴⁴

As presented throughout this paper, countless initiatives and sanctions have been used either to reach a truce in Syria or to punish the main perpetrators of crimes and human rights violations. Although these initiatives have often tried to bring the highest possible level of accountability while taking into account the various limits imposed by states or institutions, a fact remains: the record of impunity in Syria has seriously threatened the idea of an international criminal justice. In this context, the international community must find a valuable solution to bring justice to the hundreds of thousands of victims, and to the millions of Syrians whose lives have been permanently damaged by seven years of war.

The main principles of the fight against impunity combine the right to know, the right to justice, the right to reparation.¹⁴⁵ Together, they form what is called today transitional justice, a set of judicial and non-judicial measures that aim at recognizing the wounds of the past and initiating a long-term healing process. These mechanisms can include, but are not limited to, identifying those responsible for crimes and human rights violations, prosecuting those alleged to have

¹⁴⁴ Human Rights Watch. “These are the Crimes We Are Fleeing: Justice for Syria in Swedish and German Courts”, United States, (October 2017), p. 21, https://www.hrw.org/sites/default/files/report_pdf/ijsyria1017_web.pdf

¹⁴⁵ UN Commission on Human Rights. “Question of the impunity of perpetrators of human rights violations (civil and political)”, *UN Sub-Commission on the Promotion and Protection of Human Rights*, Forty-ninth session, E/CN.4/Sub.2/1997/20, (June 26, 1997).

committed serious crimes, reforming institutions, promoting national reconciliation and unity, or providing the space for an open and inclusive dialogue to ensure that the right issues and needs of the population are addressed.¹⁴⁶ While recognizing that transitional justice forms a much larger process, the present analysis mainly focuses on criminal mechanisms to prosecute individuals for crimes committed in Syria during the war. Considering that the armed conflict is not over yet, the analysis will cover a range of options that could be implemented now or after an eventual peace settlement. On that matter, diplomatic talks and initiatives aimed at ending the conflict will not be discussed per se. However, the political feasibility of implementing the proposed mechanisms will be taken into account, as the current international legal structures remains largely dependent on political support. Other evaluation criteria include: the independence of the court, the impartiality of its judges, as well as the equality before the law, which can be translated here as the level of inclusion of all parties to the conflict. Based on the legal framework and jurisprudence of the United Nations (UN Charter, human rights treaties and conventions, statutes and decisions of the ICJ and the ICC, etc.), these international standards of justice will serve as a comparative tool to analyze the following options.

Starting by analyzing the possibility of initiating criminal procedures within Syrian domestic courts, this section will then take a look at the feasibility of international options, such as referring the case to the International Criminal Court, creating a hybrid tribunal for Syria and applying the universal jurisdiction. To provide complementary and relevant information, two non-judicial initiatives will be presented in boxes, as they represent already existing projects in support of the longer quest for accountability.

¹⁴⁶ Dawlaty and No Peace Without Justice. "Transitional justice in Syria", (August 2014), p. 15, <http://dealingwiththepast.org/wp-content/uploads/2017/01/Transitional-Justice-in-Syria.pdf>

Syrian Domestic Courts

States have the primary responsibility to investigate serious violations of human rights that were allegedly committed by their nationals or that occurred on their territory, and to prosecute the suspects if deemed appropriate.¹⁴⁷ The ICRC has determined that these obligations amount to customary international law and are therefore binding on all states irrespective of their lack of signature of the Geneva Conventions.¹⁴⁸ As presented in Part II of this paper, domestic courts in Syria already have jurisdiction over their own nationals and over foreign nationals for crimes committed on the Syrian territory. However, several elements make it difficult to believe that fair, independent and impartial trials can be held domestically. The Syrian judicial system has indeed a history of serious flaws in the administration of justice and in ensuring legal safeguards to protect the rights of detainees.¹⁴⁹ In 1968, the Baath's Regional Command created the Supreme State Security Court (SSSC), which suspended all due process guarantees stipulated in the effective legislation, including all stages of the pursuit, investigation and prosecution proceedings.¹⁵⁰ Although the SSSC was dissolved in early 2012 in an attempt to absorb the demands for democratic reform, the creation of the Counterterrorism Court (CTC) in July 2012 confirmed that the abolition of the SSSC was no more than a show. By relying on a broad definition of terrorism which incorporates any act which opposes the regime, the powers vested to the CTC might go even further than those of its predecessor.¹⁵¹ Field Military Courts (FMC)

¹⁴⁷ *Rome Statute of the International Criminal Court (last amended 2010)*, United Nations, Treaty Series, vol. 2187, Rome, (July 17, 1998), preamble, http://legal.un.org/icc/statute/99_corr/cstatute.htm

¹⁴⁸ *Supra* note 61, rules 158.

¹⁴⁹ Amnesty International. "Memorandum from Amnesty International to the Human Rights Committee Concerning the Implementation of the International Covenant on Civil and Political Rights in Syria", MDE 24/047/2005, (February 2005), p. 7, <https://www.amnesty.org/download/Documents/88000/mde240472005en.pdf>

¹⁵⁰ Violations Documentation Center in Syria (VDC). "Special Report on Counter-Terrorism Law No. 19 and the Counter-Terrorism Court in Syria", (April 2015), p. 1, <http://www.vdc-sy.info/pdf/reports/1430186775-English.pdf>

¹⁵¹ While forced confessions have been frequently reported, lawyers have also been prohibited from meeting their clients and even from consulting their case files before trials. See The Syrian Human Rights Committee. "Five years

have also been used to try people charged with a number of vaguely defined offences. As an Amnesty International report highlighted, these military courts are ‘not subject to the rules of the Code of Criminal Procedure, operate outside the normal justice system under the control of the executive branch of the government [and] do not allow legal representation for defendants’.¹⁵²

In addition to these unfair trial procedures, numerous journalists, activists and human rights defenders have been arbitrarily detained¹⁵³ and executed¹⁵⁴. Although there is no precise number of the arbitrary detentions by the Syrian government, human rights organizations and documentation centers put the number at more than 200,000.¹⁵⁵ These practices testify of Syria’s justice system’s lack of legal robustness.

From a constitutional perspective, the fact that the Supreme Judicial Council is headed by the President of the Republic himself, who also appoints the President of the Supreme Constitutional Court, might prompt many regime opponents to criticize the system as naturally biased towards pro-government individuals.¹⁵⁶ As long as the government of Bashar al-Assad remains in power, this sentiment is likely to persist among the Syrian population, as it would be seen as a continuation of the war by juridical means, making any government-led initiatives doomed to fail. This problematic is intrinsically linked to another, which is the impossibility of creating a forum that will conduct national trials of all the parties involved. As shown by the Iraqi case, the

on the dissolution of The Supreme State Security Court: Repression as a court”, *Special reports*, (April 21, 2016), online: <http://www.shrc.org/en/?p=27146>

¹⁵² Supra note 149, p. 8.

¹⁵³ Amnesty International. “Syria: Syrian Kurdish Activists Arbitrarily Detained: Mohsen Taher, Amin Hussam and Bashar Amin”, *Urgent Action*, (June 9, 2017), online:

<https://www.amnesty.org/download/Documents/MDE2463812017ENGLISH.pdf>; and Human Rights Watch. “Syria: Counterterrorism Court Used to Stifle Dissent”, New York, (June 25, 2013), online:

<https://www.hrw.org/news/2013/06/25/syria-counterterrorism-court-used-stifle-dissent>

¹⁵⁴ Supra note 153; and Human Rights Watch. “Syria: Political Detainees Tortured, Killed”, (October 3, 2013), online: <https://www.hrw.org/news/2013/10/03/syria-political-detainees-tortured-killed>

¹⁵⁵ Supra note 150, p. 3.

¹⁵⁶ Supra note 82, articles 132 and 141.

multi-sided nature of the conflict in Syria further complicates the process. No group among the Kurds, the Shia-dominated government, the Sunni Arabs, and all of the religious and ethnic minorities wants to be subjected to the authority and power of the other, leading to the impossibility of instituting a balanced and nationally accepted mechanism.¹⁵⁷ Finally, giving Syrian courts full jurisdiction to prosecute grave crimes leaves the door open for an act of amnesty, which would lead to permanent impunity.

In regard to this brief overview, it is possible to question the effectivity and impartiality of domestic criminal mechanisms to conduct fair trials in response to human rights violations prohibited in the Syrian constitution. The political feasibility of prosecuting war criminals in Syrian domestic courts is however not as low as one may think. If the current regime stays in power after the eventual peace negotiation process, the prosecutions of opposition forces will likely continue or even increase. This will not guarantee, on the contrary, greater compliance with international standards of justice. Even if a new government was to be elected, the chance of having a truly independent and impartial tribunal remains extremely low, as it could be either taken as a means of revenge or instituted in collusion with the former government. In light of the horrific crimes perpetrated by pro-government and non-government forces, and considering the government's denial that violations have taken place in its detention facilities¹⁵⁸, it is difficult to envision that prosecutions could take place in Syrian national courts in due process and with respect to UN standards. This leads us to consider external means to the national criminal framework and seek complementary justice.

¹⁵⁷ Waters, Timothy William. "The shaping flame: trials, conflict and reconciliation in Syria", *International Social Science Journal*, Vol. 66, (September 2016) p. 266, note 4, <https://onlinelibrary.wiley.com/doi/pdf/10.1111/issj.12134>

¹⁵⁸ NPO2 TV 17. "Interview with President Assad of Syria", Nieuwsuur. Damascus, (December 17, 2015), video available at https://www.youtube.com/watch?v=m-q9_Dsb2OE (consulted on May 5, 2018).

Non-Judicial Initiative: The Independent International Commission of Inquiry on the Syrian Arab Republic

The Independent International Commission of Inquiry on the Syrian Arab Republic (COI-Syria) was established on 22 August 2011 by the Human Rights Council through its Resolution S-17/1. Its mandate is to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic and to establish the facts and circumstances surrounding these violations, including those that may constitute crimes against humanity.¹ The COI was also tasked with identifying the individuals allegedly responsible in order to ensure that perpetrators of the most heinous crimes are held accountable. As of today, it has conducted interviews with more than 6,000 witnesses and victims. The Commission is a valuable ‘short term’ instrument in the fight against impunity in Syria, as it collects the necessary evidence and information now in order to prosecute later. As its name indicates, it is also an independent mechanism operating under the United Nations system. In this regard, the HRC’s strong expertise in the field of human rights has brought the Commission to publish numerous reports detailing almost all of the human rights abuses and international humanitarian law violations that occurred in Syria.² Although the COI’s mandate is intentionally circumscribed to investigating and not prosecuting, the information compiled could potentially serve as valuable evidence in future trials. As a matter of fact, the report *“They came to destroy”: ISIS Crimes Against the Yazidis* found precise evidence of the criminal liability of ISIS fighters, their military

commanders, as well as their religious and ideological leaders, responsible for acts of genocide.³ Moreover, it provided a road map for prosecution.

¹ Human Rights Council. "Independent International Commission of Inquiry on the Syrian Arab Republic", *About the Commission of Inquiry*, online:

<http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCol.aspx>

² See all the reports, periodic and oral updates, statements and HRC resolutions of the COI-Syria at:

<http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx>

³ *Supra* note 64.

The International Criminal Court (ICC)

The International Criminal Court (ICC) was established in the year 1998¹⁵⁹ as a complementary mechanism to the criminal jurisdictions of the States. As mentioned above and described in the Rome Statute, "State have the primary responsibility to prosecute those responsible for international crimes, [and] the ICC [can] exercise its jurisdiction only if the competent State is inactive, 'unable' or 'unwilling' to do so".¹⁶⁰ Based in the Hague, Netherlands, the ICC has the jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity and war crimes.¹⁶¹ With its current 123 States Parties, it is one of the (if not the) most recognized instruments by which political leaders accused of international crimes are judged with respect to the highest standards of justice.

As it pertains to the case in Syria, most of the grave crimes that have been and continue to be perpetrated can fall under the jurisdiction of the ICC, as the Rome Statute incorporates many, if not all, customary international norms governing war crimes committed in NIACs. Indeed, its

¹⁵⁹ But only entered into force on July 1, 2002 following the 60th instrument of ratification.

¹⁶⁰ Lafontaine, Fannie. *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts*, Toronto, Carswell, (2012), p. 5.

¹⁶¹ *Supra* note 141, article 5(1). Note that the ICC will have jurisdiction over the crime of aggression once the conditions in paragraph 2 will be fulfilled.

article 8 calls for the prosecution of (a) grave breaches of the Geneva Conventions; (b) serious violations of common Article 3 committed against persons taking no active part in the hostilities; and (c) other serious violations of the laws and customs of war that are applicable in IACs and NIACs.¹⁶² More specifically, these crimes include willful killing; torture or inhuman treatment; taking of hostages; direct attacks against the civilian population or civilian objects, and humanitarian personnel or objects; the use of poison and other weapons which are inherently indiscriminate; rape, sexual slavery, enforced prostitution, etc.

There are different ways to trigger the jurisdiction of the ICC. While a State Party to the Rome Statute has the responsibility to refer a situation that happened on its territory or by its own nationals to the Court, the Prosecutor can also decide to initiate *proprio motu* legal investigations against an individual from a State Party or for crimes that happened on its territory.¹⁶³ The same thing can also happen when a State Party refers another to the Prosecutor's office. Although the imprescriptibility of genocide, war crimes and crimes against humanity was affirmed by the UN Convention of 26 November 1968, the Rome Statute had to, for political reasons, circumscribe the ICC's jurisdiction to crimes committed after its entry into force (1 July 2002) – *Jurisdiction ratione temporis*.¹⁶⁴ Similarly, the Court may exercise its authority over a State only for crimes committed after the date of its accession to the Statute, unless the State makes a declaration under article 12(3) recognizing the jurisdiction of the ICC with respect to crimes committed prior to his accession. The same article can be evoked by a non-State Party to temporarily trigger the jurisdiction of the Court over certain crimes. Finally, the ICC may exercise its jurisdiction over a non-State Party without the approval of the former in one occasion: when the UN Security

¹⁶² Supra note 147, article 8.

¹⁶³ See article 4(2), 13, 14, 15 and 53(1) of the Rome Statute.

¹⁶⁴ Supra note 141, article 11.

Council, acting under Chapter VII of the UN Charter, refers the case to the Prosecutor. This prerogative has only been used twice, namely in Sudan (2005) and in Libya (2011).

Considering that the Syrian Arab Republic has not ratified the Rome Statute, and that such a possibility is nil under an Assad government (since it would create jurisdiction over government crimes), many jurists, diplomats and activists around the world have pressured the UNSC to refer the critical situation in Syria to the ICC. As demonstrated in previous sections of this analysis, there have been numerous yet unsuccessful attempts at the UN to seek justice in Syria. On May 22, 2014, at the 7180th Meeting of the UNSC, France proposed a draft resolution referring the situation in Syria to the ICC. However, this initiative was vetoed by China and Russia.¹⁶⁵ In October 2016, the UN High Commissioner for Human Rights, Zeid bin Ra'ad al-Husseini, called on the UNSC to refer human rights violations being committed by the Assad regime and its allied militias to the ICC, adding that the UNSC should "adopt criteria to restrain members from using the veto when there are serious concerns that war crimes, crimes against humanity, or genocide may have been committed".¹⁶⁶ This pressure was reiterated a week later, when UN Secretary-General, Antonio Guterres, again called for a referral to the ICC, stressing that accountability for serious violations is essential to achieve sustainable peace in Syria.¹⁶⁷ Nonetheless, nothing has changed and the Council still remains highly divided on how to resolve the conflict in Syria. The fact that even requests from top UN officials have not received a

¹⁶⁵ *Meeting Report, United Nations Security Council, 7180th Meeting, S/PV.7180, New York, (May 22, 2014), p. 4,* https://www.securitycouncilreport.org/atf/cf/%7b65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7d/s_pv_7180.pdf

¹⁶⁶ AFP. "UN rights chief urges Security Council veto limit over Syria", *JusticeInfo.net*, (October 4, 2016), online: <https://www.justiceinfo.net/en/justice-reconciliation/29595-un-rights-chief-urges-security-council-veto-limit-over-syria.html>

¹⁶⁷ National Coalition of Syrian Revolution and Opposition Forces. "UN Secretary-General Urges Syria Referral to International Criminal Court", *Political News*, (March 28, 2018), online: <http://en.etilaf.org/all-news/political-news/un-secretary-general-urges-syria-referral-to-international-criminal-court.html>

positive response nor created a consensus among the UNSC Members has brought the international community to give up hope that the Syrian case will ever be referred to the ICC.

Although this was considered as the 'easiest' option, creative alternatives exist to bring justice in Syria through this Court. On the one hand, there remains a possibility that Iraq either ratifies the Rome Statute or executes a declaration under article 12(3) to activate the jurisdiction of the Court for crimes committed before its accession. Such a course of action would enable the ICC to assert jurisdiction over crimes in Iraq, including those committed by terrorist groups like ISIS and the Front al-Nusra.¹⁶⁸ In fact, a recent case relating to the persecution of Rohingya Muslims could potentially serve as a precedent for the prosecution of Syrian criminals in neighboring countries. On May 30, 2018, the ICC prosecutor, Fatou Bensouda, filed a submission asking the Court to rule on whether it has jurisdiction over alleged deportations of Rohingya from Myanmar to Bangladesh.¹⁶⁹ This is the first time that a Prosecutor from the ICC exercises its discretion to seek a ruling pursuant to Article 19(3). Considering that Bangladesh is a State Party to the ICC, the Court has jurisdiction to investigate deportation that took place within Bangladesh's borders. If the decision was to be positive, the ICC would have territorial jurisdiction under article 12(2)(a) to investigate and, if necessary, prosecute for crimes (genocide, crimes against humanity, etc.) that commenced in Myanmar but are still being committed in Bangladesh. The element of continuity is very important here, as the defendants have to prove that the Myanmar government continues to act to ensure the maintenance of these grave crimes in Bangladesh. Thus, if this precedent was to be used in Syria, it would be imperative to prove that the crimes

¹⁶⁸ Trahan, Jennifer. "New Paths to Accountability for Crimes in Syria and Iraq (Including ICC Jurisdiction Over Foreign Fighters)", (November 12, 2014), online: <https://www.justsecurity.org/17308/paths-accountability-crimes-syria-iraq-including-icc-jurisdiction-foreign-fighters/>

¹⁶⁹ *Submission on Behalf of the Victims Pursuant to Article 19(3) of the Statute*, the Office of the Prosecutor of the International Criminal Court, No. ICC-RoC46(3)-01/18, Pre-Trial Chamber 1, (May 30, 2018), <https://fr.scribd.com/document/380585813/Victims-Submissions-Pursuant-to-Article-19-3>

continued to be perpetrated in the neighboring territories. Although this possibility remains at an early stage, considering that the Prosecutor's submission has been filed very recently, it will be interesting to see how this issue evolves and potentially impacts the jurisprudence of the International Criminal Court.

On the other hand, a second alternative could be for a new Syrian government to accept the jurisdiction of the Court retrospectively through an article 12(3) declaration. Although quite rare, declarations under this article have been received from the governments of the Republic of the Côte d'Ivoire and of Uganda.¹⁷⁰ As it is the case for the first proposition, this other option could allow the Court to exercise its jurisdiction in Syria for crimes that were committed during the war, even if its authority was sought after their perpetration. In such circumstances, the date of entry into force of the Court's jurisdiction is left to the discretion of the State making the declaration. Thus, a newly formed government in Syria could potentially give jurisdiction to the ICC from the beginning of the conflict in March 2011, a few years later, or even retrospectively from the entry into force of the Statute in 2002 (which is unlikely). However, for such a referral to happen, the new government would have to be composed of a majority of neutral actors who haven't actively participated in the conflict. If not, the chance that a Syrian government submits itself to the ICC for crimes he might have committed is very low.

A last alternative to prosecute individuals who have committed grave crimes in Syria would be to exercise jurisdiction over nationals of Rome Statute States Parties. Considering that "more than 13,000 foreign terrorist fighters from more than 80 [U.N.] Member States had joined ISIS

¹⁷⁰ Freeland, Steven. "How Open Should the Door Be? Declarations by non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court", *Nordic Journal of International Law*, No. 75, (2006), Netherlands, p. 212.

and the Al-Nusra Front”¹⁷¹ since the beginning of the conflict in Syria, there remains a possibility for the ICC to exercise its jurisdiction directly on nationals of State Parties. However, used alone, this option would see the application of a “justice for the West”, leaving the main masterminds and perpetrators (government forces, opposition groups, terrorist organizations, etc.) left in total impunity.

Non-Judicial Initiative: The International, Impartial and Independent Mechanism

The International, Impartial and Independent Mechanism (IIIM) is another project that is neither a prosecutor’s office nor a court, but that deserves to be mentioned in this analysis for its eventual impact in bringing justice in Syria. The IIIM was established on 21 December 2016 by UNGA Resolution 71/248 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 2011.¹ Its main objectives are to collect, consolidate, preserve and analyze the evidence of IHL and IHRL violations and to prepare files in order to facilitate and expedite fair and independent criminal proceedings by a competent tribunal. Although the mechanism has not the authority to prosecute per se, it is capable of producing reliable evidence that can be admitted in court, of establishing individual criminal responsibility and of sharing its case files with international, regional and national jurisdictions which have, or may have in the future, jurisdiction over such crimes.² It thus represents a promising tool and another ingenious

¹⁷¹ United Nations. “Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters”, 7272nd Meeting, SC/11580, (September 24, 2014), online: <https://www.un.org/press/en/2014/sc11580.doc.htm>

example of international jurists working around the system to keep international justice moving forward. As Alex Whiting writes:

“In this context, the Mechanism is a bridge, or perhaps a temporary Band-Aid. It is a bridge to a future moment when the conditions and political will exist to provide for accountability in Syria. And in this regard, the creation of the Mechanism both preserves the possibility of a future tribunal bringing criminals to justice, by ensuring that the evidence will be collected and protected from loss or destruction, and it makes more likely that the future moment of accountability will be realized.”³

¹ United Nations. “International, Impartial and Independent Mechanism”, *Mandate*, online: <https://iiim.un.org/mandate/>

² Ibid.

³ Whiting, Alex. “An Investigation Mechanism for Syria: The General Assembly Steps into the Breach”, *Journal of International Criminal Justice*, Volume 15, Issue 2, (May 1, 2017), Pages 236, <https://doi.org/10.1093/jicj/mqx008>

A Hybrid Tribunal for Syria

Unlike traditional standing courts, hybrid tribunals are created as a response to a specific conflict that happened in a defined location over a certain period of time.¹⁷² Their particularity is that they include elements of both international and national systems, as they are the result of a treaty or an agreement between a sovereign state and the United Nations. As explained by Aaron Fichtelberg, they can be seen as a sort of compromise position in response to a number of different concerns about the prevailing forms of international and domestic criminal justice.¹⁷³

The idea of instituting a hybrid tribunal for Syria has already been put forward by a few scholars and international jurists. In 2013, a model statute for a potential tribunal has been prepared by a

¹⁷² Fichtelberg, Aaron. *Hybrid Tribunals: a Comparative Examination*, Springer Series on International Justice and Human Rights, New York, (2015), p. 1, <https://link-springer-com.proxy.bib.uottawa.ca/content/pdf/10.1007%2F978-1-4614-6639-0.pdf>

¹⁷³ Ibid. p. viii

committee of international experts. The 32-page document, called “The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes”, is the result of consultations with former international tribunal chief prosecutors and judges, leading practitioners and academic experts in the field of international criminal law, as well as Syrian lawyers, jurists, and civil society leaders.¹⁷⁴ It is comprised of 29 articles detailing the establishment of the tribunal, the mandate and appointment of its judges, the individuals and crimes for which the tribunal will have jurisdiction, the rules of procedure and evidence, as well as the details of the penalties and sentences. One of its innovative elements is that it has been drafted in accordance with the Syrian judicial system to reflect local realities and practices, while leaving the presence of international judges at the discretion of the court. To ensure fairness and impartiality, the blueprint suggests that judges who served on the regime’s Special Tribunals should not be permitted to apply for a position on this Tribunal.¹⁷⁵ While it still remains at the proposition phase, it is a turnkey solution that could be easily implemented by a future judicial body.

Moreover, the creation of such a tribunal in Syria could represent an alternative solution to the ICC, as it would allow the international community to circumvent the current deadlocks at the UN Security Council. To put it briefly, the UNSC is the only body who has the authority under the UN Charter to establish international tribunals with compulsory legal authority over individuals or states. The International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and more recently, the Special Tribunal for

¹⁷⁴ Chautauqua Institution. “The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes”, New York, (August 27, 2013), <http://insct.syr.edu/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf>

¹⁷⁵ *Ibid.*, p. 28.

Lebanon (STL), have all been instituted under this prerogative.¹⁷⁶ As the previous sections highlighted, members of the UNSC are extremely divided on the question of referring Syria to an international judicial body, making the creation of a UN-led special tribunal very unlikely. However, a hybrid tribunal that shares judicial accountability jointly between the state in which it functions and the United Nations could constitute another and innovative avenue, as it does not require the UNSC's approval. While it is quite inconceivable that the Assad regime would establish such a tribunal – considering its seeming unwillingness to submit itself to justice, and the international and Syrian community's lack of confidence that it would conduct fair and impartial trials – alternative options exist to circumvent this barrier.

First, regional governments could help by proposing to host it on their territory. In fact, Turkey and Jordan have already been suggested as valuable options considering their simultaneous connection with the conflict (neighboring countries which received important numbers of refugees¹⁷⁷) and perceived neutrality. The main benefits of such an approach would obviously be to decentralize the process from a Western to a regional initiative that respects and empowers Arab values and practices. Logistically, remaining in the conflict region would also procure easy access to witnesses and evidence, while minimizing the costs of mobilizing regional jurists and institutions. In addition to the universal jurisdiction that will be discussed in the next portion of this section, international doctrine and jurisprudence indicate that neighboring countries could also exercise their national jurisdiction over events that occurred in Syria. The *Restatement of Foreign Relations Law* of the United States assert that a state has jurisdiction to prescribe law with respect to a conduct outside its territory that has or is intended to have substantial effect

¹⁷⁶ Under UNSC Resolutions 827, 955 and 1757, respectively.

¹⁷⁷ As mentioned in Part I of this paper, Jordan has received over 655,000 Syrian refugees since 2011, while the numbers climb to over 3.5 million for Turkey.

within its territory (effect principle); and certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests (protective principle).¹⁷⁸ Syria's neighboring countries could potentially invoke such a disposition and argue that the massive flows of refugees have had substantial effects on their territory, leading to endangering the political or territorial integrity of their nation and undermining the operation of essential governmental functions.¹⁷⁹

Another option would be to wait until a new Syrian government is formed to institute the hybrid court with full authority over the crimes committed during the war. Such timing implies that the tribunal would likely be established once a peace process is agreed upon. It could however ensure that Syrian institutions are involved and that a certain level of impartiality is secured. Moreover, it would also help to rebuild the Syrian justice system in accordance with high standards of justice (independence, impartiality and fairness). For that to happen, and to guarantee that these standards will effectively be applied, it is essential for the UN to participate in its creation. International logistical and financial support would also be a key component in assisting the Syrian government, since most of the domestic judicial system will probably be inoperable after the war.

Finally, another way to establish a hybrid tribunal for Syria could come through a regional organization. Although the Arab League does not have a court like that of the African and European Unions, it is not impossible to envision that such a mechanism could be implemented to prosecute serious crimes committed in Syria. The organization of Arab states could take as an

¹⁷⁸ *Restatement, Third, Foreign Relations Law of the United States (Revised) (1987)*, Vol. 1, the American Law Institute, Washington, D.C., article 402, pp. 237-244.

¹⁷⁹ *Charter of the United Nations*, United Nations, San Francisco, (June 26, 1945), article 2, par. 1, <https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf>

example the African Union's initiative to establish the Extraordinary African Chambers (EAC) within Senegalese courts that served to successfully prosecute Hissène Habré.¹⁸⁰ Although various Arab states are already implicated in finding solutions to the humanitarian crisis in Syria, agreeing on how a potential court would function and who would be prosecuted might be more challenging, considering the conflicting presence of Saudi Arabia and Qatar in supporting different opposition groups in Syria. This is also without mentioning the current political tensions between Qatar and Saudi Arabia, the United Arab Emirates, Bahrain and Egypt, that could seriously undermine joint efforts to institute a regional mechanism.

Regardless of the location of the hybrid court, it would be appropriate to build on already existing models and learn from past mistakes and successes. The Extraordinary Chambers in the Courts of Cambodia (ECCC), which was created to prosecute senior leaders of the Khmer Rouge, could serve as a case example here. Although the Court was formally established by a Cambodian law in 2001, the participation of the UN was later requested in order to help meet international standards of justice. The roles and responsibilities of the two entities were recognized in a Memorandum of Understanding in 2003.¹⁸¹

On one side, the ECCC's structure and operation could represent a model for Syria. In fact, this functioning national court uses national staff and judges together with foreign personnel to ensure procedural fairness, respect for the rule of law and independence from any political interference. On the other side, ECCC's mistakes and challenges could also be taken into account when instituting such a hybrid court, as some of them could easily resurface in Syria. Whereas

¹⁸⁰ *Ministère Public v. Hissène Habré (2016)*. Extraordinary African Chambers, Senegal, <http://www.legal-tools.org/en/doc/98c00a/>

¹⁸¹ Extraordinary Chambers in the Courts of Cambodia. "About the ECCC", online: <https://www.eccc.gov.kh/en/about-eccc>

significant financial pressures have hindered the ability of the ECCC to manage its workload and even to pay its staff, the failure to codify a clear set of ethical guidelines has led to outright corruption in the staffing management, as well as a mismanagement of the court itself.¹⁸² In order to avoid such a terrible situation in Syria, the UN should secure a maximum of funds (based on an evaluation of the cost of other special courts) to keep the court functioning for at least 5 to 10 years. This could come through UN assessed and voluntary contributions, bilateral aid or even INGOs that could offer to professionally and technically support the court. An important element to ensure is the neutrality and independence of the funding, which should therefore be managed entirely by the UN.

A code of ethics detailing the expected behavior and practices of the international and local personnel could also be added in appendices to the Chautauqua Blueprint (or any other statute). A last element to keep in mind is the social acceptability and legitimacy of the sentences. In the case of Cambodia, although Cambodians were generally pleased that Comrade Duch, one of the main Khmer Rouge figures, was trialed and convicted, there was widespread outrage at a sentence that had been widely perceived as too light (a total of 35 years in prison).¹⁸³ As a matter of fact, the publication of Duch's apologies, as well as an official acknowledgement that their loved ones were victims of Duch and killed in Tuol Sleng Prison, were the only 'compensation' given to the victims.¹⁸⁴ While international jurists will often be of the views that convictions of high-ranking figures offer official accountability and a symbolic recognition of the crimes committed, it is important to keep in mind that the severity of the sentences and the magnitude of

¹⁸² Supra note 173, p. 114.

¹⁸³ Ibid., p. 121-122.

¹⁸⁴ Ibid. P. 121.

the victims' compensations will testify of the court's legitimacy and ultimately impact the transition process in Syria.

Finally, an ultimate option that could be implemented alongside the hybrid court, or as a last resort in the event of a failure of instituting a more inclusive mechanism, would be to expand the current efforts to hold the Islamic State of Iraq and al-Sham (ISIS) accountable for its actions in Iraq to cover for Syria. In September 2017, the UNSC unanimously adopted resolution 2379, asking for the establishment of an independent investigative team that would collect, preserve, and store evidence of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group in Iraq.¹⁸⁵ Headed by a special advisor, the team also promotes accountability for acts that may amount to atrocity crimes and closely works with the Iraqi government to find possible mechanisms in respect with national laws. The mandate of the team could potentially be expanded to cover for Syria as well. Considering that this mechanism would not include violations perpetrated by Syrian government officials or opposition groups, the UNSC might be more inclined to agree on such a proposition. However, if led by the current government, the chance that it would gain support among the Syrian population is very low. An ISIS-only tribunal would probably be seen as the recognition of Assad's anti-terrorist rhetoric used to justify crimes against the civilian population. To minimize tensions, the prosecution of terrorist groups should be done by a future government that does not have as many links with the conflict as the present one. However, in addition to grant pro-government forces immunity, this selective justice would ultimately jeopardize the court's ability to contribute to the post-conflict environment. It is therefore proposed here as an ultimate mechanism if other attempts fail to come to light.

¹⁸⁵ *Resolution 2379 (2017)*, United Nations Security Council, 8052nd Meeting, S/RES/2379
https://www.securitycouncilreport.org/atf/cf/%7b65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7d/s_res_2379.pdf

As Mark Kersten put it, the remaining challenge is to design a functioning tribunal that would both prosecute all sides that have committed war crimes during the conflict and retain the support of the major actors in the Syrian civil war, many of whom are implicated and would be prosecuted.¹⁸⁶

Universal Jurisdiction

Universal jurisdiction derives from the assumption that some crimes are so serious that they affect *all States*. Consequently, the latter have the right, or indeed the obligation, to take legal action against their perpetrators.¹⁸⁷ In an article of the *Journal of International Criminal Justice*, Roger O'Keefe defines the concept as following:

‘In positive and slightly pedantic terms, universal jurisdiction can be defined as prescriptive jurisdiction over offences committed abroad by persons who, at the time of commission, are non-resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state or, in appropriate cases, to give rise to effects within its territory.’¹⁸⁸

Put differently, universal jurisdiction can be exercised by a court of a third State that has no legal connection with the crimes committed – e.g. the nationality of the alleged victim or perpetrator, the territoriality of the crime or the fundamental interests of that State – when the territorial state is unable or unwilling to conduct an effective investigation and trial. Its application is mainly

¹⁸⁶ Kersten, Mark. “Calls for prosecuting war crimes in Syria are growing. Is international justice possible?”, *the Washington post*, (October 14, 2016), online: https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/14/calls-for-prosecuting-war-crimes-in-syria-are-growing-is-international-justice-possible/?noredirect=on&utm_term=.f8c71931380d

¹⁸⁷ Dinh Nguyen, Quoc. *Droit International Public*, 6th Edition, Paris, L.G.D.J. (1999), pp. 42-43.

¹⁸⁸ O'Keefe, Roger. “Universal Jurisdiction – Clarifying the Basic Concept”, *Journal of International Criminal Law*, Vol. 2, Issue 3, (September 1, 2004), p. 745, <https://doi.org/10.1093/jicj/2.3.735>

limited to *jus cogens* norms, which includes, inter alia, crimes relating to piracy¹⁸⁹, slavery¹⁹⁰, war crimes¹⁹¹, crimes against humanity, genocide¹⁹², apartheid¹⁹³ and torture¹⁹⁴. Although the use of universal jurisdiction by domestic courts remains quite rare, the competence in itself is not new. Indeed, articles 49, 50, 129 and 146 of the 1949 Geneva Conventions I, II, III and IV respectively declare:

‘The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.’¹⁹⁵

Considering that 196 states have ratified the Geneva Conventions, and that its principles are now codified as customary international law¹⁹⁶, it is possible to affirm that all states are bound by the obligation comprised in the article mentioned above. This has encouraged various states to implement, in their national legislation, criminal provisions aimed at prosecuting the perpetrators

¹⁸⁹ *Convention on the High Seas*. United Nations, Treaty Series, vol. 450, p. 11, Geneva, (April 29, 1958), art. 19, https://treaties.un.org/doc/Treaties/1963/01/19630103%2002-00%20AM/Ch_XXI_01_2_3_4_5p.pdf

¹⁹⁰ Orakhelashvili, Alexander. *Peremptory Norms in International Law*, Oxford Monographs in International Law, Oxford University Press, 1st edition, (2009), p. 50.

¹⁹¹ Supra note 139, p. 68.

¹⁹² Supra note 68.

¹⁹³ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, United Nations, Treaty Series, vol. 1015, p. 243, New York, (November 30, 1973), https://treaties.un.org/doc/Treaties/1976/07/19760718%2003-04%20AM/Ch_IV_7p.pdf

¹⁹⁴ Supra note 140, article 5.

¹⁹⁵ Supra note 114.

¹⁹⁶ Supra note 120, p. xxxvi.

of the crimes mentioned in Article 5 of the Rome Statute, namely the crimes of genocide and torture, crimes against humanity and war crimes.¹⁹⁷ Concrete examples of that can be found in the prosecution and conviction in Belgium of Rwandan nuns charged with complicity in the Rwanda genocide¹⁹⁸, or in the famous British House of Lords decision in the General Pinochet extradition case¹⁹⁹.

Turning to the Syrian case, the application of universal jurisdiction by third States could serve as an effective complementary tool to a possible international tribunal. On the one hand, countries that have criminalized grave breaches to the Geneva Conventions are competent to prosecute Syrian individuals in their domestic courts. As a matter of fact, some trials have already occurred or are currently on their way in Sweden, Finland, Germany, France and Switzerland. Although promising, these arrests and trials have, so far, mainly targeted jihadists and rebel fighters, demonstrating the difficulty in prosecuting high-ranking members of the Bashar al-Assad regime. Spain has once been a beacon of hope in this area, when in March 2017 a national court judge agreed to initiate proceedings against high-ranking security and intelligence officials of the Syrian government for torture and arbitrary executions.²⁰⁰ However, the case was rejected in July 2017 by a higher panel of the court.²⁰¹

¹⁹⁷ The ICC will have jurisdiction over the crime of aggression when a provision will be adopted in accordance with articles 121 and 123 of the Rome Statute.

¹⁹⁸ M. Keller, Linda. "Belgian Jury to Decide Case Concerning Rwandan Genocide", *American Society of International Law*, Volume 6, Issue 13, (May 25, 2001), <https://www.asil.org/insights/volume/6/issue/13/belgian-jury-decide-case-concerning-rwandan-genocide>

¹⁹⁹ *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3 (2000))*, House of Lords, United Kingdom, 1 A.C. 147, <http://www.uniset.ca/other/cs5/2000AC147.html>

²⁰⁰ Cumming-Bruce, Nick. "High-Ranking Syrian Officials Could Face Reckoning in Landmark Spain Case", *the New York Times*, (March 27, 2017), online: <https://www.nytimes.com/2017/03/27/world/middleeast/syria-crime-torture-assad-war.html>

²⁰¹ Reuters. "Spain court drops complaint against Syrian security forces", *World News*, (July 21, 2017), online: <https://www.reuters.com/article/us-mideast-crisis-syria-spain/spain-court-drops-complaint-against-syrian-security-forces-idUSKBN1A61J1>

Given that accusations have already been made against individuals, many human rights organizations and civilians have called for the arrest of Bashar al-Assad himself. The possibility that concrete legal actions be taken against him comes is uncertain, since it would rely not only on the willingness of a competent state to take on such an important (and spectacular) case, but also on the existence of clear evidence linking Assad to specific crimes. Furthermore, as Syria's current head of state, Bashar al-Assad cannot be prosecuted. The International Court of Justice (ICJ) ruled in the *Yerodia* decision that heads of states and some ministers have immunity from prosecution before the national courts of a third country while in office.²⁰² However, this does not preclude him from being charged once he is no longer in office. The recent trial of the former president of Chad, Hissène Habré, for crimes against humanity, war crimes, torture, sexual violence and rape, by the Extraordinary African Chambers in the Senegalese court system and his subsequent sentence to life in prison, gives a path for a similar case against Assad.²⁰³

In addition, foreign fighters who have committed crimes in Syria could also be prosecuted under universal jurisdiction. While it is clear that countries have jurisdiction over their own nationals (and thus are responsible for prosecuting foreign fighters once they return home), a third state could do the same as well. In Sweden, Mouhannad Droubi, a former rebel fighter for the Free Syrian Army (FSA) who was granted residency in 2013, has been convicted of war crime for attacking an enemy who was defenseless.²⁰⁴ In Germany, investigations by the federal public prosecutor have already led to a number of arrests and trials. In 2016, Aria Ladjedvardi, a

²⁰² *Democratic Republic of Congo v. Belgium [the Yerodia Case]*(2002), International Court of Justice, No. 121, p. 5, <http://www.ijl.org/wp-content/uploads/2016/08/The-Yerodia-Case-Democratic-Republic-of-Congo-v.-Belgium-Judgment-2002.pdf>

²⁰³ Human Rights Watch. "Chad's Ex-Dictator Convicted of Atrocities", Dakar, (May 30, 2016), online: <https://www.hrw.org/news/2016/05/30/chads-ex-dictator-convicted-atrocities>

²⁰⁴ BBC News. "Sweden sentences Syrian rebel to five years for war crime", Middle East, (February 26, 2015), online: <http://www.bbc.com/news/world-middle-east-31639378>

German national, was sentenced to prison for war crimes committed in Syria.²⁰⁵ Prosecuting foreign fighters might also be easier under terrorism charges if the state has fully criminalized the infractions related to assisting terrorist groups under its domestic laws. In fact, UN Security Council resolutions 2178 and 1373 require states to ensure that their legal systems provide for the prosecution, as serious criminal offences, of travel for terrorism or related training, as well as the financing or facilitation of such activities.²⁰⁶ Even though domestic courts have their own expertise and access to evidence, the valuable information collected by the COI-Syria and the IIIM could, without question, serve to build the cases of violations in such circumstances, and ultimately ensure a more effective judicial process.

While the large flow of refugees to neighbouring countries and Europe brings its own set of challenges, it also presents the opportunity for the recipient countries to seize upon universal jurisdiction to try Syrian criminals in their own courts. As Geraldine Mattioli, an expert on international justice at Human Rights Watch, mentioned, "the refugee influx has [also] provided new opportunities for prosecutors to collect specific information".²⁰⁷ As such, it is realistic to believe that further trials will be held by independent, fair and impartial judicial courts from third countries. At a time when the legitimacy and impartiality of the international criminal system is greatly questioned by a number of States, the use of universal jurisdiction to prosecute in an extra-territorial manner individuals that have committed grave crimes in Syria could help restore hope for the global fight against impunity.

²⁰⁵ Francis, David. "German Jihadist Gets Two Years In Jail For Posing with Severed Heads", *Foreign Policy*, (July 12, 2016), online: <https://foreignpolicy.com/2016/07/12/german-jihadist-gets-two-years-in-jail-for-posing-with-severed-heads/>

²⁰⁶ *Resolution 2178 (2014)*, United Nations Security Council, 7272nd Meeting, SC/11580, (September 24, 2014), p.4, <https://www.un.org/counterterrorism/ctitf/en/sres2178-2014>

²⁰⁷ *Ibid.*

PART IV. CONCLUSIONS AND RECOMMENDATIONS

As it has been demonstrated throughout this paper, the conflict in Syria is one of the most complexes of our time. In addition to the involvement of pro-government forces, armed opposition groups, Islamist groups and networks of terrorist organizations, many foreign powers have gradually become politically and militarily involved in the war. This second layer of tension, although not addressed in the present paper, has made the identification of the actors' legal responsibilities even more difficult. Despite this legal and geopolitical complexity, one fact remains: serious violations of international humanitarian and human rights law have been committed in Syria, leading to the death of more than 500,000 people and to the displacement of 11 million more. Although the frequency and magnitude of these violations amount, in various cases, to the level of genocide, crimes against humanity and war crimes, their perpetrators have so far been left unpunished, as the international community stood by, unable or unwilling to react.

In the interests of justice, this short analysis aimed at presenting the legal mechanisms that could be put in place to circumvent the current barriers, investigate the various crimes and prosecute individuals for their inhumane actions. The demarche fits into a transitional justice approach, a long-term reconciliation process that will hopefully contribute to the peace and reconstruction efforts after the war. However, much of this work could be avoided if better conflict prevention was done. The international community has the responsibility to prevent first; and such legal instruments should only be used as a last resort. Although multiple reactions and solutions were brought by civil society organizations, academics, international forums and mostly the United

Nations system (e.g. UNGA, OHCHR) to stop and prevent the perpetration of grave crimes, these initiatives have so far failed, leaving the international community in disarray.

Conclusion on Proposed Mechanisms: Is Justice Achievable in Syria?

In order to overcome these barriers, this paper introduced four different instruments that could potentially be used to investigate and prosecute individuals responsible for heinous crimes. Using evaluation criteria such as the impartiality and independence of the courts, the level of inclusion of all parties to the conflict, the conformity with UN standards of justice and the political feasibility, Part III of this paper compared the proposed mechanisms and tried to find the most appropriate for Syria. In light of this analysis, it appears clear that giving full authority to Syrian domestic courts can only lead to either an act of amnesty or the continued unfair prosecution of opposition and terrorist groups, ultimately leaving the Assad regime spared from any charge. A trial led by a new government would potentially lead to similar results, given the uncertainty about its political direction and the lack of financial and technical resources of the current crumbling judicial system. To overcome this challenge, international mechanisms such as a referral to the International Criminal Court (ICC), the creation of a hybrid tribunal and the use of universal jurisdiction have been proposed. The analysis that followed has however revealed the apparent discord between the most effective means of ensuring justice and the political feasibility of establishing such a mechanism. Whereas recourse to the ICC seemed to be the most solid, impartial and independent way of prosecuting individuals, the unlikelihood of seeing Syria ratify the Rome Statute and the current deadlocks at the UNSC has unfortunately led to the dismissal of this option.

Among the remaining alternatives, the instrument that would achieve the highest degree of acceptability, efficiency, impartiality and homogeneity (in the procedures and sentences) would be the creation of a hybrid tribunal between the Syrian authorities and the United Nations after a peace process is finalized and a new government is elected. As demonstrated in this paper, the case of Cambodia could serve as an example for setting up a similar tribunal in Syria. Established as a national court, the Extraordinary Chambers in the Courts of Cambodia (ECCC) called for the participation of international jurists to guarantee the application of international standards. Although it succeeded in prosecuting high figures of the Khmer Rouge, criticism surrounding corruption and mismanagement has somewhat undermined its legitimacy. To be effective and recognized as such, a Syrian hybrid tribunal would thus have to ensure that these past mistakes are not repeated.

However, the uncertainty surrounding the willingness of a future Syrian government to partly submit itself to the jurisdiction and expertise of international jurists poses some challenges as to whether the establishment of a court is feasible. While the peace talks are moving forward, the fact that the commission responsible for drafting a new constitution will not have the removal of the President Bashar al-Assad as one of its terms of reference could further undermine an inclusive transition.²⁰⁸ Needless to say, a peace process that maintains Bashar al-Assad as president of the Republic will not lead to the establishment of a tribunal or any impartial transitional justice mechanism. It will therefore be important to adjust such a solution to the future political context in Syria.

²⁰⁸ Wintour, Patrick. "Russia-backed Syrian peace talks agree deal on new constitution", *The Guardian*, Syria, (January 31, 2018), online: <https://www.theguardian.com/world/2018/jan/31/russia-backed-syrian-peace-talks-deal-constitution-un>

This suggests that for now, the most politically feasible and “short-term” solution to prosecute individuals for their crimes would be the use of universal jurisdiction. As it was demonstrated in Part III of this paper, this tool could be used around the world to impartially prosecute members of the government²⁰⁹, foreign fighters and those of opposition and terrorist groups who have committed serious crimes. Examples of such an extended application of the law can already be found in Sweden, Finland, Germany, France and Switzerland. These prosecutions of individuals in Europe for crimes committed in Syria could serve as an example and push other states to codify universal jurisdiction in their domestic law so that individuals found on their territory are tried as well. The use of universal jurisdiction in courts around the world could thus revive the enthusiasm for an international application of criminal justice, reaffirm the imprescriptibility of genocide, crimes against humanity and war crimes, and ultimately push for the creation of a more rigorous and unified instrument.

The possibility of invoking this prerogative and creating a hybrid tribunal are not mutually exclusive. Instead, this study suggests working on the creation of a hybrid tribunal, while encouraging states to use universal jurisdiction as a complementary tool. Together, these two mechanisms would ensure that a maximum of crimes are investigated and individuals prosecuted. This strategy would have many implications. First, the prosecution of strategic high figures among the various groups involved would facilitate the transition process and help the Syrian people to slowly heal from their wounds. Although the form of reparation would have to be determined, this would provide the long-awaited judgment of the masterminds behind Syria’s bloody war.

²⁰⁹ And high ranking figures of the Assad regime once they are no longer in office.

Second, establishing a hybrid court in Syria would also help to rebuild its justice system on a solid foundation. The court would indeed receive financial, logistical, legal and independent support from the United Nations system, which would maximize the conduct of independent and fair trials on the short term, but also ensure a long-term sustainable system based on international standards of justice.

Finally, this proposed solution would also send a clear message that the international community is supporting the Syrian people and is making the necessary efforts to implement criminal justice in Syria and around the world. Considering that the latter has been criticized in recent years for being biased against African leaders, this would represent an opportunity to demonstrate that political figures from other parts of the world can also be prosecuted for their inhumane acts and that justice is indeed international. At a time where the rules-based international order is challenged by a wave of populist ideologies, this renewed trust in global justice is more than essential to ensure its existence.

Achieving justice for victims in Syria is and will be difficult. It is unrealistic to think that all crimes will be investigated and all individuals responsible for committing those crimes will be punished. However, the solutions proposed in this short analysis could serve as a starting point for further reflections on the actions to be taken for the years to come.

Moving Forward: the Need to Change

As argued by Elizabeth Ferris and Kemal Kirişçi, the Syrian conflict may have become too complex, the political interests too diverse and the proliferation of actors too great for the UN to

be able to take effective action to prevent chaos.²¹⁰ This observation has led the latter, as well as many other authors and politicians, to call for a UN Security Council reform. Although this issue is outside the scope of this paper, its realization could hopefully have the effect of depoliticizing this body and increasing the effectiveness of humanitarian aid in cases of conflicts as complex and sensitive as that in Syria. Meanwhile, non-judicial means could be implemented now to try to prevent, reduce or eliminate some of the most serious crimes taking place in all parts of the world.

The first step would be to press countries at war to end all use of arms that cause indiscriminate effects when used in populated areas, such as cluster munitions, ballistic missiles, incendiary weapons and explosives weapons. A way to achieve this could be for countries to adopt laws that prohibit the sale of these types of weapons and ammunition to countries at war and suspend any dealings with companies that supply them with those arms.²¹¹ Countries could also use political and economic pressures on states that cooperate with oppressive regimes so that afflicted populations are not the direct victims of international sanctions but rather a cooperating third state, which might push the regime to change its approach. Additional financial and technical resources could also be given in support of the UN peacekeeping reform agenda and the recommendations of the High-Level Independent Panel on Peace Operations. Finally, states could use diplomatic means to promote the implementation and utilization of universal jurisdiction so that individual criminal responsibility for grave crimes is enforced in more countries.

²¹⁰ Supra note 9, p. 111.

²¹¹ Although this might be politically difficult for many countries, considering that the top 100 arms-producing and military services companies in the world are dominated by North America and Western Europe. See https://docs.google.com/spreadsheets/d/1pPk2Rk4TWc6_u0IFvfts5kLo0Ad-zy_NsBMIsSDW2N0/edit#gid=1

Syria's conflict resolution will demonstrate if our global governance system is doomed to chaos and perpetual deadlocks, or if rather fundamental changes are possible. It has long been a mantra in the humanitarian community that 'there are no humanitarian solutions to humanitarian crises'. The Syrian case has revealed that indeed, solutions are political and depends on states' willingness to engage. As such, it is essential to try to minimize the politicization of decision-making bodies which authorize the use of international justice mechanisms so that the individuals who commit the most hideous crimes are effectively punished and that the international community can finally live up to the principles it has itself established.

ANNEX

Map of the Syrian Arab Republic



Map No. 4204 Rev. 3 UNITED NATIONS
April 2012

Department of Field Support
Cartographic Section

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