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Thesis Research

**Prosecution of War Crimes Committed during the Syrian
Armed Conflict on the Basis of Universal Jurisdiction**

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IHL410 Master's Thesis

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List of Abbreviations

Common Article 3 - Common Article 3 to the Geneva Conventions 1949

ECCC – the Extraordinary Chambers in the Courts of Cambodia

ECCHR – the European Center for Constitutional and Human Rights

ECHR – European Convention on Human Rights

ECtHR – European Court on Human Rights

IAC – international armed conflict

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

ICL – International Law Commission

ICRC – International Committee of the Red Cross

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

IHL – international humanitarian law

IIM – International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in Syrian Arab Republic

ISIS – Islamic State in Iraq and the Levant

NGOs – Non-governmental organisations

NIAC – non-international armed conflict

PCIJ – Permanent Court of International Justice

Rome Statute – Statute of the International Criminal Court, 17
July 1998, 2187 UNTS 90

SCSL - Special Court for Sierra Leone

UN – United Nations

UNTAET – United Nations Transitional Administration in East
Timor

Yerodia case - Arrest Warrant of 1 April 2000 (Democratic
Republic of the Congo v. Belgium), Judgment, I.C.J. Reports
2002, p. 3

1. Introduction

The armed conflict in Syria is one of the most complicated conflicts in the world. One of the central issues in the conflict is impunity. It leads to ongoing violations of international humanitarian law (hereinafter – IHL). Many of these violations committed on a daily-basis constitute international crimes, including war crimes. Consequently, there is a question of accountability of perpetrators of these crimes.

There are several possibilities to bring justice to the Syrian armed conflict, including international and national mechanisms. The current research aims to consider universal jurisdiction as one of the possible justice instruments. Although some scholars use the term universal jurisdiction to refer to the jurisdiction of international criminal courts and tribunals,¹ in this research universal jurisdiction means exclusively the competence of states to consider a case regardless of the link, or lack thereof, with the place where the crime was committed, the nationality of the perpetrator or the victim, or the existence of harm to the interest of the state.² In addition, this research will focus only on the applicability of universal jurisdiction for war crimes. Nonetheless, even though this research aims to indicate a legal framework only for war crimes, it can be used *mutatis mutandis* in the further analysis of the prosecutions of other crimes committed in the Syrian armed conflict and subject to universal jurisdiction.

This research does not intend to blame any state, armed group or a particular person for a violation of international law or committing an international crime. The aim of this thesis is to

¹ See, e.g., Sadat, 2001, p. 246; King, 2001, p. 283.

² Bouchet-Saulnier, 2002, p. 407; Strapatsas, 2002, p. 781; Broomhall, 2003, p. 106; Brownlie, 2008, p. 305.

analyse the potential of universal jurisdiction to contribute to the accountability process regarding war crimes committed during the conflict in Syria. In the current political situation, referral of the case to the International Criminal Court (hereinafter – ICC) or creation of a new international criminal tribunal is highly difficult because of the lack of consensus in the United Nations (hereinafter – UN) Security Council. At the same time, some states have already started to use universal jurisdiction in the prosecution of international crimes committed in Syria, including war crimes. This research aims to indicate the potential and limits of universal jurisdiction as an instrument to bring accountability for perpetrators of war crimes committed in the Syrian armed conflict.

Chapter 2 will give an outline of the Syrian armed conflict. The history of the conflict and its main actors will be addressed briefly. The gravity of violations and the obstacles to a peace agreement will also be analysed. These factors help explain why the question of accountability for war crimes is so important in the Syrian context. In Chapter 3 the possible options for criminal prosecution of international crimes committed during the Syrian armed conflict will be considered. The current barriers for referral of the case to the ICC will be analysed. Next, the possibility of the creation of a new tribunal for the investigation of crimes committed in Syria will be addressed. After that, possible national prosecutions will be examined. The purpose of this Chapter is to present the available options for bringing justice to Syria, and to demonstrate why most of them are not being applied at present. Furthermore, Chapter 3 indicates that at the present moment universal jurisdiction is a very significant instrument in the absence of any international prosecution. Chapter 4 offers a legal framework of the application of universal jurisdiction in the situation in Syria. In this Chapter treaty and customary rules establishing the grounds for universal

jurisdiction are analysed. Chapter 5 considers the procedural aspects and obstacles to the application of universal jurisdiction, such as the principle of subsidiarity, prosecution *in absentia*, immunity, amnesty, and state abuses. Chapter 6 deals with the main features of war crimes committed in the Syrian armed conflict. Applicable law and the elements of war crimes committed in Syria will be analysed, demonstrating that states have a basis to start investigations of war crimes committed in Syria. Chapter 7 aims to consider the further prospects for application of universal jurisdiction in the Syrian situation, such as conflicts of universal jurisdictions and possible collision of universal jurisdiction and the jurisdiction of the ICC. A conclusion will be given in Chapter 8.

2. Main Features of the Syrian Armed Conflict

2.1. Geography and Demography

The Syrian Arab Republic is situated on the eastern shore of the Mediterranean Sea in the Middle East. It has borders with the Mediterranean Sea and Lebanon to the west, Iraq to the east, Turkey to the north, Jordan to the south and Israel to the south-west.³

The history of the area covered by modern Syria started before biblical times. Nowadays, the Syrian population includes various religious and ethnic groups, such as Alawite Shia and Arab Sunnis (which constitute a majority of the Muslim population), Kurds, Armenians, Assyrians, Christians and Druze.⁴

Syria has an impressive volume of national cultural property. Six sites in Syria have been included in UNESCO's World Cultural Heritage list (the Ancient City of Aleppo, the Ancient City of Bosra, the Ancient City of Damascus, the Ancient Villages of Northern Syria, Crac des Chevaliers and Qal'at Salah El-Din, Site of Palmyra); twelve sites are on UNESCO's Tentative Inscription List for future consideration.⁵

2.2. Brief History of the Conflict

To better understand the nature of the Syrian conflict and its evolution from internal disturbances to civil war, the history of the conflict will be addressed briefly.

³ Petrovic and Hughes, 2016, p. 138.

⁴ *Ibid.*

⁵ UNESCO World Heritage Centre (2017), 'Syrian Arab Republic'. [Online] (Available at: <http://whc.unesco.org/en/statesparties/sy/> [Accessed 17 November 2017]).

The current president of Syria, Bashar al-Assad, came to power in 2000 after the death of the former president, his father Hafez al-Assad. The regime of Bashar al-Assad is highly criticized for its authoritarian tendencies.⁶

Disturbances in Syria started in March 2011 in Dar'a after the arrest of students for graffiti expressing opposition to the regime.⁷ During these disturbances, the security forces of the Syrian Government allegedly applied non-peaceful means of regulation of the demonstration such as shooting demonstrators dead, attacking a temporary hospital, opening fire on a crowd, and using tanks and artillery.⁸ The protests and violence intensified and spread to Homs, Latakia, Banyas, Hama, some suburbs of Damascus,⁹ and later in 2012 to Damascus and Aleppo.¹⁰

In July 2011 an opposition Free Syrian Army was established.¹¹ In October 2011 an opposition Syrian National Council was established in Istanbul.¹² In November 2012 the Syrian National Council joined with other opposition groups to set up the National Coalition for Syrian and Opposition Forces. Islamist

⁶ Groarke, 2015, p. 8; Moodrick-Even Khen, 2015, p. 300; Wallace/ McCarthy/ Reeves, 2017, pp. 558-559.

⁷ McHugo, 2004, p. 221; Williams, 2017, p. 269; Moodrick-Even Khen, 2015, p. 302; Wallace/ McCarthy/ Reeves, 2017, p. 561; UN General Assembly Resolution, "70/234. Situation of human rights in the Syrian Arab Republic", A/RES/70/234 (23 December 2015), Preamble.

⁸ UN General Assembly Resolution, "71/130. The situation in the Syrian Arab Republic", A/RES/71/130 (9 December 2016), Preamble; McHugo, 2004, pp. 221, 222, 225, 226, 228; Wallace/ McCarthy/ Reeves, 2017, p. 561.

⁹ McHugo, 2004, p. 222.

¹⁰ *Ibid*, p. 228.

¹¹ McHugo, 2004, p. 227; Petrovic and Hughes, 2016, p. 141; Moodrick-Even Khen, 2015, p. 302; Wallace/ McCarthy/ Reeves, 2017, p. 562.

¹² McHugo, 2004, p. 227; Wallace/ McCarthy/ Reeves, 2017, p. 562.

groups did not join.¹³ In December 2012 Western powers, Turkey and the Gulf States recognized the National Coalition as the ‘sole legitimate representative of the Syrian people.’¹⁴

In April 2013 the so-called Islamic State in Iraq and the Levant (also known as Daesh and ISIL) (hereinafter – ISIS) became active in Syria and took over Raqqa.¹⁵ By July 2014 ISIS controlled a third of Syria’s territory and most of its oil and gas production.¹⁶ During the conflict Islamic groups, including Nusra Front and ISIS, allegedly committed several terrorist attacks, indiscriminate killings and other atrocities.¹⁷

In addition, several chemical attacks have occurred during the conflict, taking the lives of hundreds of civilians.¹⁸ There are allegations that these attacks have been carried out mainly by Syrian government forces.¹⁹ However, Bashar Al-Assad has argued that since 2014 the Syrian government forces do not possess chemical weapons, instead blaming Western countries

¹³ McHugo, 2004, p. 228.

¹⁴ McHugo, 2004, p. 228; Petrovic and Hughes, 2016, p. 142.

¹⁵ McHugo, 2004, p. 231.

¹⁶ Petrovic and Hughes, 2016, pp. 141-142; Groarke, 2015, p. 20.

¹⁷ UN General Assembly Resolution, “70/234. Situation of human rights in the Syrian Arab Republic”, A/RES/70/234 (23 December 2015), Preamble, para. 5; UN General Assembly Resolution, “71/130. The situation in the Syrian Arab Republic”, A/RES/71/130 (9 December 2016), Preamble.

¹⁸ McHugo, 2004, p. 230; Petrovic and Hughes, 2016, p. 143; UN General Assembly Resolution, “70/234. Situation of human rights in the Syrian Arab Republic”, A/RES/70/234 (23 December 2015), para. 29; UN General Assembly Resolution, “71/130. The situation in the Syrian Arab Republic”, A/RES/71/130 (9 December 2016), Preamble; UN Human Rights Council, “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic”, A/HRC/34/64 (2 February 2017), paras 17, 52.

¹⁹ UN Human Rights Council, “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic”, A/HRC/34/64 (2 February 2017), paras 17, 52.

for assisting terrorists in the organisation of chemical attacks in order to demonize the Syrian Government.²⁰

Furthermore, since the beginning of the conflict, Syria's cultural heritage has been seriously damaged as a result of ongoing hostilities.²¹ All six sites included in the UNESCO World Cultural Heritage list are now also on the list of World Heritage in Danger.²²

Since the beginning of the conflict, variety of alliances, coalitions and other forms of cooperation have formed between Assad's Government, other States and armed groups.²³

The conflict has attracted the attention of a number of international organisations, non-governmental organisations (hereinafter – NGOs) and almost all states in the world. One of the reasons for this attention is the great number of refugees leaving the areas of the conflict since its very beginning.²⁴

The UN Security Council has adopted a number of resolutions concerning Syria since 2011. Several times the Security Council was not able to reach consensus and resolutions on significant

²⁰ TyrannyUnmasked, (2017) 'Assad say's "Trumps a Puppet" to Indian media مقابلة الرئيس الأسد مع قناة ويون الهندية', [video recording] (YouTube) (3 June 2017) (Available at: <https://www.youtube.com/watch?v=SxpvoVGXURM> [Accessed 1 December 2017]).

²¹ Petrovic and Hughes, 2016, pp. 143, 145-147.

²² UNESCO, World Heritage Committee, 'Decisions adopted during the 41st session of the World Heritage Committee', WHC/17/41.COM/18 [pdf] (Krakow, 2017), Decision: 41 COM 8C.2, para. 2. (Available at: <http://whc.unesco.org/archive/2017/whc17-41com-18-en.pdf> [Accessed 17 November 2017]).

²³ McHugo, 2004, pp. 229-230; Petrovic and Hughes, 2016, p. 141; UN Human Rights Council, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", A/HRC/34/64 (2 February 2017), paras 22, 23, 62.

²⁴ McHugo, 2004, p. 226; Wynn-Pope, 2016, p. 126; Williams, 2017, p. 270-271; UN General Assembly Resolution, "71/130. The situation in the Syrian Arab Republic", A/RES/71/130 (9 December 2016), Preamble.

matters were vetoed by the Russian Federation and China or solely by the Russian Federation.²⁵ For instance, on 4 February 2012 Russia and China vetoed a UN Security Council Draft Resolution calling on Government forces and armed opposition groups to stop all violence and reprisals.²⁶

Other organs and agencies of the UN have also addressed the Syrian conflict. There are huge numbers of the UN General Assembly resolutions,²⁷ UN Human Rights Council documents,²⁸ statements and resolutions of other organs and agencies.

In November 2011 Syria was suspended from the Arab League. The League imposed political and economic sanctions.²⁹

Negotiation and mediation processes have taken place several times in order to find a political solution to the Syrian conflict. However, almost all of them, like the Geneva talks in 2014 led

²⁵ UN General Assembly Resolution, “70/234. Situation of human rights in the Syrian Arab Republic”, A/RES/70/234 (23 December 2015), Preamble.

²⁶ McHugo, 2004, p. 227; UN, Meeting Coverage and Press Releases, ‘Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League’s Proposed Peace Plan’, (4 February 2012) (Available at: <https://www.un.org/press/en/2012/sc10536.doc.htm> [Accessed 29 November 2017]).

²⁷ See, e.g., UN General Assembly Resolution, “70/234. Situation of human rights in the Syrian Arab Republic”, A/RES/70/234 (23 December 2015); UN General Assembly Resolution, “71/130. The situation in the Syrian Arab Republic”, A/RES/71/130 (9 December 2016); UN General Assembly Resolution, “International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011”, A/RES/71/248 (21 December 2016).

²⁸ See, e.g., UN Human Rights Council, “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic”, A/HRC/34/64 (2 February 2017)

²⁹ McHugo, 2004, p. 227; HRW, ‘Arab League: Carry Out, Monitor Syria Sanctions. Take Consistent Approach to Uprisings in Region’ [media source] (29 March 2012) (Available at: <https://www.hrw.org/news/2012/03/29/arab-league-carry-out-monitor-syria-sanctions> [Accessed 30 November 2017]).

by the UN, have been unsuccessful.³⁰ As no political solution has been reached, the conflict is ongoing, and international crimes continue to be committed on a daily basis.³¹

2.3. Main Actors

It is possible to divide the main actors of the Syrian armed conflict into several groups: states, armed groups, international organisations and NGOs.

As for states, there are several coalitions that cooperate in different ways, including militarily, diplomatically, and financially.³² On 30 September 2015 Russia started military intervention in Syria with the consent of the Government of Bashar Al-Assad.³³ There are allegations that Russian air strikes are against not solely ISIS, but also other opposition armed groups that do not have an affiliation with ISIS.³⁴ Furthermore, Iran supports the Assad Government.³⁵

³⁰ McHugo, 2004, p. 232; Ruys, 2014, p. 254.

³¹ Kroker, P./ Kather, A.L. (2016) 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany' [blog] (EJIL: Talk!) (12 August 2016) (Available at: <https://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/> [Accessed 29 November 2017]).

³² Groarke, 2015, p. 5.

³³ Williams, 2017, p. 312; Wallace/ McCarthy/ Reeves, 2017, p. 570; Syrian Network for Human Rights (2015), 'Russian Airstrikes Kills 254 Civilians Including 83 Children and 42 Women' [pdf] (2 November 2015) (Available at: http://sn4hr.org/wp-content/pdf/english/Russian_aviation_caused_the_deaths_of_254_people_en.pdf [Accessed 29 November 2017]); UN Human Rights Council, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", A/HRC/34/64 (2 February 2017), paras 13, 14, 22.

³⁴ Williams, 2017, p. 313; Davis, 2016, p. 1167; Wallace/ McCarthy/ Reeves, 2017, p. 570.

³⁵ Groarke, 2015, p. 14; Williams, 2017, p. 314; Wallace/ McCarthy/ Reeves, 2017, pp. 570-571.

Some Western states have helped the opposition in the face of the National Coalition by recognising them as the legitimate representatives of the state. There are allegations that some states, i.e., the USA, Turkey, Qatar and Saudi Arabia, have assisted the opposition armed groups through military training, financing, and the supply of weapons.³⁶ Moreover, since 22 September 2014, the USA air forces have been fighting on Syrian territory against terrorist armed groups, such as ISIS, without the permission of the Assad government.³⁷ The USA is acting in coalition with other states, including the United Kingdom, France, Australia, Belgium, the Netherlands, Bahrain, Jordan, Saudi Arabia and the United Arab Emirates. All of these states also take part in air strikes in Syria.³⁸ Furthermore, there are allegations from the Syrian President that the USA is supporting terrorist groups fighting on Syrian territory, i.e., ISIS and al-Nusra.³⁹ In addition, Turkey is applying force against ISIS and Kurdish militia without the consent of the Syrian Government.⁴⁰

³⁶ Groarke, 2015, p. 20; Williams, 2017, pp. 313, 315; Davis, 2016, p. 1167; Ruys, 2014, pp. 254-255; Wallace/ McCarthy/ Reeves, 2017, pp. 562-564, 571.

³⁷ Groarke, 2015, p. 20; Williams, 2017, p. 296.

³⁸ Williams, 2017, p. 277; Wallace/ McCarthy/ Reeves, 2017, p. 571; Geneva Academy: Rulac, 'International armed conflicts in Syria' [online] (Last updated: 14 February 2018) (Available at: <http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria> [Accessed 10 March 2018]).

³⁹ TyrannyUnmasked, (2017) 'Assad say's "Trumps a Puppet" to Indian media مقابلة الرئيس الأسد مع قناة ويون الهندية', [video recording] (YouTube) (3 June 2017) (Available at: <https://www.youtube.com/watch?v=SxpvoVGXURM> [Accessed 1 December 2017]).

⁴⁰ Geneva Academy: Rulac, 'International armed conflicts in Syria' [online] (Last updated: 14 February 2018) (Available at: <http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria> [Accessed 10 March 2018]); UN Security Council, 'Identical letters dated 18 January 2016 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-

As for the armed groups, there are the following fighters: the National Coalition, the Kurdish Islamic Front, Kurdish Popular Protection Units, the Democratic Union Party, Hay'at Tahrir al'Sham (formerly Jabhat al-Nusra), ISIS, the Ba'ath Brigades, the Tiger Forces, Liwa al-Quds Brigade and others; and foreign fighters such as the Al-Quds Brigades, the Islamic Revolutionary Guard Corps, Hezbollah, Asa-ib Ahl al-Haq, Liwa' Abu al-Fadl al-Abbas, Afghan militias and the Iraqi al-Nujabaa and al-Fatimiyoona militias, etc.⁴¹ Some of them are fighting against the Assad Government, e.g., the National Coalition, ISIS, Kurds, Nusra Front, while some allegedly support the Government, e.g., the above-mentioned foreign terrorist fighters.⁴² At the same time, most of them are fighting against each other, some of them in a coalition.

As was mentioned before, the conflict has attracted the attention of international organisations and NGOs. During the conflict, UN monitoring was established by a Security Council resolution;⁴³ the Independent International Commission of Inquiry on the Syrian Arab Republic was established by the Human Rights Council;⁴⁴ and the International, Impartial and

General and the President of the Security Council', S/2016/45 (22 January 2016), pp. 2-3.

⁴¹ UN General Assembly Resolution, "70/234. Situation of human rights in the Syrian Arab Republic", A/RES/70/234 (23 December 2015), para. 14; UN Human Rights Council, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", A/HRC/34/64 (2 February 2017), para. 23; Moodrick-Even Khen, 2015, p. 302; Wallace/McCarthy/Reeves, 2017, pp. 565-568.

⁴² UN General Assembly Resolution, "70/234. Situation of human rights in the Syrian Arab Republic", A/RES/70/234 (23 December 2015), para. 14; Wallace/McCarthy/Reeves, 2017, pp. 562-570.

⁴³ UN Security Council Resolution, S/RES/2165 (2014) (14 July 2014), para. 3.

⁴⁴ UN Human Rights Council Resolution, "S-17/1. The human rights situation in the Syrian Arab Republic", A/HRC/S-17/1 (23 August 2011), para. 12.

Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in Syrian Arab Republic (hereinafter – IIIM) was created by a General Assembly resolution.⁴⁵

Several international and national NGOs periodically address different issues of the Syrian conflict, such as TRIAL International, the Violation Documentation Centre in Syria, Amnesty International, Human Rights Watch, etc.⁴⁶ Some of these NGOs are playing an important role in the promotion of justice in Syria.

2.4. Gravity of Violations

According to the General Assembly resolutions,⁴⁷ the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,⁴⁸ NGOs' reports,⁴⁹ refugees' testimonies

⁴⁵ UN General Assembly Resolution, "International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011" A/RES/71/248 (21 December 2016), para. 4.

⁴⁶ See, e.g., TRIAL International (2017), 'Make way for Justice #3. Universal Jurisdiction, Annual Review 2017' (Geneva: TRIAL International); Human Rights Watch (October, 2017), "These Are the Crimes We Are Fleeing: Justice for Syria in Swedish and German Courts" (USA: Human Rights Watch); Amnesty International (2017), "Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison, Syria" (London: Amnesty International Ltd); Violation Documentation Centre in Syria (2017), 'Monthly Statistical Report on Victims. September 2017' [pdf] (Available at: http://vdc-sy.net/wp-content/uploads/2017/10/Monthly_Stat_Rep_September17_EN.pdf [Accessed 29 November 2017]).

⁴⁷ UN General Assembly Resolution, "70/234. Situation of human rights in the Syrian Arab Republic", A/RES/70/234 (23 December 2015), Preamble, paras 4, 5, 23, 29; UN General Assembly Resolution, "71/130. The situation in the Syrian Arab Republic", A/RES/71/130 (9 December 2016), Preamble.

⁴⁸ UN Human Rights Council, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", A/HRC/34/64 (2 February 2017), Summary, para 94.

and other sources of information,⁵⁰ there are allegations that all actors fighting in the Syrian armed conflict have been responsible for indiscriminate attacks against civilians, use of prohibited weapons, and other grave violations of international humanitarian law (hereinafter - IHL) as well as violations and abuses of human rights which may constitute war crimes and crimes against humanity.⁵¹

The level of violence and the gravity of violations occurring in the Syrian armed conflict make the conflict one of the most severe at the present time. The scale of the conflict is comparable with such past conflicts as those in Rwanda and in the former Yugoslavia. At the same time, the conflict in Syria has some very specific features which make it different from all other conflicts before, such as the level of international interference, the huge numbers of non-state and state actors fighting in the conflict, the high level of organisation of terrorist groups, and the huge number of refugees and internally displaced persons.

2.5. Obstacles to a Peace Agreement

There are several factors which can be considered as barriers to reach a peaceful agreement in the conflict and end the bloody war.

⁴⁹ Violation Documentation Centre in Syria (2017), 'Monthly Statistical Report on Victims. September 2017' [pdf] (Available at: http://vdc-sy.net/wp-content/uploads/2017/10/Monthly_Stat_Rep_September17_EN.pdf [Accessed 29 November 2017]).

⁵⁰ Knight, B. (2016) 'Refugees in Germany reporting dozens of war crimes' [media source] (Deutsche Welle) (11 April 2016) (Available at: <http://www.dw.com/en/refugees-in-germany-reporting-dozens-of-war-crimes/a-19179291> [Accessed 29 November 2017]).

⁵¹ UN Human Rights Council, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", A/HRC/34/64 (2 February 2017), paras 54-56, 98, Annex I, paras 40-42.

Firstly, the level of international interference makes the conflict complicated and difficult to resolve by a compromise agreement or victory of one of the parties to the conflict. This interference makes Syria the arena where other states are acting in their interests and trying to achieve their ambitions.⁵² Power sharing in Syria is one of the main reasons why the UN Security Council is not able to reach an agreement on some important issues concerning the Syrian conflict.

Another obstacle for peace regulation is the legitimacy of the Assad regime. Some actors involved in the Syrian armed conflict do not accept the legitimacy of the Assad Government, meanwhile, others do not accept the legitimacy of the opposition. Therefore, it is extremely difficult to achieve consensus as this is a very sensitive issue for some actors. The UN General Assembly stressed on the necessity to establish an inclusive transnational governing body with full executive power.⁵³

Impunity is also an important barrier to peace in Syria.⁵⁴ As was mentioned before, there are serious grounds to allege that a huge number of severe international crimes have been committed since the beginning of the Syrian armed conflict. Justice and accountability are indispensable in the Syrian situation: without them the cycle of violence is likely to continue. Justice could be achieved through fair and independent domestic or international

⁵² Groarke, 2015, p. 5.

⁵³ UN General Assembly Resolution, “71/130. The situation in the Syrian Arab Republic”, A/RES/71/130 (9 December 2016), para. 6.

⁵⁴ UN General Assembly Resolution, “70/234. Situation of human rights in the Syrian Arab Republic”, A/RES/70/234 (23 December 2015), Preamble, para. 20; UN General Assembly Resolution, “71/130. The situation in the Syrian Arab Republic”, A/RES/71/130 (9 December 2016), Preamble.

criminal justice mechanisms.⁵⁵ This research aims to investigate the potential possibility of instruments such as universal jurisdiction to help solve the problem of impunity in Syria.

⁵⁵ UN General Assembly Resolution, “70/234. Situation of human rights in the Syrian Arab Republic”, A/RES/70/234 (23 December 2015), para. 34; UN General Assembly Resolution, “71/130. The situation in the Syrian Arab Republic”, A/RES/71/130 (9 December 2016), para. 9; UN General Assembly Resolution, “International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011”, A/RES/71/248 (21 December 2016), para. 1.

3. Possible Alternatives to Criminal Prosecution of International Crimes Committed in the Syrian Armed Conflict

3.1. International Criminal Court

In the current moment of the development of international criminal law, there is a permanent institution that aims to deal with the most serious crimes of international concern—the International Criminal Court.⁵⁶ Unlike its predecessors, the ICC was established by international treaty—the Rome Statute of International Criminal Court (hereinafter – the Rome Statute).

The Syrian Arab Republic is not a party to the Rome Statute.⁵⁷ At the time of its adoption, Syria was among the states that voted against the Rome Statute.⁵⁸ Nonetheless, in 2000 Syria signed the Statute. It has not yet ratified it.⁵⁹ According to the principle *pacta tertiis nec nocent nec prosunt*,⁶⁰ Syria is not bound by the Rome Statute, and this treaty *per se* may neither harm nor benefit Syria as a third party.

Jurisdiction of the ICC is restricted by the provisions of the Rome Statute. There are restrictions *ratione personae*,⁶¹ *ratione*

⁵⁶ Rome Statute of the International Criminal Court, 17 July 1998, Art. 1.

⁵⁷ United Nations Treaty Collection, ‘10. Rome Statute of the International Criminal Court’ (status as at: 28-12-2017 07:30:25 EDT) [Online] (Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-10&chapter=18&clang=_en [Accessed 29.12.2017]).

⁵⁸ Cassese *et al.*, 2013, p. 263.

⁵⁹ United Nations Treaty Collection, ‘10. Rome Statute of the International Criminal Court’ (status as at : 28-12-2017 07:30:25 EDT) [Online] (Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-10&chapter=18&clang=_en [Accessed 29.12.2017]).

⁶⁰ See Vienna Convention on the Law of Treaties, 23 May 1969, Art. 34.

⁶¹ Rome Statute of the International Criminal Court, 17 July 1998, Art. 25, 26.

materiae,⁶² *ratione temporis*⁶³ and *ratione loci*.⁶⁴ Article 12 of the Rome Statute sets preconditions for the exercise of jurisdiction based on two jurisdictional principles: nationality and territoriality.⁶⁵ According to paragraphs 1 and 2 of Article 12, respectively, a state accepts the jurisdiction of the ICC over its citizens (whenever they commit a crime falling within the scope of *ratione materiae*) and over its territory (whoever commits a crime falling within the scope of *ratione materiae*) by becoming a Party to the Rome Statute or by lodging a declaration with the Registrar accepting jurisdiction of the ICC. Syria is neither a Party to the Rome Statute, nor has it lodged a declaration accepting its jurisdiction. Consequently, crimes committed in the Syrian armed conflict cannot be considered on the grounds of Syria's acceptance of the jurisdiction of the Court over its territory or its citizens. Theoretically, the ICC may exercise personal jurisdiction over persons who are nationals of States Parties to the Rome Statute and allegedly have committed crimes during the Syrian armed conflict.⁶⁶

Article 13 states that the jurisdiction of the ICC is triggered in three cases. The first option is when a situation is referred to the Prosecutor by a State Party to the Rome Statute (or based on Article 12(3) of the Rome Statute). The second option is when a situation is referred to the Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter. And

⁶² *Ibid*, Art. 5, 15 bis, 15 ter.

⁶³ *Ibid*, Art. 11.

⁶⁴ *Ibid*, Art. 12(2).

⁶⁵ Bekou/ Cryer, 2007, p. 53.

⁶⁶ Sayapin, S. (2016), 'A "Hybrid" Tribunal for Daesh?' [blog] (EJIL: Talks!) (4 May 2016) (Available at: <https://www.ejiltalk.org/a-hybrid-tribunal-for-daesh/> [Accessed 29 November 2017]).

thirdly, the Prosecutor can initiate an investigation *proprio motu* with preconditions established in Article 12.

This means that the jurisdiction of the ICC is possible in two cases: in the case of the sovereign desire of a state to become a Party to the Rome Statute and/or refer the situation to the ICC, or in the case of consensus within the UN Security Council to refer the situation to the ICC.

Currently, the resolution to refer the case to the ICC has not been adopted because there is no consensus within the Security Council. In 2014, France attempted to refer the situation to the ICC by bringing to a vote the draft resolution supported by 65 states. However, two permanent members (Russia and China) voted against its adoption.⁶⁷ The representative of China explained his vote with the reason that China is not a Party to the ICC Statute, and their position is against the referral of the case to the ICC without the wish of the sovereign state.⁶⁸ The representative of the Russian Federation explained the position of Russia by saying that in the current situation it is necessary to establish peace first, and referral of the situation to the ICC could add fuel to the flame of the conflict.⁶⁹ It is important to note that neither China nor Russia were against bringing justice to the conflict, but both considered that the establishment of peace should be the first priority.⁷⁰

⁶⁷ United Nations Meeting Coverage and Press Releases, Security Council, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution', (SC/ 11407, 22 May 2014) [Online] (Available at: <https://www.un.org/press/en/2014/sc11407.doc.htm> [Accessed 12.01.2018]).

⁶⁸ UN Security Council, 7180th Meeting Record, S/PV.7180 (22 May 2014), pp. 13-14.

⁶⁹ *Ibid*, p. 13.

⁷⁰ *Ibid*, pp. 13-14.

From the Meeting Record of the UN Security Council meeting that considered referral of the situation to the ICC, it is possible to conclude that there is tension within the Security Council on this matter. All permanent members blamed each other: for preventing justice, interfering in the conflict, supplying weapons to the parties to the conflict or preventing the process of political negotiation.⁷¹ It is also possible to conclude that the draft Resolution was brought to a vote with the knowledge that the Resolution would not be adopted.⁷²

Furthermore, the ICC exercises its jurisdiction in accordance with the principle of complementarity.⁷³ That means that the ICC is the court of ‘last resort,’ which can exercise its jurisdiction when States are unwilling or unable to carry out investigations or prosecutions of persons accused of crimes.⁷⁴ Therefore, it is necessary to mention the position of the Syrian Government on the question of referral of the situation to the ICC. Syria stressed several times that it is able and willing to investigate and prosecute crimes committed on its territory.⁷⁵ That means that if the ICC had jurisdiction and the Syrian Arab Republic submitted concrete evidence revealing ongoing investigation (the burden of proof on ongoing investigation lies on the relevant State),⁷⁶ the Prosecutor would need to show in every particular case circumstances indicated in paragraphs 2

⁷¹ *Ibid*, pp. 4-7, 12-14.

⁷² *Ibid*, pp. 12-14.

⁷³ Rome Statute of the International Criminal Court, 17 July 1998, Preamble, Art. 1.

⁷⁴ Rome Statute of the International Criminal Court, 17 July 1998, Art. 17(1); Triffterer/ Bergsmo/ Ambos, 2016, p. 13.

⁷⁵ UN Security Council, 7180th Meeting Record, S/PV.7180 (22 May 2014), p. 16.

⁷⁶ Schabas/ El Zeidy, 2016, pp. 802-803.

and 3 of Article 17 of the Rome Statute proving that Syria is unable or unwilling to carry out investigations or prosecutions of persons accused of a crime.⁷⁷

Furthermore, in 2014, the representative of Syria expressed his fear that if the resolution to refer the Syrian situation were adopted by the Security Council, the cases and evidence could be falsified by some countries, and some of the perpetrators could stay under the curtain by hiding evidence.⁷⁸ He also highlighted that Syria does not oppose justice, however, because the crime of aggression was not included in the jurisdiction of the Court, Syria is not a party to the Statute.⁷⁹ Currently, the Court still does not have jurisdiction over the crime of aggression; and if the Kampala amendments enter into force, the Court will be empowered to exercise its jurisdiction in very restricted circumstances: after one year when amendments are adopted and when an aggressor state has ratified the amendments.⁸⁰ These restrictions allow the conclusion that even if the Kampala amendments enter into force, the Syrian Government would not rush to become a Party to the Rome Statute.

In addition, some scholars argue that international criminal justice is a post-conflict mechanism.⁸¹ The armed conflict in

⁷⁷ Broomhall, 2003, p. 90; Nouwen, 2011, pp. 209-210; Schabas/ El Zeidy, 2016, p. 798.

⁷⁸ UN Security Council, 7180th Meeting Record, S/PV.7180 (22 May 2014), pp. 16-17.

⁷⁹ *Ibid*, pp. 16-17.

⁸⁰ Coalition for the International Criminal Court, 'The crime of aggression: All you need to know', [Online] (Available at: <http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression> [Accessed 12 January 2018]).

⁸¹ Sayapin, S. (2016), 'A "Hybrid" Tribunal for Daesh?' [blog] (EJIL: Talks!) (4 May 2016) (Available at: <https://www.ejiltalk.org/a-hybrid-tribunal-for-daesh/> [Accessed 29 November 2017]).

Syria is ongoing. Using this as an argument for non-referral of the situation to the ICC, China and Russia vetoed the draft of the Security Council Resolution.⁸² At the same time, this argumentation is disputable. There are some reasons why justice can happen notwithstanding that the conflict is ongoing. Firstly, justice and accountability can have an important role in solving impunity. Justice can have a preventive effect for future crimes by showing that violations of human rights and IHL do not go unpunished. This effect will be much stronger if the investigation procedure starts while the conflict is ongoing, and can help to avoid human suffering. Secondly, justice can contribute to the restoration and maintenance of peace. Moreover, justice can satisfy the reasonable desire of victims for accountability. It can also assist in the process of national restoration. One can say that the possibility of judgment mistakes is higher during an ongoing armed conflict. In truth, the ongoing armed conflict can be a serious barrier to the collection of evidence. However, unlike the military tribunals in Nuremberg and Tokyo, the current system of international criminal justice has many more guarantees for a fair trial for defence, e.g., appeal procedures. Moreover, the fact that the procedure starts in a time when the conflict is ongoing does not mean that it will be finished before the end of the conflict. Nonetheless, the Syrian example shows that it is difficult to achieve a consensus about the establishment of international criminal justice mechanisms when the conflict is ongoing.

At the same time, previous experience shows that, unfortunately, referral of a situation to the ICC does not always lead to immediate establishment of a justice mechanism or peace settlement. For instance, more than six years have passed since

⁸² UN Security Council, 7180th Meeting Record, S/PV.7180 (22 May 2014), pp. 12-14.

the moment when the UN Security Council referred the situation in Libya to the ICC.⁸³ Nonetheless, the Prosecutor of the ICC indicated in her report to the UN Security Council that some problems such as impunity, the risk of returning to widespread conflict, and ongoing violations of human rights and IHL are still very relevant to the situation in Libya.⁸⁴ This shows that the establishment of the jurisdiction of the ICC cannot guarantee the immediate end of impunity and violence in the conflict, but should be considered as a step in this direction.

Even if the above-mentioned Resolution were adopted by the Security Council, the activities of the ICC could be ineffective because its efficacy relies upon state cooperation.⁸⁵ In the case when the Syrian Government, Russia, and the USA have neither *prima facie* obligation⁸⁶ nor voluntary desire⁸⁷ to cooperate with

⁸³ See UN Security Council Resolution, S/RES/1970 (15 February 2011).

⁸⁴ ICC, 'Thirteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)', (8 May 2017) [online] (Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib> [Accessed 16 December 2017]), paras 3, 23, 26-28, 30, 31.

⁸⁵ ICC, 'Thirteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)', (8 May 2017) [online] (Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib> [Accessed 16 December 2017]), para. 11; Oosterveld/ Perry/ McManus, 2002, p. 767; Bekou/ Cryer, 2007, p. 60; Broomhall, 2003, p. 155; Kreß/ Prost, 2016, p. 2004.

⁸⁶ United Nations Treaty Collection, '10. Rome Statute of the International Criminal Court' (status as at : 28-12-2017 07:30:25 EDT) [Online] (Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en [Accessed 29.12.2017]); Vienna Convention on the Law of Treaties, 23 May 1969, Art. 35; Oosterveld/ Perry/ McManus, 2002, p. 788.

⁸⁷ See The Independent, 'Russia withdraws signature from ICC founding statute' (16 November 2016) [Online] (Available at: <https://www.independent.co.uk/news/world/russia-withdraws-signature-icc-founding-statute/> [Accessed 12 January 2018]); BBC News, 'US renounces world court treaty' (6 May 2002) [Online] (Available at: <http://news.bbc.co.uk/2/hi/americas/1970312.stm> [Accessed 12 January]); UN Security Council, 7180th Meeting Record, S/PV.7180 (22 May 2014), pp. 16-17; Boas / Chifflet, 2017, p. 55.

the ICC (although the Security Council could include in the Resolution the obligation for States, i.e., Syria, to cooperate with the ICC⁸⁸), it is difficult to imagine that the ICC has the potential to be effective.

Furthermore, the ICC cannot and does not aim to prosecute all crimes committed in the situation in Syria. The purpose of the ICC is to prosecute the most serious crimes,⁸⁹ while other crimes need to be prosecuted through other mechanisms.

3.2. Special Criminal Tribunal *Ad Hoc*

Another possibility for bringing justice to Syria is through special criminal tribunal *ad hoc*. These tribunals were established by the UN Security Council Resolutions acting under Chapter VII of the UN Charter⁹⁰ to consider situations in Rwanda and the Former Yugoslavia and have proved capable of dispensing fair justice.⁹¹

There is a difference between the establishment of the International Criminal Tribunal for the former Yugoslavia (hereinafter - ICTY) and the International Criminal Tribunal for Rwanda (hereinafter – ICTR). The first was established solely by the Security Council, while the ICTR was established after the request of the Government of Rwanda to establish a criminal

⁸⁸ See, e.g., UN Security Council Resolution, S/RES/1593 (31 March 2005), para. 2; UN Security Council Resolution, S/RES/1970 (26 February 2011), para. 5.

⁸⁹ Rome Statute of the International Criminal Court, 17 July 1998, Preamble.

⁹⁰ UN Security Council Resolution, S/RES/808 (1993) (22 February 1993), Annex, Statute of the International Criminal Tribunal for the Former Yugoslavia, Preamble; UN Security Council Resolution, S/RES/955 (1994) (8 November 1994), Annex, Statute of the International Tribunal for Rwanda, Preamble.

⁹¹ Cassese *et al.*, 2013, p. 262.

tribunal.⁹² At the same time, it is necessary to highlight that, in general, the mechanism of establishment of an *ad hoc* tribunal is similar to the mechanism to refer a situation to the ICC. In accordance with Article 27 of the UN Charter, for the adoption of a UN Security Council resolution on these matters a minimum of nine affirmative votes, including the concurring votes of the five permanent members, are required. Currently, it seems that in the case of Syria this consensus is highly difficult to achieve.

Furthermore, the creation of a new tribunal would require significant resources, which seems to be excessive and unnecessary in the current situation, when a permanent international criminal institution with the potential to consider the situation in Syria already exists.

At the same time, the *ad hoc* tribunals do not have a principle of subsidiarity of jurisdiction as the ICC has.⁹³ According to the Statutes of the *ad hoc* tribunals, the ICTY and the ICTR have primacy over the national courts of all states.⁹⁴ This means that unlike the ICC, the *ad hoc* tribunals can have a superior jurisdiction. If the situation in Syria is considered by an *ad hoc* tribunal, its statute could have a similar provision to allow the *ad hoc* tribunal to exercise jurisdiction without proving in every particular case the unwillingness or inability of the Syrian

⁹² UN Security Council Resolution, S/RES/808 (1993) (22 February 1993), para. 1; UN Security Council Resolution, S/RES/955 (1994) (8 November 1994), para. 1.

⁹³ Rome Statute of the International Criminal Court, 17 July 1998, Preamble, Art. 1, 17.

⁹⁴ UN Security Council Resolution, S/RES/808 (1993) (22 February 1993), Annex, Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 9; UN Security Council Resolution, S/RES/955 (1994) (8 November 1994), Annex, Statute of the International Tribunal for Rwanda, Art. 8.

judicial system to conduct proceedings itself.⁹⁵ A statute of an *ad hoc* tribunal could have a provision that at any stage the *ad hoc* tribunal may formally request domestic courts to defer to its jurisdiction.⁹⁶ This could be an important factor taking into account the statement of Syria about its desire and will to prosecute crimes committed in Syria.

Furthermore, the jurisdiction of a potential new *ad hoc* tribunal could be different from the jurisdiction of the ICC and could include the crimes of aggression, terrorism, or other crimes which correspond to the violations committed in Syria. This could be a significant step in the development of international criminal law. However, insofar as it has been difficult to achieve a consensus on the transfer the situation to the ICC, the creation of a new *ad hoc* tribunal with jurisdiction wider than the ICC currently looks unrealistic.

3.3. Hybrid Tribunals

The international criminal justice can also be exercised through the combination of international and national mechanisms. This is the so-called ‘hybrid tribunals’ approach based on internationalised or mixed courts.

The Special Court for Sierra Leone (hereinafter - SCSL) was established by the Agreement of 16 January 2002 between the UN and Sierra Leone.⁹⁷ Its Statute was drafted by the Secretary-

⁹⁵ Rome Statute of the International Criminal Court, 17 July 1998, Art. 17(2) and (3).

⁹⁶ See UN Security Council Resolution, S/RES/808 (1993) (22 February 1993), Annex, Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 9(2); UN Security Council Resolution, S/RES/955 (1994) (8 November 1994), Annex, Statute of the International Tribunal for Rwanda, Art. 8(2).

⁹⁷ Cassese *et al.*, 2013, p. 263.

General after the request of Sierra Leone.⁹⁸ It was composed of nationals of Sierra Leone and international judges and staff.⁹⁹ The SCSL has jurisdiction over crimes against humanity, violations of Common Article 3 to the Geneva Conventions 1949 (hereinafter – Common Article 3) and Additional Protocol II, other serious violations of IHL, and some criminal offences under Sierra Leone law.¹⁰⁰ According to the Statute of the SCSL, the Court has primacy over the national courts of Sierra Leone.¹⁰¹

For the situation in East Timor, according to Section 10 of the United Nations Transitional Administration in East Timor (hereinafter – UNTAET) Regulation 2000/11 (as amended by Regulation 2001/25), ex-part of the Dili District Court—the Special Panels for Serious Crimes— received jurisdiction over genocide, war crimes, and crimes against humanity, as well as murder and sexual offences, committed between 1 January 1999 and 25 October 1999.¹⁰² The UNTAET Regulation 2000/11 has the notion of ‘universal jurisdiction’ which in terms of the Regulation means jurisdiction “irrespective of whether: (a) the serious criminal offence at issue was committed within the territory of East Timor; (b) the serious criminal offence was

⁹⁸ UN Security Council Resolution, S/RES/1315 (2000) (14 August 2000), Preamble; Cassese *et al.*, 2013, p. 263.

⁹⁹ UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, Art. 12(1).

¹⁰⁰ *Ibid*, Art. 3-5.

¹⁰¹ *Ibid*, Art. 8.

¹⁰² UNTAET, ‘Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences’, UNTAET/REG/2000/15 (6 June 2000), Art. 1.1 - 1.3, 2.4, 2.5.

committed by an East Timorese citizen; or (c) the victim of the serious criminal offence was an East Timorese citizen.”¹⁰³

Furthermore, the Extraordinary Chambers in the Courts of Cambodia (hereinafter - ECCC) were created by the Cambodian Parliament for accountability of crimes committed during the period of Democratic Kampuchea. The ECCC is a result of negotiations of the Cambodian Parliament with the UN, and it has a mixed composition of Cambodians and international personnel.¹⁰⁴ Internationalised or mixed tribunals also were established in Bosnia and Herzegovina, Lebanon and Kosovo.¹⁰⁵

There are some advantages and disadvantages in the establishment of this kind of tribunal for Syria.

Firstly, such a tribunal would most likely be located on the territory of the Syrian Arab Republic, where the crimes allegedly have been perpetrated. That means that the Court will have a direct impact on the Syrian population.¹⁰⁶ Besides, the Court would have fast and direct accesses to all evidence of the crimes. Apart from these practical reasons, the place could have a symbolic reason too, like the establishment of the Military Tribunals in Nuremberg and Tokyo.¹⁰⁷

¹⁰³ *Ibid*, Art. 2.2.

¹⁰⁴ Cassese *et al.*, 2013, p. 264.

¹⁰⁵ Cassese *et al.*, 2013, p. 264-265; Bantekas/ Nash, 2003, p. 397.

¹⁰⁶ Cassese *et al.*, 2013, p. 266.

¹⁰⁷ Sayapin, S. (2016), ‘A “Hybrid” Tribunal for Daesh?’ [blog] (EJIL: Talks!) (4 May 2016) (Available at: <https://www.ejiltalk.org/a-hybrid-tribunal-for-daesh/> [Accessed 29 November 2017]).

Secondly, the cost of such a trial would be relatively inexpensive in comparison with the cost of the procedure in the ICC or the cost of establishment of a new *ad hoc* tribunal.¹⁰⁸

Thirdly, the mechanism of establishment of such a tribunal would be a political agreement. This agreement could be concluded by the states who are involved in the conflict, with or without the participation of the UN.¹⁰⁹ Political compromise could have a fruitful effect on the establishment of peace. The Syrian Government has expressed its desire to prosecute crimes allegedly committed in its territory. As an armed conflict can have a negative effect on the judicial system of a state, a hybrid tribunal could be a good tool in helping Syrian courts to deal with crimes committed during the Syrian conflict.¹¹⁰ Moreover, the current geopolitical situation does not allow for referral of the case to the ICC or the establishment of a tribunal *ad hoc*—therefore, the creation of a hybrid tribunal could help to bring justice and solve impunity problems based on cooperation.

Fourthly, practice shows that internationalised or mixed tribunals do not take as long as trials conducted by the ICC or the *ad hoc* tribunals.¹¹¹ One of the reasons for the speed of procedure can be the official language of the hybrid tribunal:

¹⁰⁸ Cassese *et al.*, 2013, p. 265.

¹⁰⁹ Sayapin, S. (2016), ‘A “Hybrid” Tribunal for Daesh?’ [blog] (EJIL: Talks!) (4 May 2016) (Available at: <https://www.ejiltalk.org/a-hybrid-tribunal-for-daesh/> [Accessed 29 November 2017]); Van Schaack, B. (2014), ‘Alternative Jurisdictional Bases for a Hybrid Tribunal for Syria’ [blog] (Just Security) (29 May 2014) (Available at: <https://www.justsecurity.org/10968/alternative-jurisdictional-bases-hybrid-tribunal-syria/> [Accessed 29 November 2017]).

¹¹⁰ Cassese *et al.*, 2013, p. 265.

¹¹¹ See, e.g., ICTY, ‘ICTY convicts Ratko Mladić for genocide, war crimes and crimes against humanity’, (22 November 2017) [Online] (Available at: <http://www.icty.org/en/press/icty-convicts-ratko-mladi%C4%87-for-genocide-war-crimes-and-crimes-against-humanity> [Accessed 12 January 2017]).

Arabic could be among the official languages because it is the official language of Syria and the most popular language in the Middle East.¹¹²

Fifthly, a hybrid tribunal could be a guarantee that the criminal procedure is unbiased and fair trial standards are observed.

Sixthly, as Sayapin has noted, the legal basis for a hybrid tribunal for Syria could combine elements of secular international criminal law and procedure and of relevant substantive and procedural rules of Islamic international criminal law. Personnel, i.e., judges, prosecutors and defence lawyers, could also include scholars and practitioners of Islamic international law.¹¹³ This could add legitimacy and credibility to the tribunal in the eyes of Islamic communities.¹¹⁴ Furthermore, prosecution of the crimes committed by Islamic terrorists could stigmatize this behaviour as prohibited not only by international criminal law but also by Islamic religion and law.¹¹⁵ It could have a long-term effect by showing that these terrorists groups are minorities in the Islamic world and helping to prevent Islamophobia.

At the same time, there are some obstacles to the establishment of a hybrid tribunal for Syria. Firstly, there is a lack of assurance that international and national personnel would cooperate effectively in a close, constructive and constant way.¹¹⁶

¹¹² Sayapin, S. (2016), 'A "Hybrid" Tribunal for Daesh?' [blog] (EJIL: Talks!) (4 May 2016) (Available at: <https://www.ejiltalk.org/a-hybrid-tribunal-for-daesh/> [Accessed 29 November 2017]).

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Cassese *et al.*, 2013, p. 266.

Moreover, the problem of smooth cooperation on the bench could also arise.¹¹⁷

Secondly, there is a problem of funding.¹¹⁸ However, like previous tribunals, the tribunal could be co-financing by the UN and the contributing countries.¹¹⁹

Thirdly, even though there are some advantages when the Court sits in the place where events occurred, there is an issue of security.¹²⁰ The trial against former Liberian President Charles Taylor is being held in The Hague, not in Freetown. And the Special Tribunal for Lebanon is in The Hague, not in Beirut. Similarly, some trials could take place not in Syria but in another state, meanwhile, most of the procedures could take place in the safest areas of the Syrian Arab Republic.

3.4. Domestic Courts

3.4.1. Syrian Courts

Despite the existence of various types of international criminal tribunals, domestic systems have a huge role in the implementation of international criminal law. The Geneva Conventions of 1949 established an obligation for States Parties “to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of the Conventions.¹²¹ Additional Protocols I and III also establish the

¹¹⁷ *Ibid*, p. 267.

¹¹⁸ *Ibid*, p. 267.

¹¹⁹ Sayapin, S. (2016), ‘A “Hybrid” Tribunal for Daesh?’ [blog] (EJIL: Talks!) (4 May 2016) (Available at: <https://www.ejiltalk.org/a-hybrid-tribunal-for-daesh/> [Accessed 29 November 2017]).

¹²⁰ Cassese *et al.*, 2013, p. 267.

¹²¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 50;

obligation for States Parties to prosecute breaches and grave breaches of the Protocol I and misuse of the distinctive emblems, respectively.¹²² The obligation of the State to investigate and prosecute war crimes also logically follows from the principle of complementarity of the ICC. The Rome Statute does not directly establish the obligation of the State to prosecute international crimes. However, the ICC does not aim to prosecute all crimes committed under its jurisdiction *ratione materiae*, rather it aims to prosecute the most serious crimes of international concerns. Logically, other crimes shall be prosecuted mainly by national courts on different jurisdictional grounds.¹²³

Territoriality is a traditional link for criminal prosecution.¹²⁴ In the *Lotus* case, the Permanent Court of International Justice (hereinafter – PCIJ) held that “in all systems of law the principle of the territorial character of criminal law is fundamental.”¹²⁵ According to this principle, the criminal law applies with respect to the alleged criminal behaviour that took place on the state’s territory with the criterion *locus commissi delicti* (the place where acts or omissions have been committed).¹²⁶ At the same time, when a crime is committed outside the state territory but

Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 146.

¹²² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 85; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, Art. 6.

¹²³ Rome Statute of the International Criminal Court, 17 July 1998, Art. 1.

¹²⁴ Bantekas/ Nash, 2003, p. 144.

¹²⁵ *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), p. 20; Cassese *et al.*, 2013, p. 274.

¹²⁶ Cassese *et al.*, 2013, p. 271.

the effect of the crime is inside of the territory, then it is amenable to the state's jurisdiction.¹²⁷

At the present moment, Syrian courts have a primary obligation and right to investigate crimes committed on Syrian territory.¹²⁸ According to the Syrian Government, Syrian courts have been investigating cases connected with the situation in Syria since the beginning of the Syrian crisis. The Syrian Government has stressed that it is able and wish to investigate these cases.¹²⁹

At the same time, there are some standards that shall be followed during these prosecutions. These standards are set in international human rights law and IHL and include the right to a fair trial for every accused.¹³⁰ There are allegations from a

¹²⁷ *Ibid*, p. 274.

¹²⁸ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 50; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 85; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, Art. 6; UN General Assembly Resolution, "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity", A/RES/3074 (XXVIII) (3 December 1973), para. 1, 2, 5.

¹²⁸ Rome Statute of the International Criminal Court, 17 July 1998, Art. 1; Bantekas/ Nash S, 2003, p. 158.

¹²⁹ UN Security Council, 7180th Meeting Record, S/PV.7180 (22 May 2014), p. 16.

¹³⁰ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 3, 49(4); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 3, 50(4); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 3, 102-108; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 3, 5, 66-75; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 75; Protocol Additional to

number of NGOs that currently in the detention places in Syria mass human rights violations are occurring.¹³¹ However, in one of his interviews, the Syrian President rejected all these allegations and called the NGOs that issued them biased, not impartial and acting in order to demonize the Syrian Government.¹³² Thus, it is difficult to allege beyond a reasonable doubt that human rights violations are taking place. Nonetheless, considering some objective factors such as the armed conflict's influence on all Syrian infrastructure and ongoing hostilities, there is clear and convincing evidence to allege that the Syrian judicial system is not able to provide accountability for all crimes committed during the Syrian armed conflict.

Moreover, there is a possibility that Syrian domestic courts will focus solely on the crimes committed by the opposition forces. At the same time, international crimes are often committed by

the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 6(2); ICRC, Customary IHL Database, Rule 100, (Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100 [Accessed 12 January]); International Covenant on Civil and Political Rights, Article 14(1); Convention on the Rights of the Child, 20 November 1989, Article 40(2)(b)(iii); European Convention on Human Rights, 4 November 1950, Article 6(1); American Convention on Human Rights, 22 January 1969, Article 8(1); African Charter on Human and Peoples' Rights, 27 June 1981, Article 7; Universal Declaration on Human Rights, 10 December 1948, Article 10; American Declaration on the Rights and Duties of Man, 2 May 1948, Article XVIII; Cairo Declaration on Human Rights in Islam, 5 August 1990, Article 19(e); EU Charter on Fundamental Rights, 26 October 2012, Article 47.

¹³¹ Amnesty International (2017), "Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison, Syria" (London: Amnesty International Ltd); Violation Documentation Centre in Syria (2017), 'Monthly Statistical Report on Victims. September 2017' [pdf] (Available at: http://vdc-sy.net/wp-content/uploads/2017/10/Monthly_Stat_Rep_September17_EN.pdf [Accessed 29 November 2017]).

¹³² TyrannyUnmasked, (2017) 'Assad say's "Trumps a Puppet" to Indian media مقابلة الرئيس الأسد مع قناة ويون الهندية', [video recording] (YouTube) (3 June 2017) (Available at: <https://www.youtube.com/watch?v=SxpvovGXURM> [Accessed 1 December 2017]).

state officials.¹³³ In these cases, not only could high-level commanders avoid accountability, but ordinary soldiers from the Government forces who committed crimes could also go unpunished.

Nonetheless, the Syrian courts are the courts that have the best chance to lead successful investigations, as *locus delicti commissi* is usually the place where it is easiest to collect evidence.¹³⁴ In most cases, there are some advantages such as access to the evidence, witnesses, alleged perpetrators, etc. which make it the appropriate place for a trial—the *forum conveniens*.¹³⁵ This means that part of the crimes have a potential to be investigated by the Syrian courts, while other crimes which will not be investigated in Syria due to political, economic or other reasons can be investigated through foreign or international jurisdiction.

3.4.2. Foreign Courts

3.4.2.1. Prosecution on Ordinary Grounds of Jurisdiction

Normally, domestic criminal law is applied if there is a specific link between the offence and the state.¹³⁶ As previously mentioned, the traditional link is territoriality. As follows from the Lotus case, the exercise of extraterritorial jurisdiction over international crimes is possible unless there exists a rule of international law prohibiting it.¹³⁷ There is also another position

¹³³ Cassese *et al.*, 2013, p. 275.

¹³⁴ *Ibid.*

¹³⁵ Attorney-General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, p. 277, 1968, pp. 302-303.

¹³⁶ Cassese *et al.*, 2013, p. 271.

¹³⁷ Cassese *et al.*, 2013, p. 272; Strapatsas, 2002, p. 781; S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), para. 19.

amongst scholars, according to which criminal jurisdiction is principally territorial unless there is a rule of international law allowing the exercise of extraterritorial jurisdiction.¹³⁸ Without going deeply into the question of criminal jurisdiction, three grounds of jurisdiction will be briefly considered as possible in the Syrian situation.

The criterion of active nationality is a generally recognized basis of extraterritorial jurisdiction.¹³⁹ According to this principle, the criminal law applies extraterritorially when the crime is committed by a national of the prosecuting state (or its domicile) notwithstanding the territory where it was committed.¹⁴⁰ Taking into account the quantity of foreign persons taking a direct part in hostilities in Syria (foreign terrorists who voluntarily came to fight in Syria, members of interfering armed forces, members of private military and security companies, etc.), it is imaginable that those who committed international crimes could be prosecuted by the state of their nationality or domicile.

In accordance with the passive personality principle, states can prosecute crimes committed in Syria against their own nationals.¹⁴¹ This could be the case when victims are members of humanitarian missions, journalists or other foreign civilians. Theoretically, it could also be the case when victims are foreign combatants against whom illegal means or methods of warfare were applied. IHL rules, which establish the obligation to prosecute grave breaches of the Geneva Conventions and their

¹³⁸ Cassese *et al.*, 2013, p. 273.

¹³⁹ Bantekas/ Nash, 2003, p. 151; Brownlie, 2008, p. 303.

¹⁴⁰ Cassese *et al.*, 2013, p. 271; Strapatsas, 2002, pp. 1-2.

¹⁴¹ Strapatsas, 2002, p. 780; Brownlie, 2008, p. 304.

Additional Protocols, confirm that states can and should investigate and prosecute such crimes.¹⁴²

In addition, there is the so-called protective principle which provides the right of the state to exercise its jurisdiction over crimes committed abroad by nationals or foreigners when such crimes concern a state's vital national interest such as security of the state.¹⁴³ This principle could potentially be relevant for the neighbour-states of Syria such as Lebanon, Iraq, Turkey, Jordan, and Israel if their security is affected by a crime committed in the Syrian armed conflict.

3.4.2.2. Prosecution on Extraordinary Grounds of Jurisdiction—Universal Jurisdiction

Universal jurisdiction is an extraordinary basis of jurisdiction which gives to states the authority to prosecute persons for committing certain serious crimes without any significant links to the accused or to the act that has been committed.¹⁴⁴ The crimes which fall into the scope of application of universal jurisdiction are defined by customary and treaty law. In other words, many crimes committed in the Syrian armed conflict

¹⁴² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 50; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 85; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, Art. 6.

¹⁴³ Cassese *et al.*, 2013, p. 273; Strapatsas, 2002, p. 780; Brownlie, 2008, p. 304.

¹⁴⁴ Bouchet-Saulnier, 2002, p. 407; Strapatsas, 2002, p. 781; Broomhall, 2003, p. 106; Brownlie, 2008, p. 305.

may be prosecuted before any court, in any country, because of their nature.

Like the other possible alternatives of prosecution, prosecution on the ground of universal jurisdiction can have advantages and disadvantages.

As for all prosecutions in the national courts, there is a risk that the procedure will not be impartial.¹⁴⁵ There are a few circumstances that can have an effect on the procedure in domestic courts, such as national feelings, political ideologies, widespread resentment among the population, media, etc.¹⁴⁶ International criminal trials may be more impartial in this respect than domestic courts.¹⁴⁷ Taking the above into account, in order to achieve impartial and non-biased procedures, it seems that crimes should not be prosecuted in states which are allegedly involved in the Syrian armed conflict such as the USA, France, the United Kingdom, Russia, Turkey, Belgium, Lebanon, etc. However, states like Spain, Germany, Canada, and many others could play an important role in bringing justice to Syria.

Moreover, there is a risk of abuses. There are some basic principles such as genuineness, effectiveness, independence, and impartiality,¹⁴⁸ which could be violated as a result of abuses. For instance, states that apply universal jurisdiction could choose cases where the conduct of the members of only some parties to the armed conflict will be investigated while members of other parties to the conflict remain unaccountable for their atrocities.

¹⁴⁵ Broomhall, 2003, p. 105.

¹⁴⁶ Cassese *et al.*, 2013, p. 267.

¹⁴⁷ *Ibid.*

¹⁴⁸ Cohen / Shany, 2011, p. 40.

Thus, Boas and Chifflet highlighted a challenge to the legitimacy of criminal justice when one or more states decide to prosecute one conflict or party over another.¹⁴⁹

Furthermore, some human rights standards, i.e., the right to a fair trial, could be violated in the application of universal jurisdiction. Moreover, not all foreign domestic courts have tools to deal with crimes committed by military and political leaders, mainly because of immunity under international law. Thus, universal jurisdiction can be a useful instrument for crimes committed by persons who are not high commanders but can be almost useless for persons who have immunity.

Furthermore, judges in national criminal courts do not have so much practical experience and, in principle, are not prepared to deal with cases involving international crimes like judges in the international criminal trials.¹⁵⁰ They can be bound by national approaches and traditions and may not be able to freely apply international principles and standards and ensure uniformity in the application of international law.

Nonetheless, national courts do not suffer from a lack of enforcement agencies. At the same time, there is another side of the coin: the power of states is restricted by the principle of state sovereignty. Thus, there is the question of the real capacity of the states to collect full evidence and not simply to accuse someone but to find and prove the truth.¹⁵¹ This capacity is even more restricted when a state decides to apply the principle of universal jurisdiction *in absentia*.¹⁵² However, states have the

¹⁴⁹ Boas/ Chifflet, 2017, p. 11.

¹⁵⁰ Cassese *et al.*, 2013, p. 268.

¹⁵¹ Broomhall, 2003, pp. 119-120.

¹⁵² Boas / Chifflet, 2017, pp. 80-81.

capacity to use such tools as state cooperation in criminal matters to collect full evidence, extradite accused, cooperate in trying victims, etc. Of course, this capacity is less powerful than the capacity of the ICC, together with that of the Security Council, to oblige States to cooperate. Nonetheless, it seems that it is possible that diplomatic cooperation is able to achieve better results than force of the discordant Security Council.

All of these procedural aspects and obstacles to the application of universal jurisdiction in the case of Syria will be addressed in Chapter 5.

It is unlikely that the situation in Syria will be referred to the ICC in the foreseeable future.¹⁵³ *Ergo*, domestic mechanisms based on universal jurisdiction have a highly important role in the establishment of justice in Syria. If any (or even all) of the above-mentioned international justice mechanisms are applied, there is still a place for domestic courts, including through universal jurisdiction. Examples of the situations in Rwanda and the former Yugoslavia confirm this. However, in the situation of Rwanda and the former Yugoslavia, the investigation started after the international tribunals *ad hoc* were established.¹⁵⁴ The case of Syria is a different example, which shows the desire of states to investigate crimes committed in the ongoing armed conflict where neither peace nor international criminal justice mechanisms have yet been established.¹⁵⁵

¹⁵³ Sayapin, S. (2016), 'A "Hybrid" Tribunal for Daesh?' [blog] (EJIL: Talks!) (4 May 2016) (Available at: <https://www.ejiltalk.org/a-hybrid-tribunal-for-daesh/> [Accessed 29 November 2017]); Cryer, R. (2016), 'International criminal law and Daesh' [blog] (OUPblog) (21 April 2016) (Available at: <https://blog.oup.com/2016/04/international-criminal-law-and-daesh/> [Accessed 26 December 2017]).

¹⁵⁴ Cryer *et al*, 2014, 68.

¹⁵⁵ See Kroker, P./ Kather, A.L. (2016) 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany' [blog] (EJIL: Talk!) (12 August 2016) (Available at: <https://www.ejiltalk.org/justice-for-syria->

In conclusion, domestic courts have a big role to play in the situation in Syria, as the purpose and capacity of international trials is to prosecute and try only those who bear the heaviest responsibilities for international crimes, i.e., leaders or high-ranking military officers.¹⁵⁶ International criminal courts simply do not have enough resources to prosecute all crimes committed in the Syrian armed conflict. Consequently, states may contribute to ending impunity and establishing justice by applying universal jurisdiction to investigate international crimes committed in Syria.

opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/
[Accessed 29 November 2017]).

¹⁵⁶ Cassese *et al.*, 2013, p. 270.

4. Legal Basis of Application of Universal Jurisdiction in the Situation in Syria

4.1. International Treaty Law

For the prosecution of many crimes, the principle of universal jurisdiction is based on international treaties.¹⁵⁷ The discussion of the treaty grounds of universal jurisdiction for war crimes committed in the Syrian conflict should start with the question of to which treaties Syria is a party, and whether this matters in establishing the grounds for universal jurisdiction.

Unlike the other branches of international law, IHL establishes obligations for the parties to a conflict and for members of armed forces and armed groups, their commanders, etc.¹⁵⁸ As for states that are parties to a conflict, treaty obligations exist due to the international law principle *pacta sunt servanda*.¹⁵⁹ Regarding obligations for non-state armed groups as parties to the conflict, there is another position, according to which treaties do not bind non-state armed groups because they cannot be a party to an IHL treaty.¹⁶⁰ Kleffner has stated that although nowadays it is generally accepted that IHL is binding on non-state organized armed groups, it is not clear why and how the

¹⁵⁷ See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Art. 5; Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, Art. 10; Inter-American Convention on Forced Disappearance of Persons, 9 June 1994, Art. 4.

¹⁵⁸ See Kleffner, 2013, pp. 52-53; Brown, 2011, p. 7; Cassese *et al.*, 2013, p. 4; O'Connell, 2013, p. 38.

¹⁵⁹ Vienna Convention on the Law of Treaties, 23 May 1969, Art. 26.

¹⁶⁰ See Sassòli, M. (2016). 'Two Fascinating Questions: Are all subjects of a Legal Order Bound by the Same Customary Law and Can Armed Groups Exist in the Absence of Armed Conflict?' [blog] (EJIL: Talk!) (4 November 2016) (Available at: <https://www.ejiltalk.org/book-discussion-daragh-murrays-human-rights-obligations-of-non-state-armed-groups-3/> [Accessed 25 March 2018]).

binding force is to be constructed.¹⁶¹ The basis for such arguments is found in the wording of Common Article 3, which is addressed to ‘each Party to the conflict,’ and the wording of some other IHL treaties.¹⁶² Furthermore, various resolutions and decisions of international bodies and the ICRC, calling upon all parties to the conflict to comply with their obligations under IHL, have confirmed this position.¹⁶³

As for the binding force of IHL for individuals, this force has been recognized for a long time.¹⁶⁴ Punishment of individuals for violations of IHL obligations confirms that individuals bear duties under IHL.¹⁶⁵ The Appeals Chamber of the ICTR has confirmed that the category of persons to be held responsible is not limited to commanders, combatants and other members of armed forces but includes “authors of violations of common Article 3.”¹⁶⁶ This means that not only members of state armed groups but also members of non-state armed groups are bound by IHL. Moreover, the Appeals Chamber of the ICTR has stated that a special relationship to a party to the conflict is not necessary to the application of Common Article 3.¹⁶⁷ That means that persons who are not members to a party to the armed

¹⁶¹ Kleffner, 2011, p. 443.

¹⁶² See Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, Art. 7, 8.

¹⁶³ UN General Assembly Resolution, “71/130. The situation in the Syrian Arab Republic”, A/RES/71/130 (9 December 2016), Preamble; UN General Assembly Resolution, “70/234. Situation of human rights in the Syrian Arab Republic”, A/RES/70/234 (23 December 2015), Preamble, paras 1, 2.

¹⁶⁴ Kleffner, 2013, p. 55.

¹⁶⁵ *Ibid.*

¹⁶⁶ Prosecutor v. Akayesu, ICTR, Judgment, Appeal Chamber, IT-96-4-T, 1 June 2001, para. 444.

¹⁶⁷ *Ibid.*

conflict but whose actions are related to the armed conflict (such as persons taking direct part in hostilities) are also bound by Common Article 3.

Treaty obligations for individuals come from the fact that a particular state is a party to the IHL treaty or not.¹⁶⁸ This means that in the case of the Syrian armed conflict, all members of the Syrian armed forces and members of the non-state armed groups, as well as persons who are not members of any armed groups but who take a direct part in hostilities, are bound by relevant provisions of the treaties to which Syria is a Party. Members of armed forces of the third states involved in the Syrian armed conflict are bound by the treaties to which these states are parties. All fighters are also bound by customary IHL.¹⁶⁹ A Party to the conflict can also accept additional obligations.¹⁷⁰ That means that a fighter can be responsible for the violation of an IHL rule only if he or she is bound by this rule. For instance, members of the Syrian armed forces cannot be responsible for the violation of the provision of the Additional Protocol II of the Geneva Conventions 1949, unless this provision has a customary nature, because Syria is not a party to the treaty.¹⁷¹

¹⁶⁸ O'Connell, 2013, p. 38.

¹⁶⁹ Statute of the International Court of Justice, 18 April 1946, Art. 38(1)(b); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 1(2).

¹⁷⁰ See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 2, 4; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, Art. 3(2).

¹⁷¹ ICRC, 'Treaties, State Parties and Commentaries. 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' [Online] (Available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475 [Accessed 23 February 2018]).

The obligation of states to prosecute war crimes follows from treaties and customary rules. As for treaties rules, the grounds of jurisdiction for the state are established when the prosecuting state is a party to the treaty containing an obligation or a right to prosecute IHL violations. This means that if state A is a party to treaty X, which provides basis for universal jurisdiction for specific acts, state A can exercise its jurisdiction over a person for violations of rules by which that person is bound. The treaty support for universal jurisdiction will be expanded upon later, after analysis of the notion of war crimes.

The definition of war crimes is contained in several documents. Article 8 of the ICC Statute defines war crimes as grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflicts (hereinafter - IACs), and serious violation of Common Article 3 and other serious violations of the laws and customs applicable in the armed conflicts of non-international character (hereinafter – NIACs). It details war crimes by an exhaustive list of actions.¹⁷² As was mentioned before, the Statute does not contain an obligation for states to prosecute international crimes.

Consequently, it is possible to conclude that, in terms of the ICC Statute, war crimes consist of grave breaches of IHL as defined in the Geneva Conventions, serious violations of Common Article 3, and other serious violations of the law and customs applicable in IAC and NIAC.

Grave breaches are defined in Articles 50, 51, 130, 147 of the four Geneva Conventions, respectively. Syria is a Party to the Geneva Conventions of 1949 and to Additional Protocol I.¹⁷³

¹⁷² Statute of the International Criminal Court, 17 July 1998, Art. 8.

¹⁷³ ICRC, 'Treaties, State Parties and Commentaries. Syrian Arab Republic' [Online] (Available at: <https://ihl->

Grave breaches include, *inter alia*, acts committed against persons or property protected by the Geneva Conventions such as wilful killing, torture or inhuman treatment, compelling of prisoners of war to serve in the forces of the hostile Party, unlawful deportation or transfer or unlawful confinement of a protected person, etc.¹⁷⁴ According to common Article 2 of the Geneva Conventions, provisions of the Geneva Conventions are applicable for IACs. For NIACs, Common Article 3 is applicable.

There is a question as to whether breaches of Common Article 3 can constitute grave breaches, or can only be classified as other breaches of the Geneva Conventions. Systematic interpretation of the ICTY Statute and the Rome Statute, where grave breaches and violations of the laws and treaties in NIAC are separated, confirms the traditional approach that neither the Geneva Conventions of 1949 nor Additional Protocol II directly set out provisions relating to grave breaches in NIACs.¹⁷⁵ The ICTY Appeals Chamber, in the Tadić case, has confirmed that grave breaches apply only in IACs.¹⁷⁶ At the same time, Judge Abi-Saab in his separate opinion to the Appeals Chamber Decision has argued that grave breaches can be applicable in NIACs if the Appeals Chamber were to change the traditional reading of grave breaches and use (1) “a teleological interpretation of the

databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY [Accessed 23 February 2018]).

¹⁷⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 51; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 147.

¹⁷⁵ Öberg, 2009, pp. 170-171.

¹⁷⁶ Prosecutor v. Tadić, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 84.

[Geneva] Conventions in the light of their object and purpose to the effect of including internal conflicts within the regime of ‘grave breaches’,” or (2) “consider it as establishing a new customary rule ancillary to the Conventions, whereby the regime of ‘grave breaches’ is extended to internal conflicts.”¹⁷⁷ The opinion of Judge Abi-Saab contains convincing argumentation and, in general, reflects a more developed approach that corresponds to the purpose and object of IHL. However, this opinion is not supported by case law, nor has it received wide support among scholars.¹⁷⁸ Furthermore, the *travaux préparatoires* of the Geneva Conventions show that states did not intend to include NIACs in the scope of the grave breaches regime.¹⁷⁹ Consequently, contrary to war crimes, which can be committed in both IACs and NIACs, grave breaches can only be committed in IACs.¹⁸⁰

The principle of universal jurisdiction for the prosecution of war crimes is based on the provisions of IHL. Articles 49, 50, 129

¹⁷⁷ Prosecutor v. Tadić, ICTY, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, Section IV.

¹⁷⁸ ICRC, ‘Treaties, State Parties and Commentaries. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016, Article 50: Grave breaches’ [Online] (Available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3#_Toc465333523 [Accessed 23 February 2018]); Dörmann, 2016, p. 323; Cassese *et al.*, 2013, p. 70; Cerone, p. 24; *But cf.* Eboe-Osuji, Ch., “‘Grave Breaches’ as War Crimes: Much Ado About ... ‘Serious Violations’?” [pdf] (Available at: <https://www.icc-cpi.int/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf> [Accessed 15 February 2018]), pp.8-14.

¹⁷⁹ ICRC, ‘Treaties, State Parties and Commentaries. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016, Article 49: Penal Sanctions’ [Online] (Available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84#_Toc452054252 [Accessed 23 February 2018]).

¹⁸⁰ Öberg, 2009, pp. 170-171.

and 146 of the four Geneva Conventions established the identical universal obligation for states to repress grave breaches of the treaties' provisions.¹⁸¹

It is possible to divide the provision to repress grave breaches into four obligations. The first obligation is to adopt any necessary legislation to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the Geneva Conventions. According to the general rules of interpretation, the text of this provision obliges states to criminalise grave breaches in their own legislation by adopting a special law or through amendments to the law that already exists. The ICRC in its commentary to this paragraph stated that it is commonly accepted that universal jurisdiction, along with the other grounds of criminal jurisdiction over grave breaches, shall be included in the implementing legislation.¹⁸²

The second obligation is to execute this legislation by searching for persons alleged to have committed, or to have ordered to be committed, grave breaches, and bringing such persons, regardless of their nationality, before the state's own courts. The wording of this provision does not contain any necessary tie between the crime and the prosecuting state. In accordance with the general rules of interpretation, this means that the obligation

¹⁸¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 50; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 146.

¹⁸² ICRC, 'Treaties, State Parties and Commentaries. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016, Article 49: Penal Sanctions' [Online] (Available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84#_Toc452054252 [Accessed 23 February 2018]).

of the state is universal and exists regardless of where the crimes were committed and the nationality of the perpetrator or the victim. States are obliged to apply their enabling legislation to exercise universal jurisdiction over grave breaches.

If the state prefers, and in accordance with the provisions of its own legislation, to hand such persons over for trial to another state concerned, there is the third obligation to extradite such persons to another state. In this case, the state should ensure that the receiving state has made out a *prima facie* case. This should be interpreted as the principle *aut dedere aut judicare* established in many other treaties.¹⁸³ However, within the meaning of the Geneva Conventions, states are obliged to prosecute first, and if they do not prosecute, to extradite. Thus, the above-mentioned principle shall be interpreted as an obligation to prosecute or extradite—*aut judicare aut dedere*.¹⁸⁴

Fourthly, the state is obliged to guarantee that, in all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided for by Article 105 and those set out in the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. This means that a state is obliged to observe the right to a fair trial and other rights. The phrase ‘in all circumstances’ means that when a state does not prosecute the suspect itself, it needs to ensure that the state which wishes to do so will guarantee a fair trial procedure before exercising the option of extradition.

¹⁸³ See, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, Art. 7; Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 26 June 1936, Art. 7-9; Convention for the Prevention and Punishment of Terrorism, 16 November 1937, Art. 8.

¹⁸⁴ Prosecutor v. Mucić and Others, ICTY, Trial Judgment, IT-96-21-T, 16 November 1998, para. 200.

Moreover, the above-mentioned Articles of the Geneva Conventions contain the less detailed obligation for states to repress violations of the Geneva Conventions other than grave breaches. According to the wording of the Articles, states shall take measures necessary for the suppression of such violations. There are no obligations similar to those for grave breaches to adopt laws and to prosecute on the basis of this law or extradite the suspect. Consequently, it is difficult to define the obligation to repress other breaches as an obligation to establish universal jurisdiction. It is rather the obligation to take measures that can include administrative, disciplinary, and penal punishment.

Case law and some scholars confirm this interpretation that the Geneva Conventions set out the obligation to establish universal jurisdiction only for grave breaches.¹⁸⁵ For example, in the Tadić case, the Appeals Chamber of the ICTY found that mandatory universal jurisdiction is limited to the grave breaches system, while for other serious violations there is no mandatory universal jurisdiction.¹⁸⁶ In Prosecutor v. Mucić and others cases, the ICTY has stated that while grave breaches of the Geneva Conventions must be prosecuted and punished by all states, other breaches *may* be prosecuted and punished.¹⁸⁷ This means that for grave breaches there is mandatory universal jurisdiction,¹⁸⁸ while for other breaches universal jurisdiction can be established voluntarily.

¹⁸⁵ Prosecutor v. Mucić and Others, ICTY, Trial Judgment, IT-96-21-T, 16 November 1998, para. 200; Roht-Arriaza/ Fernando, 2011, p. 360.

¹⁸⁶ Prosecutor v. Tadić, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 80.

¹⁸⁷ Prosecutor v. Mucić and Others, ICTY, Trial Judgment, IT-96-21-T, 16 November 1998, para. 308.

¹⁸⁸ *Ibid*, para. 200.

Furthermore, Article 85(1) of Additional Protocol I to the Geneva Conventions establishes that the provisions of the Geneva Conventions dealing with the repression of breaches and grave breaches are supplemented by Section II of Additional Protocol I. This Section extends the term of grave breaches, establishes provisions about command responsibility, contains provisions about mutual assistance in criminal matters between States and cooperation between states and the UN.¹⁸⁹

Additional Protocol II does not contain obligations similar to the Additional Protocol I.

Consequently, the obligation of states to exercise their jurisdiction, including universal jurisdiction, over the breaches and grave breaches of the Geneva Conventions is established by the Geneva Conventions and Additional Protocol I. Mainly, these obligations concern grave breaches committed in IACs. As for other breaches, including breaches of Common Article 3 in NIACs, the Geneva Conventions contain the right to establish universal jurisdiction.

There are other treaty sources that establish a basis for the prosecution of war crimes. The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999), in the preamble, establishes an obligation for states to adopt appropriate legislation criminalizing five serious violations defined in the Protocol and provide penalties.¹⁹⁰ For three of five serious violations, states

¹⁸⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 85(2)(3)(4)(5), 86-89.

¹⁹⁰ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, Preamble (paragraph 3).

shall establish universal jurisdiction.¹⁹¹ In accordance with Article 16(1)(c) of the Protocol, universal jurisdiction must be established when the alleged offender is present on the territory of the prosecuting state for the offences set forth in Article 15(1)(a)(b)(c) of the Protocol. These offences include “any of the following acts: a. making cultural property under enhanced protection the object of attack; b. using cultural property under enhanced protection or its immediate surroundings in support of military action; c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol.”¹⁹² The first and the second offences are war crimes, as cultural property is a civilian object and direct attacks on civilian objects are prohibited.¹⁹³

Unlike the Geneva Conventions, the Second Protocol to the Hague Convention contains the requirement that the alleged offender must be present on the territory of the prosecuting state to exercise universal jurisdiction over him or her.¹⁹⁴ Moreover, Article 16(2)(b) of the Protocol provides that “members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.” This means that a state may apply its jurisdiction, *inter alia* universal jurisdiction, by

¹⁹¹ *Ibid*, Preamble (paragraph 3).

¹⁹² *Ibid*, Art. 15(1)(a)(b)(c).

¹⁹³ Statute of the International Criminal Court, 17 July 1998, Art. 8(2)(b)(ii)(ix), 8(2)(e)(ii)(iv); Arnold/ Wehrenberg, 2016, p. 419.

¹⁹⁴ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, Art. 16(1)(c).

investigating only those acts that contravene a rule by which the alleged offender is bound. Syria is not a Party to the Second Protocol to the Hague Convention.¹⁹⁵

Furthermore, the Second Protocol to the Hague Convention states that it does not preclude or affect the exercise of jurisdiction under customary law.¹⁹⁶ However, it should be highlighted that the Second Protocol is applicable only for IACs.¹⁹⁷

There is also soft law which supports the position that there is an obligation to prosecute war crimes regardless of whether they constitute grave breaches and regardless of the character of the conflict. In accordance with UN General Assembly Resolution 3074(1973), war crimes, wherever they are committed, shall be subject to investigation and the persons who allegedly committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.¹⁹⁸ States have an obligation to assist each other in detecting, arresting and bringing to trial suspected persons; if they are found guilty, to punish them; and to co-operate with each other in the collection of information

¹⁹⁵ UNESCO, 'Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999' [Online] (Available at: <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E&order=alpha> [Accessed 23 February 2018]).

¹⁹⁶ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, Art. 16(2)(a).

¹⁹⁷ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, Art. 3; Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, Art. 18(1)(2), 22(1).

¹⁹⁸ UN General Assembly Resolution, "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity", A/RES/3074 (XXVIII) (3 December 1973), para. 1.

and evidence.¹⁹⁹ This means that the primary obligation of the state is to investigate crimes wherever they were committed by their own forces. If the state does not make the investigation by itself, there is still an obligation to assist the state which is carrying out this investigation.

Summarising the above, it is possible to state that IHL treaty rules establish an obligation for states to prosecute grave breaches and the right to repress other breaches. The obligation and the right exist no matter where these breaches were committed and whether these acts concern a state. Moreover, the Second Protocol to the Hague Convention contains the obligation to establish universal jurisdiction to prosecute offences set forth in Article 15(1)(a)(b)(c) of the Protocol. However, as was mentioned before, Syria is not a Party to the Second Protocol to the Hague Convention.²⁰⁰ This means that prosecutions by foreign states based on universal jurisdiction over grave and other breaches of the Geneva Conventions and, when it is appropriate, certain violations of the Second Protocol to the Hague Convention committed in the Syrian armed conflict, have a basis in treaty law.

4.2. International Customary Law

There is a customary rule of IHL according to which states have the right to vest universal jurisdiction in their national courts over war crimes.²⁰¹

¹⁹⁹ *Ibid*, paras 4, 6.

²⁰⁰ UNESCO, 'Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999' [Online] (Available at: <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E&order=alpha> [Accessed 23 February 2018]).

²⁰¹ ICRC, 'IHL Database, Customary IHL. Rule 157. States have the right to vest universal jurisdiction in their national courts over war crimes' [Online] (Available at: <https://ihl-databases.icrc.org/customary->

Furthermore, there is a customary rule obliging states to investigate not only war crimes allegedly committed by their nationals or armed forces or on their territory, or but also other war crimes over which states have jurisdiction.²⁰² According to the general means of interpretation, the last part of this customary rule, read together with the rule establishing the right to vest universal jurisdiction over war crimes in domestic courts, reflects the treaty obligation of states to establish universal jurisdiction over grave breaches of IHL.²⁰³

International and national case law has proved that the right of states to vest universal jurisdiction in their national courts over international crimes has a customary nature.²⁰⁴ In the Prosecutor v. Tadić case, the Appeals Chamber of the ICTY has stated that “universal jurisdiction being nowadays acknowledged in the case of international crimes” in proving that the ICTY has a legal basis to prosecute persons suspected of such offences.²⁰⁵ In the case Prosecutor v. Furundžija, the Trial Chamber of the ICTY has stated that “international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.”²⁰⁶ As far as war crimes are one of the group of international crimes, the findings of the ICTY prove the existence of a customary rule

ihl/eng/docs/v1_rul_rule157#Fn_5496F07A_00007 [Accessed 24 February 2018]).

²⁰² ICRC, ‘IHL Database, Customary IHL. Rule 158. Prosecution of War crimes’ (Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 [Accessed 24 February 2018]).

²⁰³ *Ibid.*

²⁰⁴ Roht-Arriaza/ Fernando, 2011, p. 360; Bantekas/ Nash, 2003, p. 156.

²⁰⁵ Prosecutor v. Tadić, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 62.

²⁰⁶ Prosecutor v. Furundžija, ICTY, Trial Judgment, IT 95 17/1 T, 10 December 1998, para. 156.

providing the right of states to assert universal jurisdiction over war crimes.

The state practice element of the customary rule²⁰⁷ is established by the legislation of many countries and national court decisions. The earliest and the most classical examples of universal jurisdiction are the cases of the prosecution of Eichmann and Demjanjuk for crimes committed during the Second World War.²⁰⁸ There are a lot of other national courts' decisions where the principle of universal jurisdiction was applied over international crimes, including those which were committed in the Iran-Iraq armed conflict (1980-1988) and Iraq's attacks against the Kurdish population of northern Iraq (1988),²⁰⁹ armed conflict in Rwanda,²¹⁰ in the former Yugoslavia,²¹¹ Chad,²¹² etc. Furthermore, there is the Model Law on Universal Jurisdiction over International Crimes,

²⁰⁷ See Statute of the International Court of Justice, 18 April 1946, Art. 38(1)(b).

²⁰⁸ See Attorney-General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, p. 277, 1968; Demjanjuk v. Petrovsky, United States Court of Appeals, Sixth Circuit. 31 October 1985, 776 F.2d 571 (6th Cir. 1985); Cryer *et al.*, 2014, pp. 59, 60.

²⁰⁹ See, e.g., Ould Dah v. France (dec.), no. 13113/03, ECHR 2009, para. 5.

²¹⁰ UN General Assembly, Report of the Secretary-General, 'The scope and application of the principle of universal jurisdiction', A/72/112, 22 June 2017, para. 22; Kaleck, 2009, p. 946.

²¹¹ See, e.g., Pub. Prosecuting Auth. v. Misrad Repak, Judgment, Oslo District Court, Case No. 08-018985MED-OTIR [pdf] (Available at: [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/45061a413067e31cc125755c004a5773/\\$FILE/Misrad%20Repak%20case%20-%20Decision%20of%2002.12.2008.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/45061a413067e31cc125755c004a5773/$FILE/Misrad%20Repak%20case%20-%20Decision%20of%2002.12.2008.pdf) [Accessed 28 February 2018]); Kaleck, 2009, p. 945.

²¹² UN General Assembly, Report of the Secretary-General, 'The scope and application of the principle of universal jurisdiction', A/72/112, 22 June 2017, paras 27-28; Human Rights Watch, 'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal' (Updated: 03.05.2016) [Online] (Available at: <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal> [Accessed 24 February 2018]).

adopted by the African Union, which intends to encourage the Member States of the African Union to adopt legislation on universal jurisdiction to prosecute international crimes.²¹³

The European Court on Human Rights (hereinafter – ECtHR) has analysed some cases concerning the application of universal jurisdiction over international crimes.²¹⁴ For instance, in the case of *Jorgic v. Germany* the applicant claimed that prosecution of genocide by the German courts on the basis of universal jurisdiction violated, *inter alia*, Article 5 §1(a) of the European Convention on Human Rights (hereinafter – ECHR) as far as there is “a general rule of public international law, namely the duty of non-intervention, which, in principle, prohibited the German courts from prosecuting a foreigner living abroad for genocide purportedly committed by him in a foreign country against foreign victims.”²¹⁵ The ECtHR did not find any violation of paragraph 1(a) of Article 5 of the ECHR, which allows a state to deprive someone of their liberty only in accordance with a procedure prescribed by law, *inter alia*, in the case of the lawful detention of a person after conviction by a competent court.²¹⁶ The ECtHR stated the German court was ‘a competent court’ within the meaning of Article 5 § 1 (a) of the ECHR.²¹⁷

It is possible to conclude that the customary rule establishes not the *obligation* of the state to assert universal jurisdiction over

²¹³ Executive Council Decision, EX.CL/Dec.708(XXI), Decision on the African Union Model National Law on Universal Jurisdiction over International Crimes, Doc. EX.CL/731(XXI)c, para 1.

²¹⁴ See, e.g., *Ould Dah v. France* (dec.), no. 13113/03, ECHR 2009; *Van Anraat v. the Netherlands*, ECHR, no. 65389/09, 6 July 2010.

²¹⁵ *Jorgic v. Germany*, no. 74613/01, §§58-59, ECHR 2007-III.

²¹⁶ *Ibid*, § 72.

²¹⁷ *Ibid*, § 72.

war crimes, but rather the *right* of the states to do so. This customary right covers all war crimes and, *ergo*, supplements the treaty provisions concerning only grave and other breaches of the Geneva Conventions and three violations of the Second Protocol to the Hague Convention. Consequently, states have the right to prosecute all war crimes committed in the Syrian armed conflict on the basis of universal jurisdiction based on the customary rule.

5. Procedural Aspects and Obstacles to Prosecution of War Crimes based on Universal Jurisdiction in the Situation in Syria

5.1. Subsidiarity

The text of the Geneva Conventions does not directly mention subsidiarity in the application of universal jurisdiction. The wording of the Conventions leads to the conclusion that subsidiarity is not necessary for the application of universal jurisdiction over grave breaches of the Geneva Conventions. Judge Yusuf, in his Separate Opinion to the Judgment of the International Court of Justice (hereinafter – ICJ) in the case *Belgium v. Senegal*, stated that the obligation in the Geneva Convention should be interpreted as the second type of the *aut dedere aut judicare* clause—an obligation to submit to prosecution, with extradition being an available option.²¹⁸ Contrary to the first type of the *aut dedere aut judicare* clause contained in many other treaties,²¹⁹ the obligation to prosecute

²¹⁸ Separate Opinion of Judge Yusuf, Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment, I.C.J. Reports 2012, p. 422, paras. 19–22; Cryer *et al.*, 2014, p. 75.

²¹⁹ See, e.g., International Convention for the Suppression of Counterfeiting Currency, 20 April 1929, Art. 9(22); African Union Convention on Preventing and Combating Corruption, 11 July 2003, Art. 15; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 25 May 2000, Art. 5.

exists always and does not depend on a request for extradition as a triggering factor.

At the same time, the regulation is different in relation to war crimes distinct from grave breaches of the Geneva Conventions. The International Law Commission (hereinafter – ICL) stated that for international crimes universal jurisdiction is a crucial component, particularly when the alleged perpetrator is not prosecuted on the territory where the crime was committed.²²⁰

If we consider that the principle of territoriality is a traditional principle of jurisdiction,²²¹ the obligation to repress war crimes falls primarily on the state where such crimes were committed. This means that according to this line of argumentation, the Syrian right to vest its jurisdiction on the territorial base prevails over the right of other states to exercise universal jurisdiction over war crimes.

After that, if the state does not exercise its jurisdiction, other grounds of jurisdiction may be applied—the obligation falls on the states which have other ties with the crime, such as active or passive nationality,²²² or when a state interest is concerned. If none of the states that has an ordinary grounds of jurisdiction start prosecution, the other states obtain the right to establish universal jurisdiction to prosecute war crimes. This logic leads to the conclusion, supported by the legislation of many states,

²²⁰ International Law Commission, The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission, 2014, p. 9, para. 18.

²²¹ Separate opinion of the President Guillaume, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 16; Separate opinion of Judge Rezek, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 4.

²²² Separate opinion of Judge Rezek, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 5.

that, in principle, universal jurisdiction is an instrument of last resort and can be applied when other instruments are not used.²²³ Judge Rezek, in his Separate Opinion to the Judgement DRC v. Belgium, has also argued for subsidiarity in the application of universal jurisdiction.²²⁴

In applying the principle of subsidiarity to the prosecution of war crimes other than grave breaches of the Geneva Conventions in the situation of Syria, some procedural issues may arise. Firstly, there is a question of how long states should wait before starting the application of universal jurisdiction in order not to preclude subsidiarity. Secondly, there is a question of communication between the prosecuting state and Syrian or other governments that have a traditional basis of jurisdiction. In principle, there is no obligation of a state to publish all results of the ongoing prosecution. Bashar Al-Assad has stated in a public interview that there are ongoing investigations of the crimes committed in the Syrian armed conflict.²²⁵ This means that, logically, all prosecutions on the grounds of universal jurisdiction, including prosecutions of grave breaches, require the prosecuting state to maintain communication with the Syrian government to avoid double prosecution and violation of the

²²³ See UN General Assembly, Report of the Secretary-General, 'The scope and application of the principle of universal jurisdiction', A/71/111, 26 June 2016, paras 21, 22; UN General Assembly, Report of the Secretary-General, 'The scope and application of the principle of universal jurisdiction', A/70/125, 1 July 2015, para. 22.

²²⁴ Separate opinion of Judge Rezek, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 4, 5.

²²⁵ YouTube, 'Assad Destroys US Reporter In Interview Exposes Zionist Propaganda' [video] (7 July 2017) (Available at: https://www.youtube.com/watch?v=_HLjC53emUM [Accessed 28 February 2018]).

principle *ne bis in idem*.²²⁶ It seems that this step does not require excessive means from the prosecuting state.

5.2. Prosecution in Absentia

There is a question as to whether or not the prosecution of war crimes committed in the Syrian armed conflict on the basis of universal jurisdiction requires the presence of those suspected on the territory of the prosecuting state.

According to the wording of the Geneva Conventions, the treaty obligation to establish universal jurisdiction over grave breaches of the Geneva Conventions does not require the presence of a suspect on the territory of the prosecuting state. The Second Protocol to the Hague Convention of 1954 establishes the obligation to assert universal jurisdiction when the alleged offender is present on the territory of prosecuting state for the offences set forth in Article 15(1)(a)(b)(c) of the Protocol.²²⁷

As for the customary right to assert universal jurisdiction over war crimes, there is no uniform practice regarding whether the principle of universal jurisdiction requires any link to the state, e.g., that the accused shall be present on the territory of the prosecuting state.²²⁸ Some national laws make this link compulsory,²²⁹ while some do not.²³⁰ For example, in 2005 the

²²⁶ International Covenant on Civil and Political Rights, 16 December 1966, Art. 14(7).

²²⁷ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, Art. 16(1)(c).

²²⁸ ICRC, 'IHL Database, Customary IHL. Rule 157. States have the right to vest universal jurisdiction in their national courts over war crimes' [Online] (Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule157#Fn_5496F07A_00007 [Accessed 24 February 2018]).

²²⁹ See e.g., Senegal, Law No. 2007-05 of 12 February 2007 amending the Code of Criminal Procedure on the implementation of the Treaty of Rome establishing the International Criminal Court, Article 431-3 [pdf] (Available at: <https://iccdb.hrlc.net/data/doc/501/> [Accessed 24 February 2018]);

Spanish Constitutional Court established that the prosecution of Guatemalan officials for atrocities committed during Guatemala's NIAC from 1960-1996 can be based solely on the nature of the crime without the requirement of presence of the suspect.²³¹ Spanish judges have subsequently requested extradition of suspects not only for crimes committed in the Guatemalan armed conflict, but also in other conflicts. In contrast, the German Code of Crimes against International Law states that even though the German Federal Public Prosecutor can investigate international crimes when the victim and the perpetrator of the crime are not present in Germany,²³² the Prosecutor has wide discretion and may decline to investigate where a suspect is not in Germany and his or her presence is not anticipated.²³³ Some scholars called this mechanism a *de facto* 'presence requirement.'²³⁴

Paraguay, Paraguayan Criminal Code, Law No. 1.160/97 [pdf] (Available at: http://www.oas.org/dil/esp/codigo_penal_paraguay.pdf [Accessed 24 February 2018]), Art. 8(2)(3).

²³⁰ See e.g., Croatia, The Croatian Criminal Code of 21 October 2011, No. 2498 [pdf] (Available at: <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/89286/102540/F1992937825/HRV-2011-L-89286%20.pdf> [Accessed 24 February 2018]), Art. 16.

²³¹ Roht-Arriaza/ Fernando, 2011, p. 364.

²³² Germany, The German Code of Crimes against International Law (Völkerstrafgesetzbuch), (Available at: <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> [Accessed 24 February 2018]), Art. 1.

²³³ Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette [*Bundesgesetzblatt*] Part I p. 1074, 1319), as most recently amended by Article 3 of the Act of 23 April 2014 (Federal Law Gazette Part I p. 410), (Available at: https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html [Accessed 24 February 2018]), Art. 153f(1).

²³⁴ Kroker, P./ Kather, A.L. (2016) 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany' [blog] (EJIL: Talk!) (12 August 2016) (Available at: <https://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/> [Accessed 29 November 2017]).

The question can be addressed through the prism of the Lotus case finding. In the Judgment, the PCIJ stated that: “Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules”²³⁵ This finding is usually used to prove the principle of international law that everything is permitted that is not prohibited.²³⁶ At the same time, as mentioned before, the findings of the Lotus case have faced significant criticism.²³⁷

The problem had potential to be solved by the decision the ICJ in the case the Democratic Republic of Congo v. Belgium (hereinafter – *Yerodia* case). The case was brought by the DRC following a challenge to an arrest warrant issued by a Belgian judge against Mr. Yerodia, the Congolese Minister of Foreign Affairs, charging him with offences constituting grave breaches of the Geneva Conventions and Additional Protocols, and with crimes against humanity.²³⁸ In the final oral proceedings, the DRC invokes only the violation of the foreign ministry immunity; however, in the application instituting the case before the ICJ, it also questioned the existence of the right of states to exercise universal jurisdiction in their own courts when an accused is not on the territory of the prosecuting state.²³⁹ The

²³⁵ S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), p. 19.

²³⁶ See, e.g., Declaration of Judge Simma, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, para. 2.

²³⁷ Cassese *et al.*, 2013, p. 273.

²³⁸ Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 11-13.

²³⁹ *Ibid*, para. 45.

ICJ did not address the last question in its judgment and focused only on the question of immunity.²⁴⁰ However, some judges expressed concern regarding this issue in their dissenting and separate opinions.

In a Separate Opinion, President Guillaume stated that the reference to the Lotus case in addressing the legality of prosecution in absentia is ‘hardly persuasive,’ as the PCIJ took its decision at a time when the United Nations Charter proclaiming the sovereign equality of states was not yet adopted.²⁴¹ He argued that international law does not accept universal jurisdiction *in absentia*.²⁴² Judge Rezek, in his Separate Opinion, also supported the position that prosecution on the basis of universal jurisdiction *in absentia* is contrary to international law.²⁴³

Unlike President Guillaume, Judge Van Den Wyngaert in his Dissenting Opinion, as well as Judges Higgins, Kooijmans, and Buergenthal in their Joint Separate Opinion, reached another conclusion through the analysis of the Lotus Case finding that there is no rule in international law which prohibits universal jurisdiction *in absentia*.²⁴⁴ Judge Van Den Wyngaert made a distinction between prescriptive and enforcement jurisdiction,

²⁴⁰ *Ibid*, para. 46.

²⁴¹ Separate opinion of the President Guillaume, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 14, 15.

²⁴² *Ibid*, paras 16, 17.

²⁴³ Separate opinion of Judge Rezek, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 10.

²⁴⁴ Dissenting opinion of Judge Van Den Wyngaert, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 51-58; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 49-58.

and argued that states have the right to assert extraterritorial jurisdiction on its territory in the prescriptive aspect, but do not have this right in the aspect of enforcement jurisdiction.²⁴⁵ In the opinion of Judge Van Den Wyngaert, the international arrest warrant issued by Belgium was in the frame of prescriptive jurisdiction.²⁴⁶

As for academic literature, there are a number of scholars who argue in favour of universal jurisdiction *in absentia*, and others who argue that universal jurisdiction should be based on the condition of presence.²⁴⁷ The ICRC pointed out “that while States may attach conditions to the application of universal jurisdiction to “grave breaches” or other war crimes, such conditions must, in every context, seek to increase the effectiveness and predictability of universal jurisdiction and must not unnecessarily restrict the possibility of prosecuting suspected offenders.”²⁴⁸

As international law does not give a clear answer to the question of the legality of exercising universal jurisdiction *in absentia*, practically, the question has been solved by the national law of every particular state which decides to apply universal jurisdiction.

²⁴⁵ Dissenting opinion of Judge Van Den Wyngaert, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 49-51.

²⁴⁶ *Ibid*, paras 72-80.

²⁴⁷ See Cassese *et al.*, 2013, pp. 280, 360-361; ICRC, ‘IHL Database, Customary IHL. Rule 157. States have the right to vest universal jurisdiction in their national courts over war crimes’ [Online] (Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule157#Fn_5496F07A_00007 [Accessed 24 February 2018]).

²⁴⁸ UN General Assembly, Report of the Secretary-General, ‘The scope and application of the principle of universal jurisdiction’, A/71/111. 26 June 2016, para. 27.

In the case where the suspect does not present in the territory of the prosecuting state, the latter *de facto* possess only one power of jurisdiction—legislative; and does not have enforcement jurisdiction—executive and judicial.²⁴⁹ In this case, to avoid any violation of the sovereignty of the other state, the prosecuting state can issue an international arrest warrant asking for an extradition of the suspect or seek other forms of state cooperation. According to the principle *aut dedere aut judicare*, the state where the suspect currently resides must prosecute the suspect or extradite him to the state that wishes to prosecute.²⁵⁰

In prosecutions of war crimes committed in the Syrian armed conflict on the basis of universal jurisdiction, three possible situations can exist. The first situation is when the suspect is on the territory of the prosecuting state. This situation is the simplest one, as the prosecuting state has full jurisdiction, including enforcement jurisdiction.

The other situation is when the suspect is on the territory of state B, which is different from Syria and the prosecuting state. In this case, when an international arrest warrant is issued by the prosecuting state, state B has at least two options: to prosecute the suspect itself or to extradite the suspect to the state where the prosecution has already started. This situation may raise no problems when there is a well-established diplomatic relationship between state B and the prosecuting state and/or an international treaty regulating the issues of state cooperation in criminal matters, i.e., extradition. On the other hand,

²⁴⁹ See Makoto, 2015, p. 358.

²⁵⁰ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, 1996, Art. 9.

international law has proven that extradition and state cooperation in criminal matters can face a lot of problems.²⁵¹

Finally, the last situation is when the suspect is on the territory of Syria. This can make extradition almost impossible if the suspect belongs to Government armed forces or is otherwise connected to the Government.

There is a question as to whether the trial can be held *in absentia* if the suspect is not in the territory of the prosecuting state and extradition is not executed, or the accused is in the territory, but his arrest cannot be enforced. Some scholars claim that there is a principle, flowing from the right to a fair trial, that the accused should be present at his trial.²⁵² The ICTY, the ICTR and the ICC Statutes all deal with a situation in which the accused is presumed to be present during the trial.²⁵³

In accordance with Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter – ICCPR), everyone has the right in the determination of any criminal charge against him, *inter alia*, “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient

²⁵¹ See, e.g., Herrington, 2015, p. 346.

²⁵² Cassese *et al.*, 2013, p. 357.

²⁵³ UN Security Council Resolution, S/RES/808 (1993) (22 February 1993), Annex, Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 21; UN Security Council Resolution, S/RES/955 (1994) (8 November 1994), Annex, Statute of the International Tribunal for Rwanda, Art. 20; Statute of the International Criminal Court, 17 July 1998, Art. 63; See, also, ICC, ‘Al Bashir Case’ [online] (Available at: <https://www.icc-cpi.int/darfur/albashir> [Accessed 27 February 2018]).

means to pay for it.” The same provision is contained in Article 6(3)(c) of the ECHR.

The right to a fair trial is customary in nature.²⁵⁴ It is possible to conclude that there is a possibility that the right of the accused to a fair trial will not be violated if some precautions are observed by the prosecuting state. For example, the Statute of the SCSL repeats the provision of Article 14(3)(d) of the ICCPR. At the same time, Rule 60(A) of the Special Court’s Rules of Procedure and Evidence establishes that the accused can be tried in his absence, if: “(i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do; or (ii) the accused, having made his initial appearance, is at large and refuses to appear in court.” In both cases to be tried in absence further, the accused shall (1) make his initial appearance; (2) expressively or impliedly, show that he waived his right to be present; and (3) be represented by counsel of his choice or directed by a Judge of the Trial Chamber.²⁵⁵

The ECtHR has stated that the purpose of Article 6 of the Convention is to establish a guarantee that a person ‘charged with a criminal offence’ is entitled to take part in the hearing.²⁵⁶ ECtHR in its case law has also addressed the conditions of a trial *in absentia*. Firstly, the accused must be notified of the hearing to be able to take part in the trial.²⁵⁷ Secondly, there

²⁵⁴ ICRC, ‘IHL Database, Customary IHL. Rule 100. Fair Trial Guarantees’ [online] (Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100 [Accessed 27 February 2018]); Robinson, 2009, p. 5.

²⁵⁵ Special Court for Sierra Leone, Rules of Procedure and Evidence, Adopted on 16 January 2002, Rule 60(B).

²⁵⁶ *Colozza v. Italy*, 12 February 1985, § 27, Series A no. 89.

²⁵⁷ *See Poitrimol v. France*, 23 November 1993, § 31, Series A no. 277-A; *T. v. Italy*, 12 October 1992, § 28, Series A no. 245-C; *Dembukov v. Bulgaria*, no. 68020/01, §§ 45-46, 57, 28 February 2008.

should be circumstances indicating voluntary waiving of the right to be present at the trial.²⁵⁸ The ECtHR has stated the accused forfeits his right to participate in the trial if he seeks to escape trial.²⁵⁹

Applying this analysis to the case of Syria, it is necessary to add that the accused can face some challenges in the attempt to realize his right to a fair trial when the investigation has already started but an international arrest warrant has not yet been issued. At that stage of the procedure, it can be necessary for the accused to receive, in advance of the trial, the evidential basis of the case. In this case, if the prosecuting state has a visa regime for nationals of Syria (or another state of nationality of the suspect) it may be the case that the accused will need to receive a visa to be able to realize the full scope of the right to a fair trial from the beginning of the trial. Therefore, it seems that a prosecuting state that exercises universal jurisdiction *in absentia* must additionally ensure that the suspect does not face any barrier to arrive at the territory of the prosecuting state at the earliest possible stage of the investigation.

Furthermore, the presence of counsel that represents the accused must be obligatory if the trial is held *in absentia*. Furthermore, it is possible to suggest that the counsel must be especially qualified in international criminal law. This is important in cases where there are a lot of human rights lawyers and NGOs on the side of the prosecutor that assist in finding evidence and legal analysis, to guarantee the right to a fair trial in the sense of equality of prosecution and defence.

²⁵⁸ T. v. Italy, 12 October 1992, § 28, Series A no. 245-C.

²⁵⁹ See *Medenica v. Switzerland*, no. 20491/92, § 55, ECHR 2001-VI; *Sejdovic v. Italy* [GC], no. 56581/00, §§82-83, ECHR 2006-II.

On the issue of the right to a fair trial, it matters to which treaties the prosecuting state is a Party. Although Syria is not a Party to the ECHR, if a prosecuting state is a party to the ECHR, a person who was prosecuted *in absentia* has the possibility to apply to the ECtHR claiming that his rights were violated. If a prosecuting state is a party to ICCPR and this state recognised the competence of the Human Rights Committee, the suspect may apply to the Committee.²⁶⁰

From the statements of states' authorities, publications of practising lawyers, and media information, it is possible to conclude that most ongoing investigations try alleged criminals who currently reside in the territory of the prosecuting state.²⁶¹ At the same time, there are efforts from some NGOs to promote investigations of the crimes committed by persons who currently reside on the territory of Syria, many of whom have ties with the Syrian Government.²⁶²

²⁶⁰ International Covenant on Civil and Political Rights, 16 December 1966, Art. 41.

²⁶¹ UN General Assembly, Report of the Secretary-General, 'The scope and application of the principle of universal jurisdiction', A/72/112, 22 June 2017, paras 23-24, 26; Knight, B. (2016) 'Refugees in Germany reporting dozens of war crimes' [media source] (Deutsche Welle) (11 April 2016) (Available at: <http://www.dw.com/en/refugees-in-germany-reporting-dozens-of-war-crimes/a-19179291> [Accessed 29 November 2017]); Deutsche Welle (2016) 'German police arrest Syrian national accused of war crimes' [media source] (7 April 2016) (Available at: <http://www.dw.com/en/german-police-arrest-syrian-national-accused-of-war-crimes/a-19170679> [Accessed 29 November 2017]); Kroker, P./ Kather, A.L. (2016) 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany' [blog] (EJIL: Talk!) (12 August 2016) (Available at: <https://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/> [Accessed 29 November 2017]).

²⁶² European Center for Constitutional and Human Rights (March 2017), "Executive Summary: Criminal complaint to the German Federal Public Prosecutor, Torture in Syria" [pdf] (Available at: https://www.ecchr.eu/en/international-crimes-and-accountability/syria/torture-under-assad.html?file=tl_files/Dokumente/Universelle%20Justiz/Syria_Torture_Complaint_ECCHR_ExecutiveSummary.pdf [Accessed: 10 February 2018]), pp. 9, 10.

5.3. Immunity

There are allegations that crimes in Syria have been committed by state officials, many of whom possess immunity. Even though immunity is not an obstacle to prosecution by certain international courts,²⁶³ it can be a barrier for the application of universal jurisdiction.

Syria is a party to the Vienna Convention on Diplomatic Relations 1961²⁶⁴ and the Vienna Convention on Consular Relations 1963;²⁶⁵ Syria is not a party to the New York Convention on Special Missions 1969.²⁶⁶

The preamble of the Vienna Convention on Diplomatic Relations emphasises that the purpose of the privileges and immunities established by the Convention “is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.” According to Article 31(1) of the Convention, a diplomatic agent has immunity from criminal jurisdiction by the receiving State. Article 32(1) states that immunity from jurisdiction may be waived by the sending state.

²⁶³ See, e.g., Statute of the International Criminal Court, 17 July 1998, Art. 27.

²⁶⁴ United Nations Treaty Collection, ‘Chapter III. Privileges and Immunities, Diplomatic and Consular Relations, Etc. 3. Vienna Convention on Diplomatic Relations’ (Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en [Accessed 27 February 2018]).

²⁶⁵ United Nations Treaty Collection, ‘Chapter III. Privileges and Immunities, Diplomatic and Consular Relations, Etc. 3. Vienna Convention on Consular Relations’ (Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en [Accessed 27 February 2018]).

²⁶⁶ United Nations Treaty Collection, ‘Chapter III. Privileges and Immunities, Diplomatic and Consular Relations, Etc. 3. Convention on Special Missions’ (Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-9&chapter=3&clang=_en [Accessed 27 February 2018]).

The preamble of the Vienna Convention on Consular Relations contains the same provision concerning immunities as the Vienna Convention on Diplomatic Relations. Article 41(1) of the Vienna Convention on Consular Relations states that “consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.” Article 45(1) states that immunities can be waived by the sending state.

The question of immunity of state officials was considered by the ICJ in the *Yerodia* case. The Congolese Government claimed that Belgium violated the rule of customary international law concerning the absolute immunity from criminal jurisdiction of incumbent foreign ministers, and in doing so, violated the principle of sovereign equality among states.²⁶⁷ The ICJ highlighted that international law has “firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”²⁶⁸ The Court stated that provisions from the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations establishing that the rule that only the sending state may waive immunities reflects customary international law.²⁶⁹ It also emphasized that immunity from foreign jurisdiction does not mean impunity as, *inter alia*, the alleged perpetrator can be prosecuted in their own state, the immunity can be waived by the state which the alleged perpetrator represents, and the alleged perpetrator can be prosecuted before certain

²⁶⁷ Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 11, 12.

²⁶⁸ *Ibid*, para. 51.

²⁶⁹ *Ibid*, para. 52

international criminal courts.²⁷⁰ The Court concluded that Belgium violated an obligation to respect the immunity of the Congolese Ministry, i.e., infringed upon immunity from criminal jurisdiction.²⁷¹

The ICJ judgment in the *Yerodia* case was not adopted unanimously and a number of Judges did not agree with the majority.²⁷² Furthermore, the Judgment is highly criticised by scholars.²⁷³ There is another position according to which international crimes could never constitute official acts.²⁷⁴

According to the draft articles on immunity of state officials from foreign criminal jurisdiction provisionally adopted so far by the ICL, there are two types of immunity: immunity *ratione personae* and *ratione materiae*.²⁷⁵ Articles 3 and 4 of the Draft articles establish that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction only during their term of office, which covers all acts performed in private and official

²⁷⁰ *Ibid*, paras 60, 61.

²⁷¹ *Ibid*, paras 70, 71.

²⁷² See Dissenting opinion of Judge Van Den Wyngaert, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 1-39; Dissenting Opinion of Judge Al-Khasawneh, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 1-8; Dissenting Opinion of Judge Oda, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para 15-16.

²⁷³ Roht-Arriaza/ Fernando, 2011, p. 363.

²⁷⁴ Roht-Arriaza/ Fernando, 2011, p. 363; Dissenting opinion of Judge Van Den Wyngaert, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 36; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 85.

²⁷⁵ ILC Report, A/72/10 (2017), Chapter VII, C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission, 1. Text of the draft articles, para. 140, Art. 3-7.

capacity during or prior to their term of office. Articles 5 and 6 state that state officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction only with respect to acts performed in an official capacity. This immunity concerning the acts performed in an official capacity continues to subsist after individuals, including individuals who enjoyed immunity *ratione personae*, have ceased to be state officials.²⁷⁶ Article 7 of the Draft Articles establishes that immunity *ratione materiae* shall not be applied in respect of crimes under international law, including war crimes.²⁷⁷ In accordance with the ILC commentary to the Draft Articles, exclusion of crimes under international law concerns solely immunity *ratione materiae*, and shall not apply in respect of immunity from jurisdiction *ratione personae*.²⁷⁸ Consequently, Article 7 interpreted in connection with Article 4 is applicable to a former Head of State, a former Head of Government or a former Minister for Foreign Affairs for acts performed by them in an official capacity during their term in office.²⁷⁹ This means that after the end of their term even Heads of State, Heads of Government and Ministers for Foreign Affairs cannot enjoy immunity in respect of crimes under international law.

To put it briefly, treaty law and case law practice have proven that immunity *ratione personae* of Heads of State, Heads of Government and Ministers for Foreign Affairs, during their term of office, does not preclude investigation by international

²⁷⁶ *Ibid*, Art. 6(2)(3).

²⁷⁷ *Ibid*, Art. 7(1).

²⁷⁸ ILC Report, A/72/10 (2017), Chapter VII, C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission, 2. Text of the draft article, with commentary thereto, provisionally adopted by the Commission at its sixty-ninth session, para. 141, Commentary, §2.

²⁷⁹ *Ibid*, §3.

criminal tribunals but does preclude criminal prosecution at the national level, even if the prosecution concerns international crimes. Immunity *ratione materiae* of state officials and former Heads of State, former Heads of Government and former Ministers for Foreign Affairs is not a barrier for foreign criminal jurisdiction.

There are ongoing investigations against low-level commanders based on universal jurisdiction.²⁸⁰ In March 2017 the European Center for Constitutional and Human Rights (hereinafter – ECCHR), along with seven claimants from Syria and two Syrian lawyers, lodged criminal complaints against high-level officials in Syria with the Office of the German Federal Public Prosecutor.²⁸¹ The complaints concern alleged crimes against humanity and war crimes. As noted previously, immunity *ratione materiae* of state officials does not cover acts which constitute international crimes, i.e., war crimes and crimes against humanity. *Ergo*, prosecution of those crimes allegedly committed by Syrian state officials in German Courts on the basis of universal jurisdiction does not violate immunity *ratione materiae*.

At the same time, even though the ECCHR considers the Syrian President as the main commander of the perpetrators who

²⁸⁰ UN General Assembly, Report of the Secretary-General, ‘The scope and application of the principle of universal jurisdiction’, A/72/112, 22 June 2017, paras 23-24, 26; Kroker, P./ Kather, A.L. (2016) ‘Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany’ [blog] (EJIL: Talk!) (12 August 2016) (Available at: <https://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/> [Accessed 29 November 2017]).

²⁸¹ European Center for Constitutional and Human Rights (March 2017), “Executive Summary: Criminal complaint to the German Federal Public Prosecutor, Torture in Syria”, pp. 9,10 [pdf] (Available at: https://www.ecchr.eu/en/international-crimes-and-accountability/syria/torture-under-assad.html?file=tl_files/Dokumente/Universelle%20Justiz/Syria_Torture_Complaint_ECCHR_ExecutiveSummary.pdf [Accessed: 10 February 2018]).

allegedly committed international crimes, it has not submitted criminal complaints against him.²⁸² Bashar Al-Assad is the actual Head of State and has immunity *ratione personae*. Theoretically, he can be prosecuted only after he ceased to be the President, and only for alleged acts that constitute international crimes, including acts committed during the term of his presidency.

5.4. Amnesty

In one of his interviews, Bashar Al-Assad has stated that upon termination of the Syrian armed conflict amnesty should be granted.²⁸³ If alleged perpetrators of war crimes are granted amnesty, the question of legality of the application of universal jurisdiction can arise.

Article 6(5) of Additional Protocol II establishes the obligation of “the authorities in power to endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained” at the end of hostilities. The ICRC, in its commentary, highlighted that the obligation of the authorities to grant an amnesty at the end of hostilities is not absolute, and rather that states are required to give their careful attention to efforts to grant such an amnesty.

As noted previously, Syria is not a Party to Additional Protocol II. However, there is a customary rule reflecting this provision

²⁸² *Ibid.*

²⁸³ Telesur, ‘Full Transcript of teleSUR’s Exclusive Interview with Syrian President Assad’ [online] (27 April 2017) (Available at: <https://www.telesurtv.net/english/news/Full-Transcript-of-teleSURs-Exclusive-Interview-with-Syrian-President-Assad-20170426-0018.html> [Accessed 28 February 2018]).

of Additional Protocol II.²⁸⁴ This rule is not applicable to “persons suspected of, accused of or sentenced for war crimes.” International case law has confirmed that amnesty cannot be applicable to war crimes.²⁸⁵

In the case of *Prosecutor v. Kallon and Kamara*, the SCSL has taken the position that even though the granting of amnesty is an exercise of sovereign power of a state, a decision to grant amnesty cannot deprive another state of its right to exercise universal jurisdiction over international crimes.²⁸⁶

As for scholars’ positions, Cassese has noted that “there is not yet any general obligation for States to refrain from amnesty laws on these [international] crimes.” He argued that if the state issues such a law, it does not breach any customary rule. At the same time, if another state decides to prosecute persons accused of international crimes, this state would not “act contrary to general international law, in particular to the principle of respect for the sovereignty of other States.”²⁸⁷ The opinion of Cassese is widely adopted.²⁸⁸

²⁸⁴ ICRC, ‘IHL Database, Customary IHL. Rule 159. Amnesty’ (Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159#Fn_5496F074_00001 [Accessed 27 February 2018]).

²⁸⁵ *See, e.g.*, *Prosecutor v. Furundžija*, ICTY, Trial Judgment, IT 95 17/1 T, 10 December 1998, § 751; UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, Art. 10; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006, Art. 40 New.

²⁸⁶ RUF Trial, *Prosecutor v Kallon (Morris) and Kamara (Brima Bazzy)*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case No SCSL-2004-15-AR72(E), SCSL-04-15-PT-060-I, ICL 24 (SCSL 2004), 13th March 2004, Special Court for Sierra Leone, Appeals Chamber, para. 67.

²⁸⁷ Cassese, 2003, p. 315.

²⁸⁸ SCSL, *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 71.

To summarise, amnesty cannot be a barrier for the prosecution of war crimes by international courts. Following the same logic, amnesty cannot be an obstacle for prosecution by foreign courts either. This means that even if amnesty is granted for those who have participated in the armed conflict, including for war crimes, this fact cannot preclude the prosecution of war crimes, *inter alia* in the foreign courts on the basis of universal jurisdiction.

5.5. State Abuses

There are a number of states and politicians who object to the application of universal jurisdiction. The argument underlying these objections is the allegation that universal jurisdiction is an interference in the internal affairs of sovereign states. For instance, Togo, in its statement to the Sixth Committee of the UN General Assembly, indicated that the conditions for the exercise of universal jurisdiction must be strictly specified in order to minimize the risk of interference in the internal affairs of a State and to “preserve the sovereignty, integrity and political independence of each State.”²⁸⁹ A number of states, including Cuba, El Salvador, Belarus, Kuwait and others, have stressed the importance of the observance of the principles of sovereign equality, political independence and non-interference in the internal affairs of States in the application of universal jurisdiction.²⁹⁰

²⁸⁹ UN General Assembly, Report of the Secretary-General, ‘The scope and application of the principle of universal jurisdiction’, A/72/112, 22 June 2017, para. 51.

²⁹⁰ UN General Assembly, Report of the Secretary-General, ‘The scope and application of the principle of universal jurisdiction’, A/69/174, 23 July 2014, paras 82, 88; UN General Assembly, Report of the Secretary-General, ‘The scope and application of the principle of universal jurisdiction’, A/70/125, 1 July 2015, paras 76, 83, 87.

Some scholars support this position and argue against universal jurisdiction.²⁹¹ For instance, Fletcher has claimed that the application of universal jurisdiction can violate the principle *ne bis in idem*.²⁹² Rubin has stated that “the rules already evident in international practice and codified in the positive law of the United Nations Charter do not apply in the case of some selected atrocities by some selected villains (but not to others), or that lawyers’ and judges’ views of “law” can overrule the political decisions of the leaders of the various communities that compose the international community today.”²⁹³

The sovereign equality of states is a core principle of international law.²⁹⁴ The question of whether the application of universal jurisdiction violates this principle has been addressed in international case law. For instance, as was mentioned before, in the case *Jorgic v. Germany*, the ECtHR stated that the German Court is ‘a competent court’ within the meaning of Article 5 of the Convention in response to the argument of the applicant that Germany has violated the principle of sovereign equality of states.

Accordingly, it is possible to conclude that international case law has proved that the application of universal jurisdiction *per se* does not violate the principle of sovereign equality of the states.

At the same time, some remarks can be made in relation to this question. Firstly, for impartial justice and to avoid the violation

²⁹¹ See, e.g., Individual Opinion of Judge Bula-Bula, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 89-94; Rubin, 2001, p. 280; Fletcher, 2003, pp. 580-584.

²⁹² Fletcher, 2003, p. 584.

²⁹³ Rubin, 2001, p. 280.

²⁹⁴ Charter of the United Nations, 24 October 1945, Art. 2(1).

of the principle of independence of the court from the government,²⁹⁵ it seems desirable that a state that is involved in the Syrian conflict will not exercise universal jurisdiction as a basis for the prosecution of crimes committed in Syria. It is difficult to find a legal basis that directly leads to this conclusion. Nevertheless, the human rights treaties establishing the obligation of independent and fair justice,²⁹⁶ customary and treaty law provisions of IHL setting fundamental guarantees,²⁹⁷ and obligations and right to repress grave breaches of the Geneva Conventions and war crimes, respectively,²⁹⁸ can be interpreted systematically. Such systematic interpretation allows the conclusion that only states that are not involved and do not

²⁹⁵ See, e.g., International Covenant on Civil and Political Rights, 16 December 1966, Art. 14(1); European Convention on Human Rights, 4 November 1950, Art. 6(1); African Charter on Human and Peoples' Rights, 27 June 1981, Art. 26; American Convention on Human Rights, 22 January 1969, Article 8(1); Universal Declaration on Human Rights, 10 December 1948, Article 10; Montréal Universal Declaration on the Independence of Justice, 10 June 1983; Minimum Standards of Judicial Independence: Adopted at the IBA's Nineteenth Biennial Conference Held in New Delhi, October 1982.

²⁹⁶ International Covenant on Civil and Political Rights, 16 December 1966, Article 14(1); European Convention on Human Rights, 4 November 1950, Article 6(1); American Convention on Human Rights, 22 January 1969, Article 8(1); African Charter on Human and Peoples' Rights, 27 June 1981, Article 7; Universal Declaration on Human Rights, 10 December 1948, Article 10; American Declaration on the Rights and Duties of Man, 2 May 1948, Article XVIII; Cairo Declaration on Human Rights in Islam, 5 August 1990, Article 19(e); EU Charter on Fundamental Rights, 26 October 2012, Article 47.

²⁹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 75; ICRC, 'IHL Database, Customary IHL. Rule 100. Fair Trial Guarantees' [online] (Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100 [Accessed 27 February 2018]).

²⁹⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 50; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 146.

have any interest in the conflict can apply universal jurisdiction to prosecute crimes committed in Syria.

Furthermore, universal jurisdiction cannot be used solely to repress the actions of only one Party to the conflict and its allies. Prosecutions like this cannot respond to the criteria of fair justice and apparently will repeat the so-called ‘Nuremberg syndrome,’ in which the actions of only one party to the conflict are prosecuted while other actions, including grave violations of IHL, go unpunished. To be more precise, applying universal jurisdiction to prosecute only crimes committed by Government forces has the potential to be seen as an abuse of universal jurisdiction, given the volume of information concerning outrageous crimes committed by terrorist groups such as ISIS.²⁹⁹ Logically, this could evoke criticism that the prosecuting state is interested not in prosecuting crimes that by their nature concern all humanity, but rather in exercising a political form of justice and making an impact on the conflict. Therefore, any state which applies universal jurisdiction to the situation in Syria needs to consider the crimes committed by all parties to the conflict, including terrorist organisations, Government forces, and rebel forces. For example, the activities of the German authorities correspond to this position. German judicial bodies prosecute crimes committed by rebels, by members of terrorist groups, and by Government forces.³⁰⁰

²⁹⁹ See Cryer *et al*, 2014, p. 67.

³⁰⁰ See, e.g., Ordentliche Gerichtsbarkeit Hessen, ‘Aria L. wegen Begehung eines Kriegsverbrechens im Zusammenhang mit dem Bürgerkrieg in Syrien schuldig gesprochen’ [online] (12.07.2016) (Available at: <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/aria-l-wegen-begehung-eines-kriegsverbrechens-im-zusammenhang-mit-dem-buergerkrieg> [Accessed 27 February 2018]); Der Generalbundeswalt beim Bundesgerichtshof, ‘Anklage wegen des Verdachts der Begehung von Kriegsverbrechen und anderer Straftaten’ [online] (17.11.2016 - 57/2016) (Available at: <http://www.generalbundesanwalt.de/de/showpress.php?searchstring=Ibrahim+Al+F&newsid=640> [Accessed 27 February 2018]; Der Generalbundeswalt

Ideally, the prosecuting state shall investigate also the crimes committed by the members of the armed forces of third states that have interfered in the conflict. This would prove that universal jurisdiction is not a mechanism against citizens of states weakened by the armed conflict, but one that can be applied irrespective of all these circumstances based only on the gravity of the crimes concerned. At the same time, there have been several attempts to bring cases against state officials of powerful countries, including the Rumsfeld case,³⁰¹ cases against ex-US president George H.W. Bush, Vice-President Dick Cheney and Colin Powell,³⁰² etc. None of these attempts have ended in prosecution.³⁰³ This allows the conclusion that states do not have the will to exercise universal jurisdiction when there is a risk of the degradation of political relations between states. This can lead to the criticism that application of universal jurisdiction can be selective and directed only against weak states.³⁰⁴ At the same time, selective justice is a problem in relation to many criminal mechanisms.³⁰⁵

beim Bundesgerichtshof, ‘Anklage wegen Mitgliedschaft in der ausländischen terroristischen Vereinigung „Jabhat al-Nusra“ und wegen des Verdachts der Begehung eines Kriegsverbrechens’ [online] (15.07.2016 - 37/2016) (Available at: [http://www.generalbundesanwalt.de/de/showpress.php?searchstring=Suliman Al-S&newsid=620](http://www.generalbundesanwalt.de/de/showpress.php?searchstring=Suliman%20Al-S&newsid=620) [Accessed 27 February 2018]); European Center for Constitutional and Human Rights, “Press Release: German Prosecutor interviews torture survivors from Syria” (Berlin, 12 May 2017) [PDF] (Available at: https://www.ecchr.eu/en/international-crimes-and-accountability/syria/torture-under-assad.html?file=tl_files/Dokumente/Universelle%20Justiz/PR_Syria_Torture_Interviews_20170512.pdf [Accessed: 10 February 2018]).

³⁰¹ Roht-Arriaza/ Fernando, 2011, p. 365.

³⁰² Cryer et al, 2014, p. 62.

³⁰³ Individual Opinion of Judge Bula-Bula, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 79-80.

³⁰⁴ Cryer *et al.*, 2014, pp. 67, 73; UN General Assembly, Report of the Secretary-General, ‘The scope and application of the principle of universal jurisdiction’, A/69/174, 23 July 2014, para. 86; Individual Opinion of Judge

For instance, according to Article 153d of the German Code of Criminal Procedure, the Federal Public Prosecutor General of Germany has the right to dispense with prosecuting criminal offences, including international crimes, or if charges have already been preferred, to withdraw the charges at any stage of the proceedings and terminate the proceedings, “if the conduct of proceedings poses a risk of serious detriment to the Federal Republic of Germany, or if other overriding public interests present an obstacle to prosecution.”³⁰⁶ This means that Germany, like many other countries applying universal jurisdiction, is very careful in the prosecution of the nationals of states with which Germany maintains important diplomatic relations.³⁰⁷

To sum up, exercising universal jurisdiction to prosecute war crimes committed in the Syrian armed conflict could lead to criticism from some state authorities, politicians and scholars. At the same time, some precautions can be taken to avoid or reduce this criticism. Namely, states involved in the Syrian armed conflict and those that have a direct interest in the conflict should avoid application of universal jurisdiction over crimes committed in the conflict. Furthermore, the prosecuting state should prove its good intentions by prosecuting crimes committed by all parties to the conflict, especially terrorists.

Bula-Bula, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 97, 103, 104.

³⁰⁵ Cryer *et al.*, 2014, p. 68.

³⁰⁶ Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette [Bundesgesetzblatt] Part I p. 1074, 1319), as most recently amended by Article 3 of the Act of 23 April 2014 (Federal Law Gazette Part I p. 410), (Available at: https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html [Accessed 24 February 2018]), Art. 153d.

³⁰⁷ Cryer *et al.*, 2014, p. 68.

6. Features of War Crimes Committed in Syria in Light of Universal Jurisdiction

6.1. Applicable Law

The Rome Statute contains the definition of war crimes.³⁰⁸ At the same time, other war crimes may be identified in customary law and treaty law that are not contained in the extensive list of war crimes in Article 8 of the ICC Statute.³⁰⁹ The general prohibition of the use of chemical or biological weapons is an example of such a crime.³¹⁰ As Cassese has stated, there is no “authoritative and legally binding list of conducts that can constitute war crimes” in customary international law.³¹¹ The Appeals Chamber of the ICTY in the Tadić case developed guidance on the identification of war crimes that has been used in the further practice of tribunals.³¹² According to these findings, four requirements must be met to establish war crimes: (1) the violation must constitute a breach of an IHL rule; (2) that rule must be customary or found in the applicable treaty law; (3) the violation must be ‘serious;’ (4) the violation must entail individual criminal responsibility under customary or treaty law.³¹³

As mentioned in Chapter 4, the fighters of the Syrian armed forces and members of non-state armed groups in the Syrian

³⁰⁸ Statute of the International Criminal Court, 17 July 1998, Art. 8.

³⁰⁹ Cryer *et al.*, 2014, p. 271; Cassese *et al.*, 2013, pp. 70, 79-83.

³¹⁰ Cryer *et al.*, 2014, p. 271.

³¹¹ Cassese *et al.*, 2013, p. 70.

³¹² Prosecutor v. Tadić, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 94; Prosecutor v. Galić, ICTY, Appeal Judgement, IT-98-29-A, 30 November 2006, paras 86-98.

³¹³ Prosecutor v. Tadić, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 94.

armed conflict are bound by the provisions of treaties to which Syria is a Party.³¹⁴ The fighters belonging to other states' armed forces are bound by the provisions of treaties to which those states are party. Furthermore, the fighters are bound by customary IHL.

Syria is a Party to the four Geneva Conventions (1949), Additional Protocol I to the Geneva Conventions (1977), the Convention on the Rights of the Child (1989) and its Optional Protocol on the involvement of children in armed conflict (2000), the Geneva Protocol on Asphyxiating or Poisonous Gases, and of Bacteriological Methods (1925), the Convention prohibiting Chemical Weapons (1993), the Hague Convention for the Protection of Cultural Property (1954) and the Hague Protocol for the Protection of Cultural Property (1954), the Convention on the Prevention and Punishment of Genocide (1948), and the Convention on Mercenaries (1989).³¹⁵ This means that members of the Syrian armed forces and members of the non-state actors participating in the Syrian armed conflict are bound by the applicable rules of these treaties. Syria is not a party to Additional Protocol II to the Geneva Conventions (1977), the Convention on the Prohibition of Biological Weapons (1972), the Convention prohibiting Certain Conventional Weapons (1980) and its Additional Protocols, the Convention on Cluster Munitions (2008), the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999),³¹⁶ and some

³¹⁴ O'Connell, 2013, p. 38.

³¹⁵ ICRC, 'Treaties, State Parties and Commentaries. Syrian Arab Republic' [Online] (Available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY [Accessed 23 February 2018]).

³¹⁶ UNESCO, 'Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999' [Online] (Available at:

other IHL treaties. This means that if the applicable rules found in these treaties are not customary, members of the Syrian armed forces and members of non-state actors participating in the Syrian armed conflict are not bound by these provisions.

Furthermore, Syria is a state in which the majority of the population is Muslim, located in a region where the majority of states' populations follow Islam.³¹⁷ Furthermore, Syria is a suspended member of the Organization of Islamic Cooperation.³¹⁸ The Syrian Constitution has established that the Syrian President must be a Muslim and Islamic jurisprudence is a major source of legislation.³¹⁹ At the same time, Syria does not have a state religion and the Syrian Constitution declares that all religions are respected.³²⁰ Notwithstanding the ongoing armed conflict in Syria, many non-state actors do enforce Sharia law, and a lot of these actors have control of territory within the Syrian Arab Republic. Consequently, it seems that a question of applicability of Islamic law can arise in prosecution of acts committed in Syria, including prosecutions based on universal jurisdiction. Therefore, it is necessary to address Islamic law concerning the law of armed conflict to determine whether the war crimes concept is supported by Islamic law.

<http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E&order=alpha> [Accessed 23 February 2018]).

³¹⁷ Petrovic and Hughes, 2016, p. 138.

³¹⁸ Al Arabiya News, 'Organization of Islamic Cooperation suspends Syria's membership' [online] (13 August 2012) (Available at: <http://english.alarabiya.net/articles/2012/08/13/232088.html> [Accessed 7 March 2018]).

³¹⁹ Constitution of the Syrian Arab Republic, 26 February 2012, (Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125885.pdf [Accessed 7 March 2018]), Art. 3.

³²⁰ *Ibid.*

There are the following instruments which can be used as sources of the Islamic law of war: 1) the Qur'ān; 2) the Sunnah (tradition of the Prophet); 3) early Islamic precedents, mainly until about 661 A.D.; 4) consensus among jurists; 5) jurists' rulings reached through analogy; and 6) the public interest.³²¹ In these sources, it is possible to find core principles of Islamic law of armed conflict which correspond to the principles of IHL. These principles include the protection of civilians and non-combatants, the prohibition against indiscriminate weapons, the prohibition against indiscriminate attacks, the protection of property, the prohibition against mutilation, and respect of prisoners of war.³²² However, there is one serious distinction that should be mentioned. The Islamic law of armed conflict is enforced not by the criminalization of its breaches, but rather by religious motivation: it shall be followed to avoid God's punishment and to be rewarded by God in the Hereafter.³²³ Nonetheless, it is possible to conclude that the Islamic law of armed conflict does not contradict IHL and the concept of war crimes is, in general, supported by Islamic law.

At the same time, serious violations of IHL, including the killing of civilians, have been justified by some non-state Muslim armed groups, i.e., terrorist groups, through selectively invoking certain juridical opinions or incorrect interpretations of the scriptures.³²⁴ Nonetheless, Islamic legal doctrine states that such interpretations of Islamic law are wrong and contradict the

³²¹ Aldawood, A. (2017), 'IHL and Islam: An overview', [blog] (Humanitarian Law & Policy) (14 March 2017) (Available at: <http://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/> [Accessed 1 March 2018]).

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ *Ibid.*

sources of Islamic law of armed conflict.³²⁵ Consequently, analysis and address Sharia in the prosecutions of war crimes, including prosecutions based on universal jurisdiction, can be proposed to challenge the claims of terrorists on Islamic legitimacy.

Below, the main elements of war crimes will be considered. It is important to note that these elements must be established in every particular case regarding the behaviour of every particular accused in detail. This paper does not aim to analyse the behaviour of any particular fighter in the Syrian armed conflict. The only purpose of the current chapter is to shape a legal framework of analysis of war crimes committed during the Syrian armed conflict.

6.2. War Crimes Allegedly Committed in Syria

6.2.1. Contextual Element

One of the elements of war crimes which must be established is the contextual element. According to treaty and customary law, war crimes can be committed in the context of an IAC or a NIAC.³²⁶

³²⁵ Grant, 2017, pp. 26-27; Aldawoody, A. (2017), 'IHL and Islam: An overview', [blog] (Humanitarian Law & Policy) (14 March 2017) (Available at: <http://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/> [Accessed 1 March 2018]); Olidort, J. (2016), 'Does ISIS Really Follow the Salafi Version of Islamic Law and Theology?', [article] (The Washington Institute for Near East Policy) (21 September 2016) (Available at: <http://www.washingtoninstitute.org/policy-analysis/view/does-isis-really-follow-the-salafi-version-of-islamic-law-and-theology> [Accessed 1 March 2018]); Siddiqui, S. (2015), 'Beyond Authenticity: ISIS and the Islamic Legal Tradition', [article] (Jadaliyya) (24 February 2015) (Available at: <http://www.jadaliyya.com/Details/31825/Beyond-Authenticity-ISIS-and-the-Islamic-Legal-Tradition> [Accessed 1 March]); An-Na'im, A.A. (2015), 'How Islamic law can take on ISIS', [blog] (The Conversation) (16 November 2015) (Available at: <http://theconversation.com/how-islamic-law-can-take-on-isis-50113> [Accessed 1 March 2018]).

³²⁶ Statute of the International Criminal Court, 17 July 1998, Art. 8; Elements of crime, p. 13, Art. 8; Prosecutor v. Tadić, ICTY, Decision on the Defence

In accordance with ICTY case law, “an 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.”³²⁷ The Appeals Chamber of the ICTY has developed two criteria to distinguish an armed conflict from “banditry, unorganized and short-lived insurrections or terrorist activities.” The first criterion is the intensity of the conflict; the second criterion is the level of organization of the parties to the conflict.³²⁸

The situation in Syria started in 2011 with mass demonstrations. These events can be characterised as a stage of internal tension. The further use of force against demonstrators and violence can be characterised as an internal disturbance.

The Free Syrian Army and the Syrian National Council were established in 2011.³²⁹ In 2012 the armed violence reached Damascus and Aleppo.³³⁰ Since the moment when armed groups in Syria achieved the level of organization and the criterion of the intensity of the conflict was met, it is possible to state that the situation evolved into an armed conflict that can be characterised as protracted and intensive. In July 2012 the Red Cross declared that, in its view, the fighting had reached the

Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, p. 97-137.

³²⁷ Prosecutor v. Tadić, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 70; Prosecutor v. Boškoski and Tarčulovski, ICTY, Judgment, Appeal Chamber, IT-04-82, 5 May 2010, para. 21.

³²⁸ Boškoski and Tarčulovski, ICTY, Judgment, Appeal Chamber, IT-04-82, 5 May 2010, para. 21.

³²⁹ McHugo, 2004, pp. 227, 228; Wallace/ McCarthy/ Reeves, 2017, p. 562.

³³⁰ McHugo, 2004, p. 228.

proportions of a NIAC.³³¹ The Independent International Commission of Inquiry on the Syrian Arab Republic has stated that a NIAC developed in Syria during February 2012.³³² Other entities have suggested that the threshold of armed conflict was reached earlier or later than 2012.³³³ Nonetheless, there are no doubts that the current situation in Syria meets the criteria of armed conflict.³³⁴

There are two types of armed conflicts to which IHL is applicable: IAC and NIAC. In accordance with the Geneva Conventions and its Additional Protocol I, an IAC exists whenever there is a resort to armed force between States, including all cases of partial or total occupation of the territory and wars of national liberation.³³⁵ Common Article 3 contains a negative definition of NIAC: all armed conflicts that do not meet the definition of an IAC are NIACs.

³³¹ ICRC (2012), 'Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting' [online] (17 July 2012) (Available at: <https://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm> [Accessed 7 March 2018]).

³³² UN Human Rights Council, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", A/HRC/34/64 (2 February 2017), paras 1-2.

³³³ See, e.g., Ivanciu, 2016, p. 591.

³³⁴ UN Human Rights Council, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", A/HRC/34/64 (2 February 2017), para. 1.

³³⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 2; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 2; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 2; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 1; Prosecutor v. Tadić, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 70.

The conflict in the Syrian Arab Republic is one of the most complicated conflicts in world history in terms of its characterisation. The main reason for this is the huge number of belligerents involved in the conflict, including state armed groups and non-state armed groups. It is possible to conclude that the armed conflict in Syria has a mixed nature composed of different armed conflicts. Consequently, the conflict in Syria can be characterised as a conflict with dual IAC-NIAC classification, in which the rules governing both types of armed conflict apply in parallel.³³⁶

As for the IAC, there are no open clashes between the armed forces of states. Since the very beginning, the conflict has been an armed confrontation between the Government Armed Forces and non-state armed groups. The Free Syrian Army has a high level of organisation, responsible command, and control over part of Syrian territory.³³⁷ Other armed groups operating in Syria have different levels of organisation, with some of them acting on the local level.³³⁸ Consequently, the conflicts between the Syrian Armed Forces and non-state armed groups, and between non-state armed groups, should be classified as a NIACs.

At the same time, there is more than one state who resort its armed force in Syria. In 2015, Russia started military intervention in Syria on the side of the Syrian Government with its consent.³³⁹ Such intervention did not internationalise the

³³⁶ Ferraro, 2015, pp. 1229-1230; Prosecutor v. Lubanga, ICC, Decision on the confirmation of charges, Pre-Trial Chamber, ICC-01/04-01/06-803-tEN, 7 February 2007, para. 209.

³³⁷ Ivanciu, 2016, pp. 589-590.

³³⁸ *Ibid*, p. 590.

³³⁹ Williams, 2017, p. 312; Wallace/ McCarthy/ Reeves, 2017, p. 570; Syrian Network for Human Rights (2015), 'Russian Airstrikes Kills 254 Civilians Including 83 Children and 42 Women' [pdf] (2 November 2015) (Available

conflict, as Russia acted in alliance with Syria against non-state armed groups.³⁴⁰ Consequently, the Russian intervention did not change the nature of the armed conflict.

Furthermore, since 2014, there has been intervention by other states, i.e., the USA acting in coalition with some Western countries, including the United Kingdom, France, Belgium, the Netherlands, Australia, Bahrain, Jordan, Saudi Arabia and the United Arab Emirates.³⁴¹ These States have carried out air operations, allegedly against terrorist armed groups, without the consent of the Syrian Government.³⁴² Moreover, Turkey is applying force against ISIS and Kurdish militia without the consent of the Syrian Government.³⁴³ The question of the characterisation of this interference is important, as it dictates the law which applies to parties to the conflict. There is no dispute that the armed conflict between non-state armed groups

at: http://sn4hr.org/wp-content/pdf/english/Russian_aviation_caused_the_deaths_of_254_people_en.pdf [Accessed 29 November 2017]); UN Human Rights Council, “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic”, A/HRC/34/64 (2 February 2017), paras 13, 14, 22.

³⁴⁰ Ferraro, 2015, p. 1243.

³⁴¹ Geneva Academy: Rulac, ‘International armed conflicts in Syria’ [online] (Last updated: 14 February 2018) (Available at: <http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria> [Accessed 10 March 2018]).

³⁴² Groarke, 2015, p. 20; Williams, 2017, p. 296; UN Security Council, ‘Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council’, S/2015/719 (21 September 2015), pp. 1-2.

³⁴³ Geneva Academy: Rulac, ‘International armed conflicts in Syria’ [online] (Last updated: 14 February 2018) (Available at: <http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria> [Accessed 10 March 2018]); UN Security Council, ‘Identical letters dated 18 January 2016 from the Chargé d’affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council’, S/2016/45 (22 January 2016), pp. 2-3.

(i.e., ISIS) and the US-led coalition should be classified as a NIAC.³⁴⁴

As for the situation between the US-led coalition and Syria, there are at least two positions on how to address this interference. According to the first position, the interference does not change the nature of the conflict, as there are no open armed clashes between the intervening forces and Syrian Government Armed Forces.³⁴⁵ Consequently, there is no armed conflict between intervening states and Syria.

According to the second position, there is an IAC between the intervening states and Syria because the air bombardment of Syrian territory is “a resort to armed force” within the meaning of the Geneva Conventions and ICTY case law.³⁴⁶ Further arguments of the second position are that the Syrian Government did not give any permission to use force in its territory; and that the bombardment of Syrian territory by state actors has caused harm to the territory of Syria—another state actor. Furthermore, there are allegations that during 2017 the US-led coalition repeatedly targeted Syrian government

³⁴⁴ Geneva Academy: Rulac, ‘International armed conflicts in Syria’ [online] (Last updated: 14 February 2018) (Available at: <http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria> [Accessed 10 March 2018])

³⁴⁵ Watkin, K. (2016), ‘The ICRC Updated Commentaries: Reconciling Form and Substance, Part II’ [blog] (Just Security) (30 August 2016) (Available at: <https://www.justsecurity.org/32608/icrc-updated-commentaries-reconciling-form-substance-part-ii/> [Accessed 10 March 2018]); Gill, 2016, p. 366 ff.

³⁴⁶ Bellal, 2017, p. 36; Geneva Academy: Rulac, ‘International armed conflicts in Syria’ [online] (Last updated: 14 February 2018) (Available at: <http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria> [Accessed 10 March 2018]); Goodman, R. (2016), ‘Is the United States Already in an “International Armed Conflict” with Syria’ 9blog] (Just security) (11 October 2016) (Available at: <https://www.justsecurity.org/33477/united-states-international-armed-conflict-syria/> [Accessed 10 March 2018]).

positions.³⁴⁷ If the second position is applicable, the conflict has a dual character: the conflict between the US-led coalition and Syria is an IAC, while the conflict between the US-led coalition and the non-state armed groups is a NIAC. The same characterisation is applicable to the conflicts between Turkey and Syria, and between Turkey and ISIS and Kurdish militia.

Furthermore, Bashar Al-Assad has stated that Syria is in a state of war with Israel.³⁴⁸ This statement is based on the fact that there was no peace agreement after the last armed conflict in which both states were involved³⁴⁹ and no diplomatic relations

³⁴⁷ U. S. Department of Defense, 'Statement from Pentagon Spokesman Capt. Jeff Davis on U.S. Strike in Syria', Press Release No: NR-126-17 (6 April 2017) (Available at: <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1144598/statement-from-pentagon-spokesman-capt-jeff-davis-on-us-strike-in-syria/> [Accessed 10 March 2018]); Almukhtar, S./ Lai, K.K.R./ Peçanha, S./ Yourush, K./ Wallace, T./ Watkins, D., 'Mapping the Targets of the American Military Attack on Syria' [online] (The New York Times) (Available at: <https://www.nytimes.com/interactive/2017/04/07/world/middleeast/us-syria-missile-attack-airbase.html?smid=pl-share> [Accessed 10 March 2018]); Ryan, M. (2017), 'U.S. launches rare intentional strike on pro-government forces in Syria' [online] (The Washington Post) (18 May 2017) (Available at: https://www.washingtonpost.com/world/national-security/us-launches-rare-intentional-strike-on-pro-government-forces-in-syria/2017/05/18/9e4e2830-3bf0-11e7-8854-21f359183e8c_story.html?utm_term=.e96ead444de1 [Accessed 10 March 2018]); Gibbons-Neff, T. (2017), 'U.S. conducts new strikes on pro-Syrian-government forces threatening U.S. Special Operations base' [online] (The Washington Post) (6 June 2017) (Available at: https://www.washingtonpost.com/news/checkpoint/wp/2017/06/06/u-s-conducts-new-strikes-on-pro-syrian-government-forces-threatening-u-s-special-operations-base/?utm_term=.c5180ab3f73a [Accessed 10 March 2018]); Gibbons-Neff, T./ Fahim, K. (2007), 'U.S. aircraft shoots down a Syrian government jet over northern Syria, Pentagon says' [online] (The Washington Post) (18 June 2017) (Available at: https://www.washingtonpost.com/news/checkpoint/wp/2017/06/18/a-u-s-aircraft-has-shot-down-a-syrian-government-jet-over-northern-syria-pentagon-says/?utm_term=.d6416e549061 [Accessed 10 March 2018]).

³⁴⁸ Telesur (2007), 'Full Transcript of teleSUR's Exclusive Interview with Syrian President Assad' [online] (27 April 2017) (Available at: <https://www.telesurtv.net/english/news/Full-Transcript-of-teleSURs-Exclusive-Interview-with-Syrian-President-Assad-20170426-0018.html> [Accessed 28 February 2018]).

³⁴⁹ Hof, 2009, p. 2.

exist between the states.³⁵⁰ However, sometimes politicians use the term ‘war’ to characterise poor diplomatic relations between states rather than to confirm the existence of an armed conflict. At the same time, several armed clashes occurred between Israel and Syrian at the end of 2017 and the beginning of 2018.³⁵¹ Consequently, it is possible to say that the law of IAC is applicable to situations when there is a resort to armed force by Israel and/or the Syrian Arab Republic. In a time when there is no resort to armed force by the states, there is no IAC.

Furthermore, it is possible to classify the conflict as an IAC through the attribution of the activities of armed groups to other states. For this, the test of ‘overall control’ is applicable.³⁵² The test of ‘overall control’ requires actions from the state that go beyond just financing and equipping and include participation in the planning and supervision of military operations.³⁵³ In reality, it is difficult to establish the existence of such support in the

³⁵⁰ Brilliant Maps (2015), ‘These 36 Countries Don’t Recognise Israel’ [online] (2 May 2015) (Available at: <http://brilliantmaps.com/israel-foreign-relations/> [Accessed 7 March 2018]).

³⁵¹ Wallace/ McCarthy/ Reeves, 2017, pp. 573, Staff, R. (2007), ‘Israeli missiles hit military post near Damascus: Syrian state TV’ (Reuters) [online] (2 December 2017) (Available at: <https://www.reuters.com/article/us-mideast-crisis-syria-attack/israeli-missiles-hit-military-post-near-damascus-syrian-state-tv-idUSKBN1DW081> [Accessed 7 March 2018]); Beaumont, P. (2017), ‘Israeli jets attack anti-aircraft battery in Syria in retaliatory strike’ (The Guardian) [online] (16 October 2017) (Available at: <https://www.theguardian.com/world/2017/oct/16/israeli-jets-attack-anti-aircraft-battery-in-syria-in-retaliatory-strike> [Accessed 7 March 2018]); Xinhuanet (2018), ‘Syrian air defense destroys Israeli missiles targeting military position in Damascus’ [Online] (7 February 2018) (Available at: http://www.xinhuanet.com/english/2018-02/07/c_136957080.htm [Accessed 7 March 2018]).

³⁵² Prosecutor v. Tadić, ICTY, Judgment, Appeal Chamber, IT-94-1-A, 15 July 1999, para. 145; Prosecutor v. Lubanga, ICC, Judgment pursuant to Art. 74 of the Statute, Trial Chamber I, ICC-01/04-01/06, 14 March 2012, para. 541; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, para. 404.

³⁵³ Prosecutor v. Tadić, ICTY, Judgment, Appeal Chamber, IT-94-1-A, 15 July 1999, para. 145.

case of Syria. There are numerous allegations that armed groups, including those that use terrorist tactics, receive support from foreign States, i.e., Qatar, Saudi Arabia, the USA, Turkey, Iran, etc.³⁵⁴ This support includes financial, weaponry and military training support.³⁵⁵ However, as was mentioned before, it is necessary to establish participation in the planning and/or supervision of military operations. There is no publicly available information concerning these requirements. However, if the prosecuting state finds enough evidence of that, the conflict in Syria between the Government Forces and the armed opposition groups could be classified as an IAC. Without this information, it is possible to classify the armed conflict in Syria between Government forces and rebels as a NIAC.

In addition, Hezbollah is fighting in the Syrian armed conflict alongside the Syrian Government.³⁵⁶ Although it is difficult to attribute its actions to Lebanon (where Hezbollah is located) or Iran (which militarily and financially supports Hezbollah) through

³⁵⁴ Groarke, 2015, p. 20; Williams, 2017, pp. 313, 315; Davis, 2016, p. 1167; Ruys, 2014, pp. 254-255; Wallace/ McCarthy/ Reeves, 2017, pp. 562-564, 571; YouTube, 'Assad Destroys US Reporter In Interview Exposes Zionist Propaganda' [video] (7 July 2017) (Available at: https://www.youtube.com/watch?v=_HLjC53emUM [Accessed 28 February 2018]); Abrahms, M. (2017), 'Syria's Extremist Opposition' (Foreign Affairs) [online] (30 October 2017) (Available at: <https://www.foreignaffairs.com/articles/middle-east/2017-10-30/syrias-extremist-opposition> [Accessed 2 March 2018]); Perry, T./ Al-Khalidi, S./ Walcott, J. (2017), 'Exclusive: CIA-Backed aid for Syrian rebels frozen after Islamist attack – sources' (Reuters) [online] (21 February 2017) (Available at: <https://www.reuters.com/article/us-mideast-crisis-syria-rebels/exclusive-cia-backed-aid-for-syrian-rebels-frozen-after-islamist-attack-sources-idUSKBN1601BD> [Accessed 2 March 2018]); Ivanciu, 2016, p. 590.

³⁵⁵ Abrahms, M. (2017), 'Syria's Extremist Opposition' (Foreign Affairs) [online] (30 October 2017) (Available at: <https://www.foreignaffairs.com/articles/middle-east/2017-10-30/syrias-extremist-opposition> [Accessed 2 March 2018]); Perry, T./ Al-Khalidi, S./ Walcott, J. (2017), 'Exclusive: CIA-Backed aid for Syrian rebels frozen after Islamist attack – sources' (Reuters) [online] (21 February 2017) (Available at: <https://www.reuters.com/article/us-mideast-crisis-syria-rebels/exclusive-cia-backed-aid-for-syrian-rebels-frozen-after-islamist-attack-sources-idUSKBN1601BD> [Accessed 2 March 2018]).

³⁵⁶ Janaby, 2016, p. 384.

the ‘overall control’ test, there is a dispute regarding the status of Hezbollah.³⁵⁷ Hezbollah has control over Southern part of Lebanese territory and receives support from the other states.³⁵⁸ Lebanon *de facto* has not objected the presence and activity of Hezbollah in the Lebanon territory and has allowed Hezbollah to take part in armed conflicts and carry out military defence functions of the state.³⁵⁹ Therefore, in accordance with Article 7 of the Articles on Responsibility of States for International Wrongful Acts, it is possible to attribute actions of Hezbollah as conduct of ‘entity empowered to exercise elements of the governmental authority’.³⁶⁰ *Ergo*, the armed conflict between Hezbollah and non-state armed groups is NIAC. As for hostilities between Hezbollah and the state armed forces, e.g., Israel,³⁶¹ it may be classified as IAC.

Consequently, the situation in Syria can be classified as armed conflict with elements of an IAC and a NIAC. *Ergo*, the contextual element of war crimes is met.

6.2.2. Objective Element

In order to establish the objective element of war crimes, the acts in question must be criminalized by international treaty or customary law.³⁶² This criminalization can be established by consistent international or national case law, provisions of the statute of an international criminal court, national legislation of

³⁵⁷ See, e.g., Janaby, 2016, pp. 383-384.

³⁵⁸ Bloom, 2008, pp. 84-85.

³⁵⁹ *Ibid*, p. 85.

³⁶⁰ *Ibid*.

³⁶¹ Wallace/ McCarthy/ Reeves, 2017, p. 573.

³⁶² Prosecutor v. Tadić, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 94.

states, the general principles of criminal justice common to domestic legal systems, or the legislation and judicial practice of the state to which the accused belongs or where the alleged crime has been committed.³⁶³

Furthermore, according to the findings of the ICTY, the violation must be ‘serious’ to constitute a war crime. This means that the violated rule must protect important values, and the breach must involve grave consequences for the victim.³⁶⁴

There are allegations that, since the beginning of the armed conflict in Syria, numerous IHL violations have been committed by all sides of the conflict.³⁶⁵ These violations include attacks on civil objects. It is difficult to define whether civil objects were targeted specifically, by mistake, or as collateral damage during attacks on military objectives. In any case, summarising information concerning attacks which occurred during more than six years of ongoing armed conflict, there are reasonable grounds to allege that the following IHL violations have happened: violation of the principle of distinction and direct targeting of civilians, attacks on objects indispensable to the survival of the civilian population, reprisals, use of prohibited weapons, use of indiscriminate means and methods of warfare, violation of the principles necessity and proportionality, causing of excessive collateral damage, recruitment of children, use of civilians as a human shields, and many others.³⁶⁶ These acts

³⁶³ Cassese *et al.*, 2013, pp. 68-69.

³⁶⁴ Prosecutor v. Tadić, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 94.

³⁶⁵ UN Human Rights Council, “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic”, A/HRC/34/64 (2 February 2017), para. 12.

³⁶⁶ UN Human Rights Council, “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic”, A/HRC/34/64 (2 February 2017), paras 14, 20, 25-32, 41-47, 52, 61, 65, 69, 71-76, 98; UN General Assembly Resolution, “70/234. Situation of human rights in the

violated important protected values and, therefore, are serious. Moreover, most of these acts are criminalized by international treaty and/or customary law.³⁶⁷

To conclude, many acts committed in the Syrian armed conflict are criminalized by international treaty and customary law and serious enough to constitute war crimes. Consequently, there are reasonable grounds to believe that acts committed in the Syrian armed conflict constitute an objective element of war crimes.

6.2.3. Subjective Element

The necessity of the establishment of the subjective element (*means rea*) is based on the word ‘wilfully,’ which is contained in numerous IHL treaties.³⁶⁸ The subjective element means that an accused had a criminal intent to create the consequences of the act prohibited by international law. In some cases, the establishment of recklessness (so-called *dolus eventualis*) or culpable negligence (*culpa gravis*) can also constitute *means rea*.³⁶⁹

The subjective element is one of the elements that is difficult to address generally without considering a particular person. Nonetheless, the existence of the *means rea* element is obvious regarding the use of human shields, recruitment of children, the actions of terrorist groups directed against the civilian

Syrian Arab Republic”, A/RES/70/234 (23 December 2015), Preamble, paras 4,5, 29, 23.

³⁶⁷ See, e.g., Statute of the International Criminal Court, 17 July 1998, Art. 8(2)(b)(i)(ii)(v) and 8(2)(e)(i)(ii)(iv).

³⁶⁸ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 130; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 85(3).

³⁶⁹ Cassese *et al.*, 2013, pp. 75 - 76.

population which are primarily intended to spread terror among groups protected by IHL, and many others.³⁷⁰ The use of indiscriminate weapons or other indiscriminate methods and means of warfare which took place in the Syrian armed conflict³⁷¹ also can have a direct intent, or, in some cases can be an example of recklessness or culpable negligence.

To sum up, the existence of *means rea* must be considered and proved in every case particularly. However, there are reasonable grounds to believe that this element is also fulfilled.

6.2.4. Nexus with the Armed Conflict

Case law and scholars' opinion have confirmed that not all crimes committed during an armed conflict constitute war crimes.³⁷² In order to qualify criminal conduct as a war crime, it must be "closely related to the hostilities."³⁷³

Some criteria for the establishment the nexus with the armed conflict have been indicated in case law. These criteria may include: the perpetrator is a combatant, the victim is a non-combatant or a member of the opposing party, the act pursued

³⁷⁰ UN General Assembly Resolution, "70/234. Situation of human rights in the Syrian Arab Republic", A/RES/70/234 (23 December 2015), Preamble, paras 4, 5; UN General Assembly Resolution, "71/130. The situation in the Syrian Arab Republic", A/RES/71/130 (9 December 2016), Preamble.

³⁷¹ UN General Assembly Resolution, "71/130. The situation in the Syrian Arab Republic", A/RES/71/130 (9 December 2016), Preamble.

³⁷² Cassese *et al.*, 2013, p. 77; Cottier, 2016, p. 314; Prosecutor v. Tadić, ICTY, Judgment, Trial Chamber, IT-94-1, 7 May 1997, para. 572; Prosecutor v. Delalić et al, ICTY, Judgment, Trial Chamber, IT-96-21-T, 16 November 1998, para. 193.

³⁷³ Cassese *et al.*, 2013, p. 77.

the ultimate goal of a military campaign, the perpetrator acted as part of or in the context of his official duties, etc.³⁷⁴

There are no doubts that the majority of the acts committed in Syria are part of the armed hostilities, committed with the purpose of achievement of military advantage or otherwise contributing to the armed conflict. For example, aerial bombardments of shelters,³⁷⁵ which can be classified as war crimes,³⁷⁶ are examples where the nexus with the armed conflict can be easily established. In other cases, such as killing or raping of civilians, the nexus with armed conflict is an element which must be established to distinguish war crime from the ordinary crime under domestic law, such as murder or rape.³⁷⁷ It is especially important to establish the nexus with a NIAC and/or in cases when the alleged perpetrator does not belong to any party to the conflict.³⁷⁸

Consequently, there are reasonable grounds to believe that most of the acts allegedly committed in Syria are part of the armed conflict and committed for military purposes. Therefore, the element of the nexus with the armed conflict also can be established.

³⁷⁴ Prosecutor v. Kunarac and others, ICTY, Judgment, Trial Chamber, 22 February 2001, para. 402; Prosecutor v. Nyiramasuhuko and others, ICTR, Judgment and Sentence, Trial Chamber, 24 June 2011, paras 6153-6154.

³⁷⁵ UN General Assembly Resolution, “71/130. The situation in the Syrian Arab Republic”, A/RES/71/130 (9 December 2016), Preamble.

³⁷⁶ See Statute of the International Criminal Court, 17 July 1998, Art. 8(2)(b)(i)(ii)(v) and 8(2)(e)(i)(ii)(iv).

³⁷⁷ Cottier, 2016, p. 314.

³⁷⁸ Cassese, 2013, p. 76.

6.3. Conclusion

The standard of proof which is necessary to establish in order to start an investigation and issue an arrest warrant, is lower than the standard of proof required at the stage of delivering a judgment.³⁷⁹ Preliminary analysis of publicly available information concerning acts committed in the Syrian armed conflict leads to the conclusion that there are reasonable grounds to believe that war crimes have been committed during the conflict. This means that states have enough information to start investigations of acts committed in Syria on the basis of universal jurisdiction.

³⁷⁹ See Statute of the International Criminal Court, 17 July 1998, Art. 61(7).

7. Prospects for the Application of Universal Jurisdiction to the Situation in Syria

7.1. Conflicts of Universal Jurisdiction

The Geneva Conventions provisions concerning universal jurisdiction established that all state parties have the obligation to prosecute grave breaches of the Geneva Conventions and the right to prosecute other breaches if these crimes are not prosecuted by states who have an ordinary basis of jurisdiction. If all states fulfil this obligation, it can lead to a situation in which multiple states may start investigations on the basis of universal jurisdiction at once. The collision of application of several universal jurisdictions to the same conduct could occur. In the Separate Opinion to the ICJ Judgment in the *Yerodia* case, Judge Guillaume has pointed out that the exercise of universal jurisdiction *in absentia* can lead to the risk of creating total judicial chaos.³⁸⁰

At the current moment, there is not any well-known case where at least two states have started parallel investigations of the same situation based on universal jurisdiction. That fact shows that not all states have a desire to investigate war crimes through the mechanism of universal jurisdiction. On the one hand, this policy helps to avoid concurrency of universal jurisdictions and ‘judicial chaos.’ On the other hand, it leads to a high level of impunity in IHL. Therefore, the price of the state attitude towards the obligation and the right to repress grave breaches and other war crimes, respectively, is too high—the impunity and ongoing violations of IHL in current armed conflicts.

³⁸⁰ Separate opinion of the President Guillaume, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 15.

Some states have pointed out that various states might request the application of universal jurisdiction all at once and, therefore, “it would be useful to establish the criteria for addressing that challenge.”³⁸¹ Furthermore, the parallel application of the principle of universal jurisdiction without any solution can lead to violations of the international principle *ne bis in idem*. Consequently, the possible solutions to the parallel applications of universal jurisdictions for the same conduct will be briefly considered.

There is no legally binding document that establishes the order of the application of universal jurisdiction and the circumstances that determine the priority. At the same time, taking into account the interests of justice, it is possible to suggest the following guiding principles.

It seems that in a case where the question of parallel exercise of universal jurisdiction arises, and all other things being equal, the primary right belongs to the state that started the prosecution first.

On the other hand, in a case where the state that has *forum conveniens* was not the first state to have started prosecution, it seems that, for effective justice, this state should have a primary right to apply universal jurisdiction. The main example of *forum conveniens* in a case of universal jurisdiction is when the state has the *forum deprehensionis* (the place where the suspect was arrested). Other examples can be: strongest possibility to obtain efficient evidence, possibility to extradite the suspect, guarantees that the criminal procedure will be executed in accordance with international criminal justice standards, etc.

³⁸¹ UN General Assembly, Report of the Secretary-General, ‘The scope and application of the principle of universal jurisdiction’, A/70/125, 1 July 2015, para. 92.

For the effective and unobstructed application of universal jurisdiction, there should be a diplomatic solution to the existence of parallel prosecution. A state which relinquishes jurisdiction to another state applying universal jurisdiction can still take part in the prosecution through cooperation in criminal matters. In light of the Geneva Conventions provision, the state can and should share all case material in its possession and cooperate in the obtaining of further evidence.

In any case, during and after adopting a decision regarding which state will exercise universal jurisdiction, the main interest to be considered should be to establish truth and bringing accountability for violations of IHL through fair and independent justice procedures. Thus, the dispute between the states should be decided against these main goals, and it seems that the states which intend to exercise universal jurisdiction should be in favour of diplomatic regulation of the question of which state will be the one to undertake the main investigation, and which will merely assist in the investigation. The purpose of universal jurisdiction is not to create a conflict between national courts, but rather to exercise justice by means of domestic systems.

To sum up, in addressing the possible application of universal jurisdiction by several states for the same conduct, the principle *ne bis in idem* requires that states must decide which state will carry out criminal prosecution. However, there is no guidance regarding this challenge. At the same time, the main purpose of the IHL rules concerning universal jurisdiction and the interests of justice can help to establish guidance for dealing with this challenge. Furthermore, in the absence of universal regulation, diplomatic negotiations, bilateral treaties and provisional assurance can be used to solve the collision.

7.2. Possible Collision of Universal Jurisdiction and Jurisdiction of the International Criminal Court

The obstacle to referral of the situation in Syria to the ICC was analysed in Chapter 3. As concluded, at the present moment there is a very low possibility that the situation in Syria will be referred to the competence of the ICC.³⁸² At the same time, it is possible that the situation will change later, and that the ICC will receive jurisdiction over the case. As states have already started to apply universal jurisdiction in prosecuting crimes in Syria, including war crimes, it is possible that a collision could occur in future between universal jurisdiction and the jurisdiction of the ICC.

If the ICC receives jurisdiction over the situation in Syria, then the conflict of national and international jurisdictions applicable to the same conduct could occur. Currently, national courts are considering crimes committed by low-level commanders.³⁸³ Contrary to these ongoing investigations, the ICC has a different purpose—to consider “the most serious crimes of international concern” of sufficient gravity.³⁸⁴ Therefore, it seems that a collision is not very likely. At the same time, it is hard to exclude the possibility of collisions. Consequently, this question shall be considered below.

³⁸² Sayapin, S. (2016), ‘A “Hybrid” Tribunal for Daesh?’ [blog] (EJIL: Talks!) (4 May 2016) (Available at: <https://www.ejiltalk.org/a-hybrid-tribunal-for-daesh/> [Accessed 29 November 2017]).

³⁸³ UN General Assembly, Report of the Secretary-General, ‘The scope and application of the principle of universal jurisdiction’, A/72/112, 22 June 2017, paras 23-24, 26; Kroker, P./ Kather, A.L. (2016) ‘Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany’ [blog] (EJIL: Talk!) (12 August 2016) (Available at: <https://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/> [Accessed 29 November 2017]).

³⁸⁴ Statute of the International Criminal Court, 17 July 1998, Art. 1, 17(1)(d).

As stated in Chapter 5, the Geneva Conventions do not mention subsidiarity in the application of universal jurisdiction. At the same time, in principle, universal jurisdiction is an instrument of last resort and can be applied when the other instruments are not used.³⁸⁵ The jurisdiction of the ICC is complementary to national criminal jurisdictions.³⁸⁶

Article 17 of the Rome Statute establishes that the ICC shall determine a case inadmissible if there is an ongoing domestic investigation or prosecution by a state which has jurisdiction over the case. According to the general rules of interpretation, these cases include investigations or prosecutions based on universal jurisdiction. Furthermore, if the case has already been investigated by a state and this state has decided not to prosecute the suspect, the ICC shall also declare the case inadmissible. The Rome Statute allows for an exception to both rules described above in the case where “the state is unwilling or unable genuinely to carry out the investigation or prosecution.”³⁸⁷ Article 17(2) describes the circumstances which help to determine unwillingness in a particular case as follows: the purpose of the proceedings or national decision is to shield the person from criminal responsibility; there has been an unjustified delay in the proceedings; or the proceedings were not or are not being conducted independently or impartially. Article 17(3) establishes that inability means that “the state is unable to obtain the accused or necessary evidence and testimony or

³⁸⁵ See UN General Assembly, Report of the Secretary-General, ‘The scope and application of the principle of universal jurisdiction’, A/71/111, 26 June 2016, paras 21, 22; UN General Assembly, Report of the Secretary-General, ‘The scope and application of the principle of universal jurisdiction’, A/70/125, 1 July 2015, para. 22; Separate opinion of Judge Rezek, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras 4,5.

³⁸⁶ Statute of the International Criminal Court, 17 July 1998, Art. 1.

³⁸⁷ *Ibid*, Art. 17(a)(b).

otherwise unable to carry out its proceeding...due to a total or substantial collapse or unavailability of its national judicial system.”

If the state has already convicted or acquitted the person based on universal jurisdiction, the ICC cannot try this person again for the same conduct. This is in order not to violate the principle *ne bis in idem*.³⁸⁸ The exceptions to this rule are when (1) the proceedings were with the purpose of shielding the person from criminal responsibility, or (2) the proceedings were not conducted independently or impartially.

At the same time, there are examples in which the state has the right to apply universal jurisdiction and may nevertheless relinquish jurisdiction to the ICC. For example, Article 153f(2)(4) of the German Code of Criminal Procedure provides that the public prosecution office may dispense with the procedure if the offence is being prosecuted by an international court. On 1 March, 2011, the German Federal Constitutional Court applied this rule and dispensed with the procedure concerning a Rwandan national who resides in France because of an arrest warrant issued by the Pre-Trial Division of the ICC. The Rwandan national was suspected in crimes against humanity and war crimes allegedly committed in the Democratic Republic Congo between January and December 2009.³⁸⁹

Applying these rules to the situation in Syria, it could happen that the ICC has the jurisdiction over the situation in Syria at the same time as there is ongoing prosecuting or investigation by a state based on universal jurisdiction. It could also occur that the

³⁸⁸ *Ibid*, Art. 20.

³⁸⁹ German Federal Constitutional Court’s Order of 1 March 2011, 2 BvR 1/11, paras 6, 353,354.

case has already been investigated by a state through universal jurisdiction and the latter took a decision not to prosecute the suspect. In these cases, the ICC should declare the case inadmissible unless the prosecuting state is “unwilling or unable genuinely to carry out the investigation or prosecution.”³⁹⁰ A situation could also arise in which a prosecuting state has started an investigation based on universal jurisdiction with purposes contrary to this mechanism, e.g., to shield a person from justice or to hold proceedings that are not independent and impartial. It is also possible that a state could start a procedure based on universal jurisdiction, without having in place the instruments necessary to obtain evidence or to receive a suspect in its territory. In a case where the state applying universal jurisdiction has the *forum deprehensionis*, according to the Rome Statute, the ICC should declare the case inadmissible. When the state applies universal jurisdiction *in absentia* and is unable to obtain the accused or enough evidence, the Rome Statute allows the ICC to consider the case. This means that the state should terminate the ongoing investigation or prosecution.

To sum up, a collision between a state applying universal jurisdiction and the ICC is unlikely to happen but still possible. There are some examples in which this collision has already happened. Furthermore, one of the most prominent cases in international criminal law—the Tadić case—was originally initiated in Germany on the basis of universal jurisdiction, but was discontinued, and Tadić was transferred to the ICTY.³⁹¹ Consequently, it is possible that a case considered by a state based on universal jurisdiction could be of sufficient gravity to

³⁹⁰ Statute of the International Criminal Court, 17 July 1998, Art. 17.

³⁹¹ Cryer, 2014, p. 66; Separate opinion of the President Guillaume, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 12.

be considered by the ICC as well. In this case, the Rome Statute is an instrument that determines the circumstances in which the case can be declared admissible.

7.3. Further Prospects

In this Chapter, only two possible collisions were considered: the collision of universal jurisdictions, and the collision of universal jurisdiction and the jurisdiction of the ICC. At the same time, it is possible that other collisions could occur if universal jurisdiction were applied alongside a potential future international criminal tribunal or hybrid tribunal. In such cases, it seems that the collisions should be addressed at the stage of the drafting of a statute of such a specific tribunal in accordance with the principles of international law.

As for the possibility of the collisions of universal jurisdiction, the following points can be mentioned. International law at the current stage does not contain any guidance for how to address this challenge. At the same time, using as a guide the interests of justice, some possible solutions to deal with the collision of universal jurisdictions can be proposed. In the process of taking a decision on which state should exercise its jurisdiction, the main principles should be the interests of justice and diplomatic solutions of any disputes that may arise.

As for the potential referral of the case to the ICC, it is important to highlight the following. The possible jurisdiction of the ICC over the situation in Syria is not a reason to undermine the importance of the application of universal jurisdiction. If the ICC has jurisdiction over the conflict, any collision of jurisdiction that occurs could be solved based on the provisions of the Rome Statute.

8. Conclusion

The armed conflict in Syria is one of the biggest challenges for the international community. Impunity is an important issue in this conflict and one of the causes of the ongoing violations of IHL. In this paper, the potential of universal jurisdiction to bring justice to war crimes committed in the Syrian armed conflict has been analysed.

The UN Security Council resolutions and its meeting reports, as well as the mechanisms of creation new tribunals, have confirmed that, at the present time, the application of international criminal justice mechanism in the situation in Syria is almost impossible. At the same time, there are reasonable grounds to believe that war crimes have been committed in the Syrian armed conflict. Universal jurisdiction is one of the instruments available to states to prosecute these crimes.

Treaty and customary law provide states with a legal basis to exercise universal jurisdiction in prosecuting war crimes committed in the situation in Syria. International and national case law have confirmed the legality of the application of universal jurisdiction, leaving open some questions of the application of universal jurisdiction and obstacles to it, such as the possibility of prosecutions *in absentia*. At the same time, an analysis of legal sources allows the conclusion that the application of universal jurisdiction *in absentia*, in principle, does not violate international law. It was concluded that some factors may constitute barriers to the exercise of universal jurisdiction, such as immunity and state abuses (such as bias and non-impartial procedures), while some factors do not affect the applicability of universal jurisdiction for war crimes, such as amnesties for war crimes.

The legal framework of universal jurisdiction makes it possible to foresee that collisions of universal jurisdiction could occur in the future. Possible solutions to this challenge were suggested. Furthermore, analysis of potential conflicts of universal jurisdiction and the jurisdiction of the ICC in prosecuting war crimes committed during the Syrian armed conflict has shown that the Rome Statute contains provisions addressing this potential collision.

This research has indicated the capacity and limits of universal jurisdiction regarding prosecution of war crimes committed during the Syrian armed conflict. As a result of this analysis, it is possible to argue that the application of universal jurisdiction is restricted and cannot solve the problem of impunity for all perpetrators of war crimes committed in Syria. However, universal jurisdiction has a field of application which includes many of the categories of war crimes committed during the Syrian armed conflict. Therefore, universal jurisdiction has the potential to contribute to delivering justice.

Even if one of the international criminal justice mechanisms is established or the situation in Syria is referred to the jurisdiction of the ICC, the universal jurisdiction will not lose its relevance. Universal jurisdiction has its own ambit, making it a unique and independent instrument which cannot and does not aim to replace any international criminal justice mechanism. Consequently, in all circumstances, it can and should continue to be used by States in prosecuting war crimes committed during the Syrian armed conflict.

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