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Enforcement of War Crimes in Syria

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Anno Accademico 2019/2020

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INTRODUCTION

After enduring decades of authoritarian governments, the people of several Middle Eastern countries raised their voices in protest and outstood their leaders in what has been called the Arab Spring. In Egypt and Tunisia, the uprisings were quick and decisive; in Lybia the protests led to a short civil war that ended with the death of Muammar Gaddafi. Syria has a whole different story. What began as protests against President Assad's regime in 2011 quickly escalated into a full-scale war between the Syrian government and anti-government rebels.

1. The roots of the conflict

Since before WWI Syria's conditions have been one of continuous turbulence and disorder, but after 1919 the political upheaval and repression brought to continuous religious disagreements, destroyed cities, massacres, and wars. It basically reverted Syria to the "normal condition which has always existed when the Syrians are left to their own devices"[1]. Indeed, it seems that peace can only be achieved when a foreign power (such as Egypt or the Ottomans) take control over the land. Syrians have always fought each other when left on their own since the Bronze and Iron Age, in the Crusader period and now the pattern continues in the twentieth and twenty-first century. In order to understand the roots of the Syrian Civil War, however, we need to start from the beginning and more specifically from 8 May 1916, when the *Sykes–Picot Agreement* was signed by the United Kingdom and France, with consent from Italy and the Russian Empire. The aim of the agreement was to define the spheres

[1] John D Grainger, Syria : An Outline History, chapter 22 (Pen & Sword History 2016).

of influence and control of the two Western countries in an eventual partition of the Ottoman Empire after WW1. Both France and the UK realized that the Ottoman Empire could not be defeated without the Arab's support. In order to convince them to launch an Arab revolt against the Ottomans, the United Kingdom and France promised to recognize Arabs independence and the possibility for this population to create a self-governing country called the Great Arabia.[2] Unfortunately both France and the UK did not maintain their promises and divided the land, designating the borders of Middle Eastern countries. The UK took control over Jordan, Iraq and an area around the city of Haifa and France established its grip in the Northern part of Iraq, Syria and Lebanon. In the early 1920s, the League of Nations' mandate system formalized the British and French control over these areas of interest. More specifically, in September 1923 France was assigned the mandate of Syria (at the time Syria also included most part of Lebanon and the current city of Alexandretta, Southern part of

[2] Elie Kedourie, *In the Anglo-Arab Labyrinth : The McMahon-Husayn Correspondence and Its Interpretations, 1914-1939* (Cambridge University Press 2010).

Turkey). In addition to the creation of the State of Syria, two more States saw the light, namely the Alawite State and Jabal ad Druze.

Figure 1 Map French Mandate of Syria, worldstatesman.org

In 1936 both of them ceased to exist as autonomous States and were incorporated into Syria as regions. It is worth mentioning that during the early years of the last century the Kurd population claimed their rights over their own territory (North-East of Syria), but they were never recognized their own autonomous State: the best examples are both the treaties of Sèvres and Lausanne, signed respectively in 1920 and 1923, both of which did not mention the creation of a separate country for the Kurds. With the signature of the United Nations Charter in 1945, France's mandate by the League of Nations to "render administrative advice and assistance to the population" of Syria effectively ended[3] and Syria emerged as an independent country. After a period in which Syria and Egypt merged

[3] The end of the mandate came into effect on April 1946

in order to create the United Arab Republic, Syria reobtained its full independence in 1961 and since then it has been ruled by the Ba'ath Party, exclusively run by the Assad family since 1970.

2. The last 60 years of Syrian History

In order to understand the reasons behind the start of the Syrian Civil War, we shall begin from the dictatorship of Hafez al-Assad, President of Syria from 1971 to 2000. Leader of the Ba'ath Party, during his years of service considerable efforts were made in order to improve conditions in the Syrian republic. Baathism is an ideology founded in 1947 and it is based on three main ideas: Arab socialism, pan-Arab nationalism and secularism[4]. There is no exact translation for the word Baathism, but it is usually translated in "resurrection" in opposition to Western colonialism and imperialism. One of the main aim of the Ba'ath Party is to create the Great Arabia, the dream that was quashed by the UK and France during the early years of the twentieth century. Indeed, the motto of the Party is "*Unity, Freedom and Socialism*", with *Unity* referring to the creation of the Great Arabia and *Freedom* emphazising the willingness to be free from foreign interferences. It is important to notice that Arabs are a population, not a religion. Therefore, Arabs might profess any religious creed. In Syria, Islam is the most practiced religion, while Christians represent 10% of the population. Moreover, Arab Muslims follow various religious and ethnic branches of Islam: the main division is the one between Sunnis and Shiites. Even though the State is secular, the political and military forces in Syria are Shiites, or better Alawites. Alawites are a sect of Shia Muslims, which currently represent less than 12% of the Arab population, while Sunnis make up the majority reaching 70%. After WW2, the

[4] Cheryl Rubenberg, *Encyclopedia of the Israeli-Pallestinian Conflict* (Lynne Rienner Publishers 2010)

Ba'ath Party seemed the best option to replace the traditional Arab Muslims elites which were not able to provide welfare and administrative standards comparable to the Western world. This new secular, nationalist, socialist Party appeared to be less corrupted, well-organized but more importantly it allowed non-Muslims, Muslims and Christian Arabs to work toghether[5]. Indeed, quite surprisingly the Ba'ath Party had a significant number of Christian Arabs among its founding members. The plan implemented by Hafez al-Assad in order to improve Syria's conditions was a socialist process, which included the building of subsidized houses for the poor, creation of employment opportunities, establishment of tariff barriers to protect local industries, and so on. The regime may have been Baathist in ideology, but it was *de facto* military and its reaction to opposition was violent. After the death of Hafez al-Assad in 2000, his son Bashar al-Assad succeeded. The Constitution of Syria was amended: the age requirement for the presidency was lowered to 34, which was Bashar's age at the time and he was then elected President, with support for his mandate over 97%. He found that the Baathist-army establishment was stable and soon accommodated itself to it. Any hope for a change in policy faded real quickly[6]. It took twelve years of repression before Syrians started their own Arab Spring. Bashir al-Assad stance was conciliatory at the beginning, but the repression continued which in turn multiplied protests around the country, all repressed with severity and brutality. Any chance of a peaceful resolution died and groups of armed rebels started to appear almost immediately. Since then, the government and the rebels are mired in a war that claims the lives of more than 400,000 people.

[5] Cheryl Rubenberg, *Encyclopedia of the Israeli-Pallestinian Conflict*, Lynne Rienner Publishers, 2010.
[6] John D. Grainger, *Syria: An Outline History*, chapter 22 (Pen & Sword History 2016)

3. The current situation

Three campaigns drive the conflict: coalition efforts to defeat the Islamic State, violence between the Syrian government and opposition forces, and military operations against Syrian Kurds by Turkish forces. During nine years of war, Syria has experienced a proliferation of factions which can all be divided into Shiites and Sunnis. In the ranks of the former we have the Assad government backed by Hezbollah, a paramilitary political party based in Lebanon, Iran and Russia, while the latter are formed by many heterogeneous groups: the FSA (Free Syrian Army, also referred as TFSA – Turkish backed Free Syrian Army – or SNA – Syrian National Army –) which is an *interim* government of the opposition, seated in the areas currently occupied by the Turkish forces. Until 2018 it was backed by Saudi Arabia, France, the UK and the US. Along with the FSA, the Syrian Salvation Government, a *de facto* alternative Government of the opposition, operates in the Idlib Governorate. In 2013 the Islamic Front joined the opposition: it is composed by 7 rebel armed groups, namely: the Al-Tawhid Brigade, mostly operating in Aleppo, Ahrar ash-Sham (the second largest rebel group after the FSA), Liwa al-Haqq based in the city of Homs. Supporting the Syrian Salvation Government in Idlib, there is Suqour al-Sham. Finally, Jaysh al-Islam based in Damascus, Ansar al-Sham and the Kurdish Islamic Front. Radicalist Islamic groups involved in the conflicts are Al-Nusra (former Al-Quaeda) and the ISIL (Islamic State of Iraq and the Levant.) Furthermore, the SDF (Syrian Democratic Forces) is present in the North East area of the country and it is ruled by the YPG, a mostly Kurdish militia. Their aim is to fight the Turkish occupation of the land with support from the US, Russia and France. Last, but not least the CJTF-OIR a Combined Joint Task Force - Operation Inherent Resolve, an

international coalition led by the US against the ISIL[7]. It gathers soldiers and civil personnel from more than 60 countries and NATO, which has played a key role in the fight against terrorism, is part of the coalition since 2016. This is the main reason why, even if the operations are not formally taking place under NATO's leadership, the Task Force is exploiting NATO's resources.

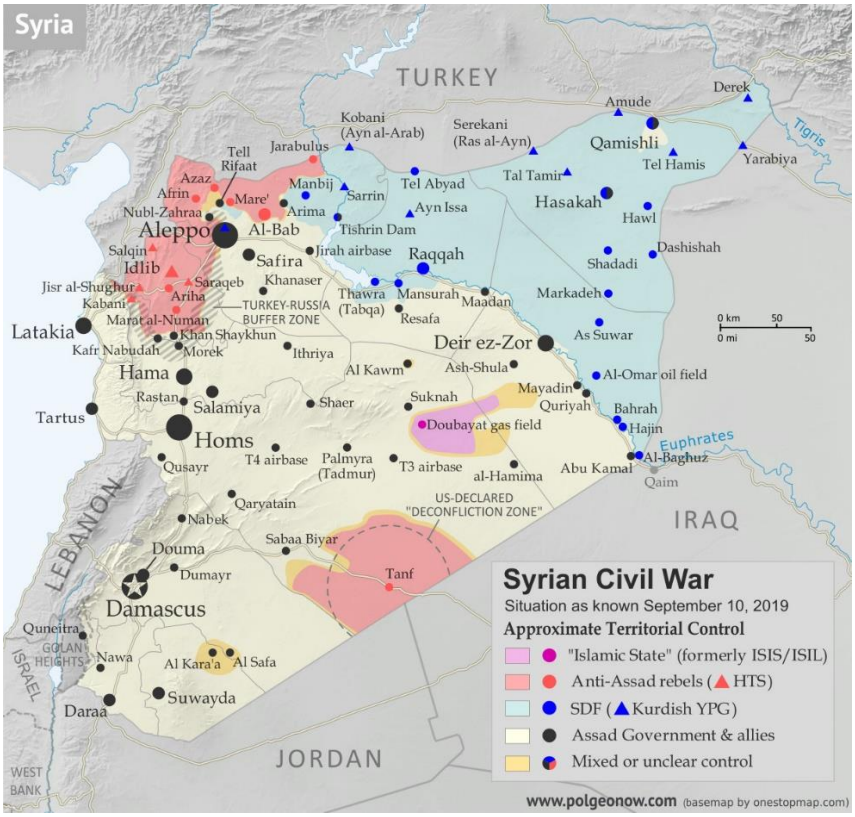

Figure 2 Syrian Civil War, www.polgeonow.com

For the entire length of the conflict, efforts to reach a diplomatic resolution have been made but they resulted to be unsuccessful since no mutually acceptable terms were to be found between the opposition groups and the officials of Assad's government. The UN tried to facilitate a political transition by organizing peace conferences which took place in Montreaux and Geneva. Geneva II

[7] Geneva Academy of International Humanitarian Law and Human Rights, "Non-International Armed Conflicts in Syria | Rulac" (*Rulac.org*, 2011) http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse1accord

and III conferences on Syria did not reach any of the aims proposed, namely the creation of a transitional new government as a result of a compromise between the opposition and the Assad's forces, and conequently the end of the civil war. Another round of talks started in 2017, with UN envoy Staffan de Mistura. The starting point of the conferences was the UN Security Council Resolution 2254, which had as main objectives to put an end to attacks on civilians, the banning of radicalist Islamic groups, the formation of a multiethnic society where people with different cultures and religions might live in peace and the direction of a free and just election in the short term. Anyway, the Geneva Peace Talks stalled, not reaching the initial aims. Also in 2017, members of Syria's government and armed opposition met in Astana, Kazakhstan, where a peace talk complementary to the Geneva ones started. This negotiation was initiated by Russia and it involved the diplomatic corps of Iran and Turkey. After four rounds of talk, a cease-fire was announced and four de-escalation zones were established: the Idlib Governorate and the adjacent districts of Hama, Aleppo and Latakia; the Northern part of the Governorate of Homs; Eastern Ghouta and the piece of territory along the borders of Syria and Jordan. The perimeter of these zones slightly changed during the following rounds of the Astana process. However, attacks by Assad's government forces against rebel-held areas in the de-escalation zones resumed shortly, nullifying the achievements that were made during the Astana process.

4. The numbers of the conflict

As of January 2019, according to the UN estimates, more than 5.6 million Syrians have fled the country, seeking refugee in Jordan, Lebanon, Turkey and Europe. 7 million people have been

internally displaced[8]. According to the opposition, civilian deaths amount to 116,086[9] – 117,967[10], while according to the SOHR (Syrian Observatory for Human Rights) the number of total killed might be around 585,000 people[11].

5. *The aim of my thesis*

The regulation of warfare may be traced back to ancient times. Laws and customs varied between different civilizations, until 1864 when the first Geneva Convention was adopted. Since then, International Humanitarian Law (IHL) has developed extensively. Nonetheless, "enforcement of international norms, which can be challenging in the best of circumastances, is more difficult in contexts of a deadly struggle among armed groups."[12]. The focus of my thesis will be on war crimes, which criminalize a narrower part of IHL, and the creation of an ad-hoc court for the prosecution of war crimes perpetrated in Syria during the last decade. First step would be analyze the concept of war crime and then examining which crimes are being perpetrated in Syria. Of course, it is paramount to assess the legal theories and the judicial practice developed in the past by the Tribunals that are considered to be the blueprint for any future Court, namely the ICTR, the ICTY and the ICC. Then the focus of the second chapter will be shifted to the practical challenges that these Tribunals have faced during their prosecutions, such as gathering of evidence or

[8] UNHCR, "Internally Displaced People - UNHCR Syria" (*UNHCR*, 2017) https://www.unhcr.org/sy/internally-displaced-people
[9] "Syrian Revolution NINE Years on: 586,100 Persons Killed and Millions of Syrians Displaced and Injured" (*The Syrian Observatory For Human Rights*, March 15, 2020) https://www.syriahr.com/en/157193/v
[10] "VDC - Violations Documentation Center - مركز توثيق الإنتهاكات" (*VDC - Violations Documentation Center* https://vdc-sy.net/en/
[11] See note 9.
[12] Hersch Lauterpacht, "The problem of the Revision of the War", 360-384, *British Yearbook of International Law*, vol 29 (1952).

participation of victims. In order to do that, it is crucial to break down a trial and find the elements needed for a successful prosecution. The Nuremberg Military Tribunal and the Tokyo Military Tribunal will be discussed at length, since for the sake of this thesis mistakes during proceedings are more valuable than flawless prosecutions. In the end, a detailed assessment of the best viable option in order to prosecute war crimes in Syria will follow: four potential mechanisms will be examined, namely the possibility of referring the situation to the ICC, the establishment of an internationalized domestic court, a domestic court created with international support and last but not least, an ad-hoc court created by the UN. For each of these options, references to existing Courts will be made, as for example the Special Court for Sierra Leone, the Iraqi High Tribunal, the Extraordinary Chambers of Cambodia abd the War Crimes Chambers of Serbia. Learning from the past, the aim of my thesis is the creation of a "up and running" court that hopefully could be successful in the prosecutions and convictions of war criminals, achieving retributive justice for the victims of war crimes committed in Syria since 2011.

CHAPTER 1

The Syrian conflict is characterized by relentless violations of International Humanitarian Law (IHL). The Syrian population has suffered violence and mistreatments, disproportionate attacks, the empolyment of prohibited weapons (such as chemical weapons and cluster munitions), as well as starvation and ceaseless siege warfare as methods of warfare. And the list of offences does not end here, the emergence of ISIL has introduced new inhuman perpetrators who operate outside the boundaries of the law, leading to brutal consequences. The magnitude of atrocities and cruelty, together with the absence of political progress, has generated an "apocalyptic disaster" that is nowhere near an end[13]. Fortunately, "the Syrian conflict has one of the most well-documented international crime base in history."[14]. In order to "investigate all alleged violations" of International Human Right Law (IHRL) and to establish the facts and circumstances "that may amount to war crimes and crimes against humanity, the U.N. Human Rights Council through resolution S-17/1 established the Independent International Commission of Inquiry on the Syrian Arab Republic (COI) with a view to ensuring the perpetrators […] are held accountable."[15]. In this chapter, a detailed analysis of IHL grave breaches in the Syrian territory will follow, but firstly I will examine the definition of war crime giving a generic frame of the sources of IHL, and the relevant jurisprudence on the subject.

[13] "Syria Crisis: 'Apocalyptic Disaster,' Clapper Says" (*NBC News*, February 11, 2014) https://www.nbcnews.com/news/world/syria-crisis-apocalyptic-disaster-clapper-sa%20ys-n27466
[14] Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal.
[15] "Resolution Adopted by the Human Rights Council at Its Seventeenth Special Session S-17/1. Situation of Human Rights in the Syrian Arab Republic" https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/ResS17_1.pdf

1. *History and development of International Humanitarian Law (IHL)*

The regulation of warfare has a long history: around the world, different civilizations, in different centuries, have tried to lay out some basic rules governing conduct during armed conflicts (*ius in bello*)[16]. However, the most significant step was taken by Henri Dunant, a businessman from Geneva, in 1859. He addressed the international community asking to stop the atrocities he witnessed in the aftermath of the Battle of Solferino and this appeal prompted the foundation of the International Committee of the Red Cross a few years later. Since then, International Humanitarian Law has never stopped developing. Nowadays, the treaties that focus on IHL are commonly classified into the "Hague law" which regulates methods and means of warfare[17], and the "Geneva law"[18] which concentrates on the protection of civilians and non-combatants. This conventional difference blurs in some cases, as, for istance, in Additional Protocol I[19] and II[20] to the Geneva Conventions, which notably combines elements from both the Hague and the Geneva Laws. The norms contained in the Hague Resolutions and the Geneva Conventions are widely acknowledged as customary laws[21], while not all the provisions in the AP I and II are recognized as such[22]. After centuries of development, the

[16] LC Green, The Contemporary Law of Armed Conflict (Manchester University Press 1999)
[17] "The First Hague Convention" 1899 and "The Second Hague Convention" 1907.
[18] "The Geneva Conventions I - IV" 1949.
[19] " Protocol Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts" 1971, Protocol I.
[20] "Protocol Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts" 1977, Protocol II.
[21] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon 1991)
[22] *Strugar case*, ICTY A.Ch. 22 November 2002.

key principles of IHL are the principle of distinction[23] and the principle of proportionality. The former implies that soldiers must distinguish between military and non-military targets and spare non-combatants (civilians, soldiers *hors de combat*, prisoners-of-war), while the latter entails the necessity to minimize collateral damage to civilian poulation, therefore reducing avoidable suffering.

[23] International Court of Justice, "'Legality of the Threat or Use of Nuclear Weapon", Advisory Opinion (1996) https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/Advisory%20Opinion,%201996%20I.C.J.%20226.pdf

2. *The definition of "war crime"*

"A war crime is a serious violation of the laws and customs applicable in armed conflict (namely IHL), which give rise to individual criminal responsibility under international law."[24]. As it is obvious from the definition itself, IHL interpretation is fundamental in order to completely understand War Crimes Law. One of the real struggles is finding a balance between the militaristic approach and humanitarian considerations. Recently, the international community is witnessing a shift from the former to the latter, that many scholars consider to be a process of "humanization of humanitarian law"[25] that led to significantly more rigid provisions. Despite the fact that different approaches to the criminilization of IHL have been taken by the different Tribunals that the International community has witnessed in the last and current centuries, there are some common issues to any war crime. In the next paragraph, I will give a general overview of the fundamental elements of a war crime, without any pretension of being exhaustive.

[24] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge Cambridge University Press 2019).
[25] Theodor Meron, "The Humanization of Humanitarian Law" (2000) 94 The American Journal of International Law 239 https://www.cambridge.org/core/journals/american-journal-of-international-law/article/humanization-of-humanitarian-law/4753E9A6EFB9810EBA6F4B4FC5E5EFAE accessed November 8, 2019.

3. *The elements of a war crime*

a. *Armed conflict*

"IHL is triggered by the outbreak of an armed conflict"[26], therefore there must be a *nexus* between war crimes and the use of armed force. There is no need for a state of war to be declared; the existence of a conflict is sufficient for the application of IHL provisions[27]. It seems quite obvious, nowadays, that IHL would apply in both non-international and international armed conflict, but in the past, namely before human rights came into the scenario, "internal affairs" were considered to be outside the scope of the international community. The first step taken in order to extend the application of IHL to internal armed conflict was the introduction of common Article 3 of the Geneva Conventions, and in 1977 the drafting of Additional Protocol II, which regulates non-international armed conflicts entirely. It was during the 90's that the International community felt the need for evolution in this particular area of IHL. In fact, the UN criminilized serious violations of common Article 3 of the Geneva Conventions and the core provisions of Additional Protocol II with the adoption of the International Criminal Tribunal for Rwanda (from now on ICTR) Statute. The Tadić decision by the International Criminal Tribunal for the Former Yugoslavia (ICTY) was also groundbreaking and had a major impact on *ius in bello.* After taking into consideration

[26] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge Cambridge University Press 2019).
[27] "The Geneva Conventions I - IV" 1949, Common Article 2.

all sources of International Law, the Chamber supported the view that "a number of rules and principles have gradually been extended to apply to internal conflicts"[28], but not mechanically. It is not the prohibitions themselves that apply to internal armed conflict, but rather the general gist of the rules applicable to international armed conflict that become applicable to internal conflicts as well. Despite the fact that jurisprudence and law keep moving towards convergence[29], there is still a significant asimmetry between the provisions that can be implemented in these two different kinds of conflicts, and sometimes the discrepancy is hard to offset. Finally, the ICRC has been working on the definitions in compliance with the objectives listed in Article 4 of their own Statute[30]. Therefore, the prevalent legal opinions are the following: an "international armed conflict" (IAC) is characterized by the opposition of two or more countries, while a "non-international armed conflict" (NIAC) is a combat between the State and armed groups which are outside the governmental authority, or between such groups only. The ICRC also underlines a distinction between NIACs falling within the scope of common Article 3 of the Geneva Conventions and NIACs that comply with the definition of Article 1 Additional Protocol II[31], the latter being more restrictive than the former. Article 1 of the AP II should "develop and supplement" common Article 3, but in practice it diverges

[28] *Tadić*, ICTY A.Ch. 2 October 1995, paras. 94 – 96.
[29] Jean-Marie Henckaerts and others, *Customary International Humanitarian Law* (Cambridge University Press 2005).
[30] Namely, "for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof"
[31] Art 1 A.P.II 1 "This Protocol […] shall apply to all armed conflicts […] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations […] 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

from it, giving a narrower definition and a higher threshold for NIACs[32]. However, and most importantly, this stricter definition is only relevant when applying the AP II itself, so "it does not extend to the law of NIACs in general."[33]. What is really relevant for this thesis, is that currently no other type of armed conflict exists: there is the possibility that an IAC could evolve into a NIAC and viceversa[34], and that these two types of conflicts might coexist in the same scenario. This is the case of Syria, which is going to be discussed in detail in the following paragraphs.

b. Nexus between conduct and conflict

Criminal activities do not amount to war crimes just for the fact that they are perpetrated in a territory experiencing armed conflicts; "for example, if a person kills a neighbour purely out of jealousy or because of a private dispute over land, and it happens to occur during an armed conflict, that is not a war crime."[35]. In order to establish the existence of this nexus, the ICTY Appeals Chamber in the *Kunarac* judgement elaborated a test that takes into consideration the influence that a conflict might have over the perpetrators' ability to commit a crime intentionally (*mens rea*) and also whether the conflict impacts the manner in which the crime was committed, or the purpose for which it was executed.[36]. The ICC Elements of the Crime,

[32] Art 1 A.P.II requires territorial control of non-governmental armed forces and the involment of the State as a party to the conflict, elements that are not required in common art 3 of the Geneva Conventions
[33] ICRC, "How Is the Term 'Armed Conflict' Defined in International Humanitarian Law?" (2008) https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf
[34] *Ibid.*
[35]Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge Cambridge University Press 2019); see also Knut Dörmann, Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court : Sources and Commentary* (Cambridge University Press 2003).
[36] Other questions might be taken into account such as the status of the perpetrator, the condition of the victim, if the act was aimed at serving a military purpose

which extensively integrated the ICTY jurisprudence, requires the conduct to be carried out "in the context of and associated with" a conflict.[37]. The expression "associated with" specifically introduces the link between conduct and conflict, which is one of the fundamental elements of a war crime.

c. Mens Rea

The law of war crimes regulates the conducts of both civilians and members of the armed forces. In order for it to constitute a war crime, the perpetrators must be aware of the existence of an armed conflict.[38]. This requirement was not always met, especially in early Tribunal judgements, but then the ICTY Appeals Chambers overturned the previous approach in the Kordić and Natilić decisions[39], paving the way for the creation of another element necessary to the existence of a war crime. Indeed, in both decisions the Chambers set a bar on "it suffices that he [the perpetrator] was aware of the *factual* circumstances, e.g. that a foreign state was involved in the armed conflict"[40], but the he is not required the frame the conflict in the correct legal category[41]. The ICC Elements of Crimes embrace this approach, mitigating it in three ways:

- the perpetrators must be aware of facts, no legal evaluation is requested in order to be prosecuted;

[37] See also *Tadić*, ICTY A.Ch. 2 October 1995 para. 70 "It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."
[38] International Criminal Court, *"Elements of Crimes"* (International Criminal Court, Cop 2011), art. 8(2)(a)(i) element 5
[39] *Kordić*, ICTY A.Ch., 17 December 2004 and *Naletilić*, ICTY A.Ch. 3 May 2006
[40] *Kordić*, ICTY A.Ch., 17 December 2004, para. 311
[41] *Naletelić*, ICTY A.Ch. 3 May 2006, para 119

- no appraisal of the nature of the conflict;
- mere awareness of the fact that the crime was perpetrated "in the context of or associated with" an armed conflict[42];

d. The victim/object of the crime

As already mentioned in paragraph 1, IHL is divided in two main branches: The Hague Law, regulating warfare, and the Geneva Law, governing the protection of protected persons. In regards to the latter, the combination of Arts. 12 and 13 of Geneva Convention I and II, Art 4 of Geneva Conventions III and IV, and common Art. 3 present a full picture of what protected persons mean: they include "civilians, prisoners-of-war, and combatants who are no longer able to fight because they are sick, wounded, or shipwrecked"[43], but also "persons no longer taking active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or other cause."[44]. As for the former, unnecessary suffering has to be avoided, and not only in respect of protected persons. Therefore, for some war crimes, even soldiers benefit from special protection.[45]. Geneva Convention IV however, focuses on protecting civilians, namely those "who find themeselves […] in the hands of a Party to the conflict or occupying power of which they are not nationals."[46]. This provision was conceived to regulate a classical IAC, where two or more

[42] International Criminal Court,*"Elements of Crimes"* (International Criminal Court, Cop 2011), Introduction to war Crimes, para. 3; see also section 12.2.4.
[43] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge Cambridge University Press 2019);
[44] "The Geneva Conventions I - IV" 1949, Common Article 3
[45] E.g. "Rome Statute of the International Criminal Court" 1998 (The ICC Statute) Article 8(2)(b)(xvii)-(xx)
[46] "IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War" 1949, Article 4

States are military involved. Nowadays, conflicts are much more complex and articulated, and applying the Geneva Conventions would literally be counterproductive and leave many without safeguard.[47]. The Tadić decision was also a turning point for this issue: in order to assess whether the persons are in the hands of "the enemy", the test to apply is one of ethnicity rather than nationality. Albeit diverging from the literal interpretation of the provision, the Court decided that substance has to be preferred over mere formalities.

[47] E.g. Bosnia, Rwanda

4. Challenges of regulating warfare

The real challenge of regulating armed conflicts lies on the fact that "war crimes law criminalizes a narrower subset of IHL."[48]. It is correct to state that not all breaches of IHL have the potential to constitute a war crime[49], indeed not all the provisions contained in the aforementioned sources of IHL are construed to criminalize conducts; for example, according to Arts. 28 and 60 of Geneva Convention III, prisoners-of-war should be given a monthly pay and should have a canteen where it is possible to purchase food, soap, and tobacco: a shortage, or absence, of soap constitutes a violation of IHL, but not a war crime. The crucial question then would be which IHL provision constitues a criminal offence when violated. Tribunals adopted different methods in order to criminalize conducts. The following subparagraphs will examine the specific offences constituting war crimes, analyzing the relevant instruments of main courts and tribunals.

a. The ICTY and the ICTR

In the seminal Tadić decision, the ICTY outlined some preconditions in order to assess if the breach of IHL can amount to a war crime: first, the violation must not only breach a rule of IHL but it shall also be "serious", meaning that it will infringe paramount values and have grave consequences for the victims. Second, the rule must either be customary, or found in an

[48] M.Bothe, "War Crimes" in Antonio Cassese, Paola Gaeta and John, *The Rome Statute of the International Criminal Court : A Commentary* (Oxford University Press 2002).
[49] *Tadić*, ICTY A.Ch. 2 October 1995, para 94

applicable treaty. Finally, the offence must presuppose individual criminal responsibility.[50]. The adjective "serious", unfortunately, rises a series of questions that have not been answered yet[51]. Nevertheless, this test inspired the selection of war crimes both contained and not-contained in the ICC Statute[52]. Art. 2 of ICTY Statute criminalizes grave breaches of the Geneva Conventions of 1949, while Art. 3 includes "violations of the laws or customs of war", providing a non-exhaustive list of five potential war crimes[53]. As for the grave breaches, eight relevant provisions were expressly criminalized, namely:

- "wilful killing;
- torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering or serious injury to body or health;
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a civilian;
- taking civilians as hostages."[54].

[50] *Ibid.*
[51] Theodor Meron, "International Criminalization of Internal Atrocities" (1995) 89 The American Journal of International Law 554.
[52] Herman von Hebel and Darryl Robinson, "Roy S. Lee (Ed.): The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations and Results" (2000) 4 Max Planck Yearbook of United Nations Law Online 588.
[53] Namely, employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; wanton destruction of cities, towns or villages, or devastation not justified by military necessity; attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property.
[54] "Statute of the International Tribunal for the Former Yugoslavia" (The ICTY Statute) 1993, Article 2.

The ICTR, on the other hand, deals with internal conflicts. Hence, its Statute expressly prohibits conducts contained in common Article 3 of the Geneva Conventions and Additional Protocol II. Even in this case, the list is not exhaustive, and it contains:

- "violence to life, health, and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation, or any form of corporal punishment;
- collective punishments;
- taking of hostages;
- acts of terrorism;
- outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault;
- pillage;
- the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;
- threats to commit any of the foregoing acts."[55].

[55] "Statute of the International Tribunal for Rwanda" (The ICTR Statute) 1994, Article 4

b. The ICC

The ICC Statute follows the same approach of the two ad-hoc Courts and condemns criminal activities by source. The drafters tried to blur the line of distinction between NIACs and IACs in Article 8. The conducts are divided into four different lists:

- grave breaches of the Geneva Conventions (IAC)[56];
- other serious violations of IHL applicable to international armed conflict (IAC)[57];
- serious violations of common Art 3 of the Geneva Conventions (NIAC)[58];
- other serious breaches of IHL applicable to non-international armed conflict (NIAC)[59];

In spite of fifty-three offences being criminilized, the lists are not exhaustive. Therefore, the ICC has always adopted the Tadić test mentioned in paragraph *4.a* in order to criminilize conducts not included in their extensive lists. Unfortunately, the list was defined as "unwieldy"[60] and not easily understandable to the reader[61]. Nonetheless, for the sake of the Syrian analysis, some war crimes are worth mentioning. At the core of war crimes law, there are a series of provisions that could be grouped into the category of ***crimes against non-combatants***. "Deliberate and blatant violations of these provisions make up the majority of war crimes charges that have been brought in national and

[56] The ICC Statute, Article 8(2)(a)
[57] *Ibid.,* Article 8(2)(b)
[58] *Ibid.,* Article 8(2)(c); this list includes costumary provisions extracted by various sources of law such as the Hague Regulations and the Geneva Laws.
[59] *Ibid.*,Article 8(2)(e); this list includes costumary provisions extracted by various sources of law such as the Hague Regulations and the Geneva Laws.
[60] Mahmoud Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, vol 32 (Cornell International Law Journal 1999).
[61] Lyal Sunga, "The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5--10)" (1998) 6 European Journal of Crime, Criminal Law and Criminal Justice 61.

international jurisdictions"[62], this is the reason why there will be a brief analysis of the most important crimes involving violence and mistreatments. Murdering and wilfully killing fighters is obviously not prohibited[63], and protected persons might die as collateral damage of military actions conducted against military objectives, but those deaths would not amount to war crimes, if the attacks were proportionate. The ICC Statute incorporated the Geneva Conventions definition of protected persons[64], and despite the fact that the IAC provisions refer to "wilfully killing", and the provisions regarding NIACs refer to "murder", the elements of the crime are the same. Torture, inhuman treatment, mutilation, and any kind of experiment are also not allowed in both IACs and NIACs. The ICC Statute diverges slightly from the structure given by the AP I and the Geneva Conventions. Nevertheless, the prohibitions are the same. Torture as a war crime must be denoted by the "purpose requirement": if torture is aimed at acquiring information, then it could amount to a war crime, otherwise it can be categorized as crime against humanity. The ICC Statute has also the benefit of encompassing crimes that are sparse in many different instruments: for example, the AP I mentions only medical and scientific experiments, whilst the Geneva Conventions mention the biological ones. The ICC encompasses them all, expressly criminalizing them. Furthermore, the ICC adds other elements to this specific crime, such as the the absence of medical reasons and the lack of the person's interest in the carrying out the operations. Committing outrages upon personal dignity is drawn from common Art. 3 and both the AP, respectively arts. 75(2)(b), 85(4)(c) and art. 4(2)(e)[65]. Even in this

[62] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge Cambridge University Press 2019);
[63] as far as the military operations are led legitimately
[64] See paragraph 3.d
[65] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge Cambridge University Press 2019);

case, the ICC Element of Crimes makes further comment on this particular war crime, setting a high objective level of seriousness of the degrading and humiliating acts that a person is forced to perform. One of the most significant developments was the acknowledgement of many distinctive forms of sexual violence as war crimes. The ICTY did not include them in war crimes and the ICTR listed rape, enforced prostitution, and other forms of sexual violence in "outrages upon personal dignity"[66], not recognizing a special and autonomous place in the Statute. The ICC took the right approach and expressly recognized them as grave violations of the Geneva Conventions; hence rape, sexual slavery, enforced prostitution, sterilization, and pregnancy can amount to war crimes. As for other legal interests, for the sake of the thesis, it is worth mentioning the unlawful deportation, and transfer of confinement of civilians. This particular crime is considered a grave breach of Art. 127 of the Geneva Convention IV, meaning that the victims of the crime can only be civilians. The ICTY and the ICC Statutes also crimilized this conduct[67], but unfortunately the latter seems to differentiate between international and internal conflicts. As far as NIACs are concerned, art. 8(2)(e)(viii) presents a less stringent prohibition: it is indeed not possible to order "the displacement of the civilian population, […] unless the security of the civilians involved or imperative military reasons so demand"[68]; on the other hand, in international armed conflicts there is no such limitation. Another significant sector of war crimes is ***regulation of warfare***. The principle that governs this particular area is the principle of distinction, hence combatants are obliged to distinguish between military and non-military objectives. "The war crimes of directing attacks against civilians or the civilian population or against civilian

[66] The ICTR Statute, Article 4(e)
[67] The ICTY Statute, Article 2(g) and The ICC Statute 8(2)(a)(vii)
[68] In order to understand whether or not the transfer/confinement/deportation is legitimate, it is crucial to refer to the IHL provisions contained in Geneva Conventions IV (for example, arts. 79 – 141)

objects are the most elementary and straightforward expression of these principles."[69]. The ICTY, ICTR, and ICC Statute recognized three main prohibitions: two of them are drawn from arts. 25, 27, and 56 of the 1907 Hague Regulations, and the third from Geneva Convention I, arts. 38 – 44. They are, namely:

- "attacking or bombarding undefended towns, villages, dwellings, or buildings that are not military objectives"[70]
- "intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objective"[71]
- "directing attacks against buildings, transport, and personnel using the distinctive emblems of the Geneva Conventions"[72]

The mental element sufficient for these crimes to arise is recklessness according to Tribunal jurisprudence[73]. Recklessness (or *dolus eventualis*) is more blameworthy than careless behaviour, since the perpetrator can predict the possibility of an objective risk of hitting civilians, therefore causing unnecessary suffering to them. Unfortunately, the application of this concept, not new in criminal law, could have negative repercussions on the assessment of the existence of a war crime if not coupled with the other fundamental rule: the principle of proportionality. In a nutshell, if an

[69] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge Cambridge University Press 2019).
[70] The ICC Statute, Article 8(2)(b)(v) and The ICTY Statute art. 3(c)
[71] *Ibid.*, Articles 8(2)(b)(ix) and (e)(iv)
[72] *Ibid.*, Articles 8(2)(b)(xxiv) and (e)(ii)
[73] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 291 (Cambridge Cambridge University Press 2019).

offensive is directed against a military objective, the foreseeable collateral civilian damage must be proportionate to the anticipated military advantage[74]. This particular principle has witnessed major changes when transposed from one instrument to another. Anyway, it would be inappropriate to discuss them here in detail; just to give a general frame, the ICC Statute not only includes the harm caused to civilians and civilian objects[75], but also the environmental impact of the attack[76]. Furthermore, during the diplomatic discussion of the ICC Elements of Crimes, it was decided not to incorporate the requirement of result of harm as it is established by AP I and international legal practice[77]. Lastly, the ICC Statute seems to draw a distinction for NIACs and IACs; indeed not all the provisions included in Art. 8(2)(b) have been transposed in the list of Art. 8(2)(e); as far as civilian damage is concerned, in non-international armed conflicts the ICC prohibits to attack civilians, but not civilian objects. Therefore, in order to be protected, the objectives must be dedicated to specific purposes, or must show the symbols recognized by the Geneva Conventions or other humanitarian missions. In this regard, it is important to notice that the ICC Statute specifically prohibits attacks on staff, installations, and vehicles involved in humanitarian missions or peacekeeping missions according to the UN Charter[78]. Lastly, in NIACs there is no provision prohibiting the excessive "incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term,

[74] Louise Doswald-Beck, Jeanmarie Henckaerts and International Committee Of The Red Cross, *Customary International Humanitarian Law. 2,1 Practice,* 46 – 50 (Cambridge Cambridge University Press 2005). See also, Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure,* 291 (Cambridge Cambridge University Press 2019)..

[75] "Protocol Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts" (AP I) 1971, Article 85(3)(b)

[76] The ICC Statute, Article 8(2)(b)(iv)

[77] AP I, Article 85(3). See also *Kordić,* ICTY A.Ch., 17 December 2004, paras. 5 – 68

[78] The ICC Statute, Articles 8(2)(b)(iii) and (e)(iii); "Statute of the Special Court of Sierra Leone" (The SCSL Satute) 2002, Article 4(b)

and severe damage to the natural environment."[79]. Anyway, these prohibitions are to be considered principles of IHL and they would certainly meet the ICC Tadić test, which is the instrument through which the Court assess the seriousness of the crime and applies customary law in internal armed conflicts[80]. To conclude, the third category of war crimes encompasses all the provisions regarding the ***prohibition of means and methods of warfare.*** Weapons are prohibited if they are inherently indiscriminate, hence it is impossible to use them applying the principle of distinction, and if they cause unnecessary suffering or superfluous injury to fighters[81]; it is true that killing combatants is allowed under IHL, nevertheless the consequences of the weapon used and its military efficacy must be taken into account in order to assess whether that particular means is prohibited. The ICC Statute criminalizes, specifically, in both NIACs and IACs, the employment of poison and poisoned weapons, the use of asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices, and the use of bullets which expand or flatten easily, such as "dum – dum bullets."[82]. Unfortunately, the list of war crimes in non-international conflicts in character does not contain the catch-all provision provided for IACs, which bans all weapons that are indiscriminate and that cause unnecessary suffering, or excessive damage. Due to disagreements during the negotiations, the ICC Statute does not criminalize chemical, biological, and nuclear weapons. Nevertheless, the employment of such means of warfare would constitute a war crime if their definition is encompassed in the aforementioned articles, or if they are misused, therefore utilized in a way which is not permitted by the ICC Statute itself. Consideration must be given to cluster bombs. When dropped,

[79] *Ibid.,* Article 8(2)(b)(iv)
[80] See paragraph 4.a
[81] The ICC Statute, Article 8(2)(b)(xx)
[82] *Ibid.,* Art. 8(2)(b)(xvii) – (xix) and after the Kampala Review Conference of 2010, Article 8(2)(e)(xiii)-(xv)

the bomb releases many bomblets that cover a significant area, impossible to determine in advance. This is the main reason why cluster munitions are usually used to attack moving targets (such as means of transportation). It seems that no customary rule prohibits them and their employment is not a war crime *per se* under the ICC Statute[83], but it could still amount to a war crime if it violates a method of warfare. The Convention on Cluster Munition (CCM), which entered into force on 1st August 2010, represented a great achievement for the International Community; the main goals are not only the prohibition to use, produce, and stockpile cluster munitions, but also to allow cooperation among countries, give support and assistance to the victims, and clean dangerous areas[84]. Nowadays, 121 countries share these objectives, but unfortunately none of the main countries involved in the Syrian conflict are parties to the CCM, namely: Syria, Russia, the USA, and Turkey. Lastly, methods of warfare should be analyzed in order to have a complete scheme of the ICC Statute. For the sake of this thesis, siege, barring humanitarian access, and starvation are the three conducts we should focus on. These methods are indeed interconnected and the latters are expressly criminalized in art 8(2)(b)(xxv). Their source in IHL is Geneva Convention IV: indeed "contracting party shall allow the free passage […] of essential foodstuffs, clothing, and tonics intended for children under fifteen, expectant mothers, and maternity cases"[85], and "to the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population […]"[86]

[83] ICC Office of the Prosecutor Response to Communications Received Concerning Iraq" (2006) https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB774CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

[84] It is not uncommon that cluster bombs do not explode after the impact; therefore they represent a continuous threat for civilians even after the attack is terminated.

[85] "IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War" 1949, Article 23.

[86] *Ibid.,* Article 55.

and in case of inadequate supply "the Occupying Power shall agree to relief schemes […]"[87]. Furthermore, starvation is also prohibited by Art 54 of AP I[88] and Rule 53 of CIHL, and granting humanitarian access can be found as a general principle of IHL in customary Rule 55[89]. It is important to notice that siege warfare is not criminalized *per se*; it does amount to a war crime only if the party to the conflict that is laying siege does not allow humanitarian aid to enter the interested area, letting the population starve. As mentioned before, these rules are widely recognized as customary; hence, even though the ICC Statute does not include an equivalent provision for NIACs, there is no question that these conducts are crimilized and banned in both international and non-international armed conflicts. Having given a generic frame of doctrine and jurisprudence in the area of the law of war crimes, the next paragraph analyzes in detail, and chronologically, the violations of IHL perpetrated in Syria reported by the COI, and assesses whether these conducts might be considered criminal offences.

[87] *Ibid.*, Article 59.
[88] "Starvation of civilians as a method of warfare is prohibited. It is prohibited to attack, destroy, remove or renderuseless objects indispensable to the survival of the civilian population [...] for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party [...]"
[89] Louise Doswald-Beck, Jeanmarie Henckaerts and International Committee Of The Red Cross, *Customary International Humanitarian Law. 2,1 Practice, Part 1* (Cambridge Cambridge University Press 2005), (The CIHL Study), Rule 55 "The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character andconducted without any adverse distinction, subject to their right of control".

5. *War Crimes in Syria*

In order to assess the extent of the violations of IHL that can be prosecuted as war crimes, it is necessary to establish the starting date of the conflicts within Syria. This requirement, indeed, distinguishes war crimes from other international crimes such as genocide or crimes against humanity, which clearly do not depend on the presence of armed conflicts. There is no authoritative agreement establishing the exact date for the beginning of the war, but most NGOs and academics considered it to be in late 2011 or early 2012[90]. As far as war crimes are concerned, however, evidences must be collected on the crime scene, and not all organizations and scholars had this chance; this is the main reason why the first step that a future Court shall take is to assess when and where the first episodes of IHL violations took place, and how widespread they were, meaning that the Court shall evaluate if war crimes were experienced all over the territory or just in delimited perimeters. To give an example, the first outbreaks, which started in 2011, affected the main governorates of Syria and therefore the main cities such as Homs, Idlib, Rif Dimashq, and Hama, but not the entire country. Indeed, these areas have experienced a high increase in violence between governmental and anti-governmental forces since November 2011. The Syrian Army increased bombardments on the rebels, giving no warning to the civilian population and that led, according to the Violations Documenting Center, to at least 787 civilian deaths[91]. After the failure of a UN peace plan and ceasefire[92], rebel groups extended their area of influence and, by July 2012, Damascus

[90] Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal.
[91] Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/19/69" (Human Rights Council 2012), paras. 39 – 41.
[92] Geneva Academy of International Humanitarian Law and Human Rights., "Non-International Armed Conflicts in Syria |Rulac" (*Rulac.org*, 2011) http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse1accord

became the scenario of heavy shelling: on 18 July 2012, the national security building in Damascus was bombed and the explosion killed the Minister of Defense and other security officials; on 14 June 2012, a car bomb exploded near the Sayyidah Zaynab shrine harming 11 people; on 19 May 2012, a car bomb detonated in the car park of a military compound and, 9 days prior, two large car bombs exploded near the Military Intelligence branch killing 55 people; in April 2012, a bomb near a mosque of Al-Meidan killed 11 people, and in March 2012, two bombs apparently intended to destroy an intelligence service office and a police headquarters killed 27 people[93]. Therefore, in order to assess jurisdiction and prosecute those crimes, a Tribunal shall first evaluate when and where the gross violations crossed the IHL threshold for war crimes. Moreover, as mentioned before, these findings constitute evidence but they are not precise, therefore not reliable enough since the COI was impaired by the lack of access to the battlefield, the absence of collaboration from the Syrian Arab Republic's institutions, and by the dearth of information on the perpetrators[94]. The second step a Court should take for the prosecution of possible war crimes is to examine the nature of the conflicts for the purpose of establishing the applicable law; since there are discrepancies in both treaty law and customary law concerning IACs and NIACs, it is vital to assess the character of the conflicts in order to understand which set of war crimes might be charged and prosecuted. The Syrian war is a web of conflicts with many facets and, thus far, no Party to the conflict has expressed comments on the nature of it; with the view to "provide an independent and impartial classification of situations of armed conflict in the

[93] Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/21/50" (Human Rights Council 2012) para 55.

[94] Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/19/69" (Human Rights Council 2012), Annex IV Note verbale dated 28 December 2011 addressed to the Permanent Representative of the Syrian Arab Republic. See also Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/21/50" (Human Rights Council 2012) para 56.

world"[95], the Rule of Law in Armed Conflicts project (RULAC) of the Geneva Academy has given a general framework, establishing the existence of various overlapping NIACs, namely the fight between the Syrian government[96] and the Free Syrian Army (FSA), the United National Army (UNA), Hay'at Tahrir al-Sham, Ahrar al-Sham, the ISIL, and the Syrian Democratic Forces. Alongside, there are non-international armed conflicts among non-governmental factions as well for the control of delimeted areas or governorates. In order to be categorized as a NIAC, first of all, a conflict should cross a certain level of violence and intensity, therefore it cannot be compared to internal disturbances, riots, or hostilities; second, there must be at least one non-state armed group with a certain degree of internal organization partecipating to the conflicts. All of the conflicts mentioned above fit into the definition since the duration, the intensity of the confrontations, and the number of soldiers, weapons, and equipment used in the fightings satisfies the former requirement[97], while on the logistic side both governmental forces and non-state armed groups have a command structure governed by disciplinary mechanisms and the ability to plan and execute military plans and negotiate truces and cease fires[98]. The RULAC Project, however, affirms the presence of several international armed conflicts as well, even if this classification is controversial. First difference to draw is that, in order for an international armed conflict to arise, there is no need for an IHL threshold to be crossed. The armed intrusion of a foreign country is sufficient: it can interfere by deploying troops and carrying out military activities in the territory of another State, but the lack of consent

[95] Geneva Academy of International Humanitarian Law and Human Rights., "The Rule of Law in Armed Conflict Project | Rulac" (*Rulac.org*) http://www.rulac.org/
[96] With the support of Russia, Hezbollah and Shia fighters
[97] To see the entire list of factors see *The Prosecutor v Ljube Boškoski and Johan Tarčulovski*, ICTY T. Ch. Judgment, IT-04-82-T, 10 July 2008, para. 177.
[98] *The Prosecutor v Ramush Haradinaj and others*, ICTY T. Ch. Judgment, IT-04-84-T, 3 April 2008, para. 60.

from the latter creates a parallel conflict which is international in character. As mentioned before, this classification is controversial and many are, contrary to the broad interpretation, given by the Geneva Academy; the dispute is about the heavy influence given to the element of consent: some scholars argue that consent does not change the categorization of the conflict and neither creates an IAC alongside the already existing NIACs[99]; some are in favour of a radical tranformation, from several NIACs to one individual IAC[100]; the last approach is to consider the lack of consent and create a parallel IAC between the intervening State and the armed groups alongside non-international armed conflicts[101]. The last view is widely accepted and adopted by the ICRC. Therefore, for the sake of this thesis, the attacks perpetrated by the U.S.-led coalition and Turkey against ISIL are considered international in character, as well as the offensive carried out by Turkey against Kurdish militia, and the Israeli attacks on allegedly Iranian targets. Indeed, Syrian government has regularly stressed that no intervention was requested and the Turkish attacks were considered no less than acts of aggression[102]. To sum up, the presence of several international armed conflicts "does not exclude that there may be a parallel non-international armed conflict between the intervening state and the targeted non-state armed group, provided that the criteria for a non-international armed conflict are

[99] Djemila Carron, "Transnational Armed Conflicts" (2016) 7 Journal of International Humanitarian Legal Studies 5. See also Tamás Hoffmann, 'Squaring the Circle – International humanitarian law and transnational armed conflicts' in *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts* (Martinus Nijhoff, Biggleswade 2011).

[100] Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts" [2012] SSRN Electronic Journal https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132573, 2019.

[101] Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law* (Harvard University 2006); See also Tristan Ferraro, Lindsey Cameron and International Committee of the Red Cross, "Application of the Convention" [2016] Commentary on the First Geneva Convention 68; International Committee of the Red Cross, "Treaties, States Parties, and Commentaries - Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field,1949 - 2 - Article 2 : Application of the Convention - Commentary of 2016" (*ihl-databases.icrc.org*, 2016) https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518.

[102] 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, UN doc S/2016/45, 22 January 2016.

fulfilled."[103]. In conclusion, we need to bear in mind that the offensive perpetrated by foreign States against ISIL (a non-state armed group) without the consent of Syria remains a transnational non-international armed conflict that spreads across Syria and Iraq.

a. The substantive law applicable to the Syrian conflicts

As far as NIACs are involved, it is important to remember that all the parties caught in the fights have ratified the Geneva Conventions and therefore shall comply with common Article 3. This Article summarizes the ground rules contained in the Geneva Conventions and makes them enforceable in non-international armed conflicts. These provisions are not derogable under any circumstance. Among others, the fundamental rules include "humane treatment for all persons in enemy hands, without any adverse distinction", it forbids "murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial" and "it requires that the wounded, sick and shipwrecked be collected and cared for."[104].

Given that Syria did not sign AP II, related to the protection of victims of NIACs, it is imperative that common art. 3 is fully respected. As I mentioned before[105], the definition of Article 1 AP II is stricter then the one in common art. 3, since the former has two requirements not present in common Article 3: territorial control of non-governmental armed forces and the involment of the State as a party to the conflict. The fact that Syria is not a signatory of the AP II lowers the NIACs threshold and does not create any confusion on the preconditions of

[103] Geneva Academy of International Humanitarian Law and Human Rights., "International Armed Conflicts in Syria | Rulac" (*Rulac.org*, 2014) http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria#collapse3accord
[104] "The Geneva Conventions of 1949 and Their Additional Protocols" (*International Committee of the Red Cross*, January 1, 2014) https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols
[105] See Chapter 1 para. 3.a

the applicable law. Armed groups are also bound by CIHL applicable to non-international armed conflict[106] and international human rights law. As for the IACs, all the parties to the conflicts are party to the four 1949 Geneva Conventions and Syria, Australia, Saudi Arabia, Jordan, France, the United Kingdom, and the United Arab Emirates are also a party to the AP I, related to the protection of the victims of international armed conflicts. CIHL of IACs applies, namely the 1907 Hague Conventions[107] regulating methods and means of warfare. Human rights law also continues to govern the armed conflicts[108]. The only exception to these legal frameworks~~,~~ is the occupation of the Golan Heights. The Isreaeli occupation started long before the start of the Syrian arab spring, namely in 1967. On December 1981 Israel passed the Golan Heights Law which declared a *de facto* annexation of the territory[109]. A few days later, UN Security Council Resolution 497 affirmed that "the Israeli decision to impose its laws, jurisdiction, and administration in the occupied Syrian Golan Heights is null and void and without international legal effect" and that "all the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 continue to apply to the Syrian territory occupied by Israel since June 1967."[110]. Thus far, this particular area is still governed by Geneva Conventions IV.

[106] "Customary IHL" (*Icrc.org*, 2019) https://ihl-databases.icrc.org/customary-ihl/eng/docs/home
[107] The Hague Conventions do not contain penal provisions, but it is widely recognized as customary law; see Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal.
[108] Geneva Academy of International Humanitarian Law and Human Rights., "International Armed Conflicts in Syria | Rulac" (*Rulac.org*, 2014) http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria#collapse3accord
[109] the word "annexation" was never used. See "Golan Heights Law" 1981, available at https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/golan%20heights%20law.aspx
[110] UN SC Res. 497, 17 December 1981.

b. Deliberate, Indiscriminate, and Disproportionate Attacks on Civilians

Taking into account the Syrian situation, we shall analyze the key rules of the ICRC CIL study on the mistreatment of civilians which are, namely:

- Rule 1: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."
- Rule 7: "The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects."
- Rule 10: "Civilian objects are protected against attack, unless and for such time as they are military objectives."
- Rule 156 expressly criminalize these conducts**.**

The combination of these provisions would allow the prosecution of the intentional attacks on bakeries and markets[111], hospitals, medical personnel and journalists[112]. Human Rights Watch found a pattern according to which the Government forces repeatedly attacked bakeries and civilians waiting in line, a pattern confirmed by the Syrian Revolution General Commission[113] according to which 78 is the number of bakeries attacked by air strikes or artillery shelling

[111] Human Rights Watch, "Reports" (April 10, 2013) https://www.hrw.org/report /2013/04/10/death-skies/deliberate-and-indiscriminate-air-strikes-civilian. See also Independent International Commission of Inqury on the Syrian Arab Republic, "'A/HRC/42/51'" (Human Rights Council 2019), paras. 45–46 and 52.
[112] Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/31/68" (Human Rights Council, 2016).
[113] A local opposition Commission

across the entire territory of Syria in 2013[114]. Hospitals and educational facilities were targeted as well; in 2012 the first attacks were perpetrated in Latakia governorate against makeshift hospitals[115] and, since then, there is no sign of abaiting these attacks: on 6th August 2016, an airstrike directly hit the al-Almal hospital in the Idlib governorate killing 13 people, including three medical staff support and an ambulance driver. Another three persons were injured, including a midwife and a nurse. The hospital of Atarib, in Aleppo, was also repeatedly hit by airstrikes during 2016-2017. On 14th November the hospital was hit four times and the building was damaged, forcing the hospital to close down permanently[116]. Educational facilities have also been targeted since the beginning of the conflict, resulting in children being killed and maimed, teachers' deaths, and the destruction of school buildings. In particular, 2016 was one of the deadliest years for attacks on school and the events of 26th October 2016 are an effective example: several airstrikes hit the aggregate of Haas in the Idlib governorate, which contained five different educational institutions. 36 civilians were killed, among them 21 children. Another 114 persons were injured. 2,000 students attended the schools but, after the events, the complex shut down in case of future airstrikes[117]. The Commission of Inquiry on the Syrian Arab Republic considers these kinds of attacks as war crimes[118].

[114] Human Rights Watch, "Reports" (April 10, 2013) https://www.hrw.org/report /2013/04/10/death-skies/deliberate-and-indiscriminate-air-strikes-civilian. See also: Independent International Commission of Inquiry on the Syrian Arab Republic, "'A/HRC/42/51'" (Human Rights Council 2019), paras. 45–46 and para. 52

[115] Independent International Commission of Inquiry on the Syrian Arab Republic, "Assault on Medical Care in Syria A/HRC/24/CRP.2" (Human Rights Council 2013), para. 10.

[116] Independent International Commission of Inquiry on the Syrian Arab Republic, Conference Room Paper "Human Rights Abuses and International Humanitarian Law Violations in the Syrian Arab Republic, 21 July 2016- 28 February 2017," *Human Rights Council 34 Session* (2017), paras. 15 - 19

[117] *Ibid.*, paras 20 – 21

[118] Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/27/60" (Human Rights Council 2014), paras. 109 – 111; Independent International Commission of Inquiry on the Syrian Arab Republic,

c. Unconventional and Improvised Weapons and Weapon Systems

Unfortunately, most of treaties dedicated to the use of specific weapons which adopt a regulatory or disarmament criteria usually only apply to IACs[119]. The Conventions that expressly apply to NIACs as well are the "Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects; the "Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC); and the "Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction."[120]. As far as the CIL is concerned, the use of prohibited weapons amounts to a war crime, but unfortunately no general agreement has been reached by the International community in order to specify which weapons are forbidden *per se.* According to some scholars, there is no customary practice regarding the use of chemical agents in civil conflicts,[121] despite the Security Council has repeteadly implied that the use of chemical weapons in a NIAC is a war crime[122]. Other sources of International Law, such as the Hague Declaration and the Gas Protocol, bind the parties that signed them but do not apply when the States involved in the conflicts have not ratified them. In Syria, unconventional weapons are used indiscriminately or in such manner that cannot discriminate between

"A/HRC/33/55" (Human Rights Council 2016), paras. 42 – 65; Independent International Commission of Inquiry on the Syrian Arab Republic,"A/HRC/34/64" (Human Rights Council 2017), paras. 30 – 40.

[119] Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal.

[120] "Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction" 1997.

[121] Jillian Blake and Aqsa Mahmud, "A Legal 'Red Line'?: Syria and the Use of Chemical Weapons in Civil Conflict UCLA LAW REVIEW DISCOURSE" (2013) http://www.uclalawreview.org/pdf/discourse/61-16.pdf.

[122] UN SC Res. 2209, 6 March 2015. See also UN SC Res. 1228, 27 September 2013.

civilians and combatants; in particular, the use of chemical weapons is alarming. Attacks with chemical agents started early in the conflict: in 2013 allegations were made that all the parties to the conflict were using chemical weapons, in particular government forces: in March, Aleppo was striked as well as Damascus, and in April the attacks moved to the Idlib governorate. At the time, it was not easy to gather evidence to determine which kind of toxic agent was used, how it was delivered, and who the perpetrators were[123]. Anyway, the use of chemical agents is still one of the recurring practices of the governamental armed forces. "Between March 2013 and March 2017, the Commission documented 25 incidents of chemical weapons use in the Syrian Arab Republic, of which 20 were perpetrated by government forces and used primarily against civilians."[124]. In 2017, the scale of the attacks was unprecedented: in the major incident, the Syrian air force used sarin in Khan Shaykhun, killing 83 persons, of which 28 children, and injured another 293 persons. Weaponized chlorine was also used by the Syrian army in the Idlib governorate, in eastern Ghouta and Hamah[125]. This particular accident has to be mentioned since the Commission has reasonable grounds to consider it the war crime of "using chemical weapons and indiscriminate attacks

[123] Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/23/58" (Human Rights Council 2013), para. 139.
[124] Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/36/55" (Human Rights Council 2017), para. 67; See also Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/23/58" (Human Rights Council 2013), paras. 136-140; Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/27/60" (Human Rights Council 2014), paras. 115-118; Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/28/69" (Human Rights Council 2015), paras. 15 and 43; Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/30/48" (Human Rights Council 2015), para. 39; Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/33/55" (Human Rights Council 2016), para. 30; and Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/34/64" (Human Rights Council 2017), paras. 17, 34 – 35, 39 and 52 – 56.
[125] Independent International Commission of Inquiry on the Syrian Arab Republic, "A/HRC/36/55" (Human Rights Council 2017), paras. 75 and 84.

in a civilian inhabited area"[126]. The use of sarin by Syrian forces also violates the CWC, which Syria ratified in 2013 as a member of the U.S.-Russian Joint Framework Agreement on Chemical Weapons[127]. The ratification was one step forward in the application Security Council Resolution 2118, which compelled Syria to demolish its chemical weapons stockpile with the supervision of the international community[128]. Under the procedural point of view, "there is little precedent for the prosecution of weapons crimes."[129] Unfortunately, the ICC Statute does not encompass chemical weapons in its definition of "asphyxiating and poisonous weapons", as it is clear from the drafting history of the Statute itself. During the negotiation the provision which would have criminilized the usage of chemical agents was expressly rejected[130]. Therefore, the prosecutor before the ICC would be forced to consider the use of these kind of weapons at the same level of other unconventional or improvised weapons such as barrel bombs, cluster munitions, and incendiary weapons, on the basis that they all cause superfluous injury and are inherently indiscriminate. Moreover, following the patterns of the incidents in Syria, the use of chemicals could amount to the war crime of intentionally attacking civilians, even though the target of the strikes were military objectives. Since the incidents took place in densely-populated areas, with enough evidence of the

[126] *Ibid*., para. 77
[127] "Letter from the Permanent Representatives of the Russian Federation and the USA to the UN Secretary-General, UN Doc. S/2013/565" (2013).
[128] UN SC Res. 2118, 2013.
[129] Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal.
[130] Dapo Akande, "Can the ICC Prosecute for Use of Chemical Weapons in Syria?" (*EJIL: Talk!*, August 23, 2013) https://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/

unproportionality between the suffering of civilians and the military advantage, the prosecutor could be able to encompass these crimes also under arts. 8(2)(b)(i) and 8(2)(e)(i).

d. Siege Warfare

In connection to the prohibited means we have the prohibited methods of warfare. The most frequently implemented during the Syrian conflict is definitely siege. One of the greatest example is the city of Madaya that in 2016 was sieged for months and civilians were forced to eat grass to survive[131]. Siege warfare is a method used by government forces as well as rebel groups, as it is proven by the sieges of Fuaa and Kefraya in Idlib province[132].

Humanitarian access (ICRC included) to these hard-to-reach areas was denied by the Syrian government, a matter that is going to be examined in the next subparagraph. Despite the resolution of the Security Council[133] intimating all parties to stop sieges and grant humanitarian aid to the civilian population, this method was consistently used throughout the territory[134]. It has to be noted that siege is not prohibited *per se*[135], but it has to respect all IHL provision in order not to be prosecuted as a war crime and, according to the Commission of Inquiry and the documents gathered over the years, the sieges perpetrated amounted to

[131] John Hall, "40,000 Starving Syrians Are Being Forced to Make Soup from Grass as They've 'Already Eaten Every Stray Cat and Dog'" (*The Independent*, January 7, 2016) https://www.independent.co.uk/news/world/middle-east/siege-of-madaya-40000-starving-syrians-trapped-by-assad-regime-forced-to-make-soup-from-grass-a6800811.html.
[132] Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal.
[133] UN SC Res. 2139, 2014.
[134] Independent International Commission of Inquiry on the Syrian Arab Republic, "Human Rights Abuses and International Humanitarian Law Violations in the Syrian Arab Republic, 21 July 2016- 28 February 2017 A/HRC/34/CRP.3," *Human Rights Council 34 Session* (2017), Conference Room Paper, para. 11 the town of al-Waer (Homs), Douma and Harasta (eastern Damascus).
[135] See also *Galić*, ICTY A.Ch., 30 November 2006.

"egregious violations" of humanitarian law[136]. Indeed, nowadays it is "very difficult for a commander to conduct a siege that is both successful and lawful"[137] since armed conflicts are usually fought in densely populated areas, and it is complex to distinguish between civilians and those participating in the conflicts, especially when they are located in the same area and depend ~~from~~ on the same primary needs. Therefore, it is safe to affirm that all the sieges in Syria can potentially be prosecuted before the ICC.

e. Barring Humanitarian Access to Civilians and Starvation of Civilians

Barring Humanitarian access to civilians and starvation are strongly linked to siege warfare. The Security Council Resolution 2165 not only addressed sieges, but also called for ceasefires and humanitarian truces to allow for assistance, food, and medical supplies to the population[138].

According to IHL, starvation is a prohibited warfare method, as well as to "attack, destroy, remove or render useless" any items necessary for civilians' survival[139]. It is clear that it is possible to destroy the armed groups resources if used in support of military intervention, since it is correct to consider them military objectives[140]. Also, AP II, concerning NIACs, prohibits starvation under Article 14. Anyway, the ICRC study, considers the intentional

[136] Independent International Commission of Inquiry on the Syrian Arab Republic, "SIEGES AS A WEAPON OF WAR: Encircle, Starve, Surrender, Evacuate. INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC" (2018) http://syriaaccountability.org/wp-content/uploads/PolicyPaperSieges_29May2018-2.pdf
[137] KJ Riordan, "Shelling, Sniping and Starvation: The Law of Armed Conflict and the Lessons of the Siege of Sarajevo" (2010) 41 Victoria University of Wellington Law Review 149 (2010)..
[138] UN SC Res. 2165, 2014
[139] "Protocol Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts" (AP I), 1971, Artcle 54.
[140] Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal.

starvation of civilians to be a part of CIL[141]. Despite that, starvation is only a war crime if perpetrated during IACs according to the Rome Statute[142]. Even if the conduct is criminalized, prosecutors prefer to focus on other crimes. One exception was the Perišić case, brought before the ICTY[143]. In this case a number of defendants were condemned for conducts perpetrated during the siege of Zadar under the Croatian Criminal Code, which enlists starvation as a war crime[144]. Turning to barring humanitarian access to civilians, the Security Council enforced chapter VII, creating humanitarian corridors across Syrian territory, and requested all the factions to allow rapid shipment and distribution of aid under form of food, and medical supplies, and to grant the protection of humanitarian personnel[145] all orders that have not been respected. This crime has a strong treaty base, such as Geneva Convention IV Arts. 2 and 55, but the breach of these provisions is not "grave", therefore it is not possible to allocate individual criminal responsibility. Anyway, the ICC Statute allows for the prosecution of "depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions"[146]. Anyway, as mentioned for the crime of starvation, this crime is criminalized only for IACs in the ICC

[141] Louise Doswald-Beck, Jeanmarie Henckaerts and International Committee Of The Red Cross, *Customary International Humanitarian Law. 2,1 Practice, Part 1* (Cambridge Cambridge University Press 2005).
[142] The ICC Statute, Article 8(2)(b)(xxv)
[143] *Perišić*, ICTY A. Ch., 28 February 2013.
[144] Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal; See also Croatian Criminal Code, Chap. 13, Article 158, The Official Gazette of the Republic of Croatia "Narodne novine"(hereinafter: NN) No. 110 of October 21, 1997 (entered into force on January 1, 1998).
[145] Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal.
[146] The ICC Statute, Article 8(2)(b)(xxv)

Statute, even if Rule 55 of the CIL study does not take into account the differences between IACs and NIACs, and Rule 156 criminalized both conducts in all kind of combats[147].

[147] Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal.

6. Conclusions

In a nutshell, this chapter focused on the main war crimes perpetrated in Syria, giving a legal framework for each of them and investigating the prosecutability before the ICC. The real struggle is defining the conflict itself: nowadays, as already mentioned in paragraph 5, the ICRC categorizes the conflict both as non-international and international in character, in relation to the armed groups involved in the single incidents. For this reason, domestic and international courts might have trouble enforcing IHL treaties giving the fact that the asymmetry between IACs and NIACs is still tangible[148]. Taking into consideration the ICC, it has to be noted that the obstacle of indicting all the possible range of war crimes is not always critical: indeed, if not as war crimes, some conducts might be prosecuted as crimes against humanity[149]. Nonetheless, prosecution of war crimes shall revolve around accountability under the law of war crimes, and resorting to crimes against humanity should be considered a last resort[150]. In this chapter, the ICC and the major ad-hoc tribunals jurisprudence was taken into account to give a general idea of a possible prosecution before the ICC, but this argument was briefly debated since it will be discussed in detail in the last chapter of this thesis. Before that, an analysis of the real challenges faced in the past prosecution is required in order to deal with the one that will arise, hopefully sooner than later, for the prosecution of war crimes in Syria.

[148] See paras. 5.d and e.
[149] For example, the use of chemical weapons could be encompassed under art. 7(1)(a)(b)(k) crimes against humanity of murder, extermination or other inhumane acts.
[150] Beth Van Schaack, "Mapping War Crimes in Syria" (2016) 92 SSRN Electronic Journal.

CHAPTER 2

In the following chapter, the structure of International Criminal Tribunals will be thoroughly analysed as well as the actors involved in the proceedings. The reason for this analysis lies on the fact that past prosecutions, even if somehow successful, have been riddled with mistakes. If the aim of this thesis is to create an "up and running" Court for the prosecution of war crimes in Syria, sooner or later, the Syrian Court is going to face the same challenges that previous Tribunals have endured. Therefore, this chapter will first of all, make some considerations about the consequences that different legal traditions, namely common law and civil law, may have during a prosecution. Then, it is crucial to understand the roles and functions of the different actors involved in the proceedings, such as judges, prosecutors, witnesses and defendants, and how these roles change according to the system we are implementing, either adversarial or inquisitorial. The focus will be mainly on the ICTY, the ICTR and the ICC as they serve as role models for the other courts, especially the internationalized ones, that will be studied in the last chapter of this thesis. After that, a close-up on evidentiary rules and cooperation is required to have a complete frame of the features that characterize a Tribunal. In particular in the last two paragraphs, this chapter will deal with the IIIM, a mechanism established by the UN in order to collect, evaluate and preserve evidences and enhance cooperation among States[151].

[151] "UN GA Res. 71/248 Terms of Reference of IIIM" (January 11, 2017) https://iiim.un.org/terms-of-reference-of-iiim/

1. *Different legal tradition: common law or civil law?*

Major differences characterize the common law tradition (Anglo-American system) and the civil law tradition (Romano-Germanic system). The dichotomy is usually used "to describe and evaluate the criminal procedures of the international criminal jurisdictions, often with a preference expressed for the legal tradition that the commentators knows best."[152]. Indeed, common law is considered an accusatorial model, while civil law is inquisitorial in nature. Having that said, no pure model exists in practice and differences arises among models belonging to the same "family". Evidently both systems aim towards the truth, but which kind? This is one of the paramount distinction between common and civil law: the former seeks a "procedural truth", emphasizing the settlement of the controversy, while the latter focuses on the objective truth, the requirement for an equitable solution[153]. Referring to procedures, however, the adversarial method introduces two parties (the prosecution and the defence) bringing their cases before the Court. The parties might investigate for themselves and during the proceedings, the judge has the task of safeguarding the procedural rules. The decision, however, will be taken by a jury. The inquisitorial system is premised on objective investigations carried out by public official After the preliminary inquiries, a case file is assembled by the prosecutor and the investigating magistrate (juge d'instruction). Then the case file is transferred to the trial judge that must be a different judge from the one who investigated, in order to ensure the

[152] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge Cambridge University Press 2019), 424.
[153] *Ibid.*

impartiality of the trial and the independence of the judge. The judges in this system are not just "referees", but they have a central role in seeking the truth. In international criminal procedures, the best option would be to combine compatible rules of different systems, creating a fair and effective method for criminal prosecution. Anyway the political aspect shall not be underestimated: efficiency and fairness might be endangered by compromises that may result in "untested solutions" or "overly flexible rules."[154]. Mixed models in criminal prosecution have a set of advantages that a purely adversarial or inquisitorial Court might not have: first of all, it is more likely that a mixed court is recognized and accepted broadly. Moreover, the adversarial system is preferred to serve the purpose of guaranteeing a fair trial, while procedurally speaking, the inquisitorial model should be adopted. Indeed, the position of the accused and the prosecution changes accordingly with the development of the situation in the country where the investigation needs to take place. In the former Yugoslavia, for example, the International Prosecutor could not access documents stored in the State archives as easily as the accused could in order to prepare their defence, while in Rwanda, and more extensively after any the regime change, it is not unlikely that access to any kind of information is completely blocked. Even if the inquisitorial system *per se* could not overcome the obstacle of not having access to documents, at least it brings the parties on a level playing field: indeed, investigations are conducted to a separate organization or an *ad-hoc* mechanism, which is entrusted with the task to collect all the evidences relevant to the case, create a dossier and then hand it over to the Court. The role given to the victims is another relevant feature of the inquisitorial system that is key during prosecution of war

[154] *Ibid.,* 425.

crimes: if witnesses and victims testify during a process, the judge might have a better knowledge over the facts, leading to a better cognitive process and maybe to a just decision[155].

[155] *Ibid.*

2. *The structure of a Tribunal: a quick historical evolution*

The Nuremberg International Military Tribunal (IMT) Charter had some basic procedural principles laid down: in particular, Part IV guaranteed the right to a fair trial, Part V explicited the powers of the Tribunal and the proper conducts for a fair trial, and Part VI provided for the criteria for the judgement and the sentence; a pattern which was followed by the Tokyo IMT one year later[156]. Basic procedural principles were agreed with considerable difficulties[157]. However, they were not enough to regulate proceedings; this is the reason why, in both Charters, the legislator allowed the Courts a certain range of autonomy in setting their own rules of procedure. Indeed, the Nuremberg rules of 1945 and the Tokyo Rules of Procedure of 1946 were both adopted a few months later after the issuing of the Charters themselves. They contained detail procedural profiles that were used in the past as models of international criminal justice. In particular, the Nuremberg procedures were mostly inspired by the adversarial system, but the possibility of conducting the process in absentia and being judged by a panel of judges, and not a jury, are typical features of the civil law system[158]. Procedurally speaking, the proceedings of both the Nuremberg and Tokyo IMTs were fair. The famous argument *nullum crimen sine lege* that both the IMTs had to face was about the complete absence of sources of law containing the crimes that were being prosecuted at the time (the so called crimes against peace),

[156] "INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST Special Proclamation by the Supreme Commander Tor the Allied" (1946) https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (Tokyo Charter), Articles 9 and 10 (fair trial), arts 11-15 (powers and procedures), and arts. 16-17 (judgement and sentence)
[157] Robert H Jackson, "Address by the Hon. Robert H. Jackson" (1945) 39 Proceedings of the American Society of International Law at its annual meeting 10.
[158] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge Cambridge University Press 2019), 425.

therefore the alleged unfairness of the proceeding involves the substantive law, not the procedures[159]. Anyway, the standars of protection granted nowadays such as the right to appeal or to remain silent were minimal, if non-existent, and they developed over time. During the 90's, the Security Council adopted the same approach while drafting the ICTY and ICTR Statutes: judges were entrusted with the task of laying down procedural details in the Rules of Procedure and Evidence (RPE). As explained in the *Tadić* decision[160], the procedures combined characteristics of common and civil law and were mostly experimental. The ICTY itself, in the first Report sent in 1994 to the UN, highlighted the difficulties of writing down the RPE given the scarcity of precedents[161]. Anyway, both the ICTY and ICTR adopted mixed procedures and later on amended their RPE with inquisitorial features, while the proceedings were still pending, bringing about arguments whether legal certainty was compromised or not.[162] The amendments aimed at increasing the *ex officio* powers of the judges, in order to shorten significally the length of the course of action[163]. Judges of both Courts also exploited the principle of "inherent powers." According to it, in performing full and complete justice, judges can apply powers that are inherent to the jurisdiction of the Court itself.. The best example of the use of inherent powers can be found in *Tadić*, where the Court ascertained its own jurisdiction over the case and also ordered disclosure of a prior Defence witness statement[164]. As affirmed by the Court,

[159] The Nuremberg and Tokyo Tribunals asserted that crimes against peace were criminilized and that "the attacker must know that he is doing wrong" and that "it would be unjust" not to punish him. See also, Quincy Wright, "The Law of the Nuremberg Trial" (1947) 41 The American Journal of International Law 38.
[160] *Tadić,* ICTY T.Ch. II, 5 August 1996, para. 14.
[161] ICTY, "Annual Report to the General Assembly and Security Council" (1994), para.54. https://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf.
[162] Andrea O'Shea, "Changing the Rules of the Game in the Middle of the Play: The Dilemma of of Procedural Development in the Rwanda Tribunal" "South African Journal of Criminal Justice"
[163] Daryl A Mundis, "From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence" (2001) 14 Leiden Journal of International Law 367.
[164] *Tadić*, ICTY A.Ch., 2 October 1995, paras 14-20 and *Tadić*, ICTY A.Ch., 15 July 1999, para. 322.

this power does "not derive from the sweeping provisions of Sub-rule 89(B)" of the RPE[165]; it is one of the powers, already mentioned by the Appeal Chambers in the *Blaškić* case[166], "that accrue to a judicial body even if not implicitly or explicitly provided […] because they are essential for the carrying out of judicial functions and ensuring the fair administration of justice."[167]. Even if the ICTY and ICTR adopted a mixed approach for procedures, they remained substantially adversarial. The same pattern was followed by the ICC Statute, but during the negotiations of the Treaty more inquisitorial features were incorporated in order to achieve compromises among States[168], as for example the creation of the pre-trial chamber and the procedure for the ammission of guilt. Although States drafted the procedural provisions in a very specific and detailed manner, Article 51 of the ICC Statute allows State parties, the judges, and the Prosecutor to propose amendments to the Rules of Procedure and Evidence. In particular:

"[…] in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may by a two-third majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of State Parties"

The practice of leaving to the judges the possibility to adopt procedural law is typical of International Courts: it is a practice that could lead to "principled objections"[169], but it also favoures adaptability.

[165] The ICTY RPE, sub-rule 89(B) states that "in cases not otherwise provided […], a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".
[166] *Blaškić*, ICTY A.Ch., 29 October, 1997, paras. 25-31
[167] *Tadić*, ICTY A.Ch., 15 July 1999, para. 322.
[168] Silvia Fernandez de Gurmendi, "Roy S. Lee (Ed.): The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations and Results" (2000) 4 Max Planck Yearbook of United Nations Law Online 588, 217-27.
[169] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 427 (Cambridge Cambridge University Press 2019); See also C Kress, "The Procedural Texts of the International Criminal Court" (2007) 5 Journal of International Criminal Justice 537.

The unusual aspect of Article 51 that should be highlighted, however, is the possibility for State Parties to amend the RPE and to syndicate on the judges' proposals, deciding whether accept or reject them. Nevertheless, judges can "adopt by an absolute majority Regulations of the Court, necessary for its routine functioning."[170]. The Regulations are then sent to the State Parties and are subject to comments and, if no majority of State Parties is against them, they remain in force. As it is clear, the ICC Statute was heavily influenced by the precedent experiences and it shows by the complexity, the precision and the amount of procedural texts[171]. Anyway, each of the Courts analyzed in this paragraph could be considered *sui generis*, since they all present unique features[172]. Some authors wonder whether this new hybrid procedural system represents a real evolution in this field of international law or it is just a compromise achieved by the political forces in order to establish these Courts[173] and many are skeptic about the successful results in prosecutions when applying a mixed system[174]. Regardless of doubts and thoughts on the matter, nowadays it is possible to affirm that "to a certain extent, the traditional divide between common and civil law has been overcome"[175], and now this hybrid system inspires not only international criminal prosecution, but also domestic

[170] The ICC Statute, Article 52.
[171] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 427 (Cambridge Cambridge University Press 2019).
[172] P Robinson, "Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia" (2000) 11 European Journal of International Law 569
[173] Mark Findlay, "Synthesis in Trial Procedures? The Experience of International Criminal Tribunals" (2001) 50 International and Comparative Law Quarterly 26.
[174] Vladimir Tochilovsky, "International Criminal Justice: 'Strangers in the Foreign System'" (2004) 15 Criminal Law Forum 319.
[175] Robert Cryer, Darryl Robinson and Sergey Vasiliev, An Introduction to International Criminal Law and Procedure, (Cambridge Cambridge University Press 2019).

jurisdiction[176], and more importantly internationalized criminal courts, which will be discussed in detail in the next chapter of this thesis.

a. The composition of the Tribunal: the judges

In order to have a clear structure of a Tribunal, it is crucial to consider the actors involved in the prosecution of war crimes and the development of their role in the proceedings over the years. First element to analyze is the composition of the Court: both Nuremberg and Tokyo tribunals were heavily criticized under this perspective. It is clear that the number and nationality of the judges appointed are going to influence prosecution; therefore a balanced panel is key for a fair administration of justice. The Nuremberg IMT was composed of eight judges: four represented the main Allies France, the UK[177], the Soviet Union, and the US, while the other four were substitues. Each of the major Allies could nominate its own Prosecutor while on the other side, the defence was lead by mostly German lawyers[178]. As it is clear, the panel mirrored the results of World War II since Allies not only were not prosecuted, they also had the exclusive power to exercise judicial powers. This flaw in the prosecution did not go unnoticed and the US chief Prosecutor, Justice Robert Jackson, adressed it in his first speech at the opening session of the prosecution case. He turned aside the doubts about the aforementioned concerns, affirming that "while this law is first applied

[176] Göran Sluiter, "The Law of International Criminal Procedure and Domestic War Crimes Trials" (2006) 6 International Criminal Law Review 605.
[177] The President of the Tribunal was Lord Justice Geoffrey Lawrence from the UK
[178] "the leading lights [of the German defence] were Hermann Jahreiss, an international lawyer from cologne and Otto Kranzbühler, a talented naval judge-advocate" Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 117 (Cambridge Cambridge University Press 2019).

to German aggressor, the law includes, if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgement."[179]. Before analyzing the accusation held against the Nuremberg IMT of being an example of "victor's justice", it is better to focus first on the Tokyo IMT, since the same critiques are applicable to both Tribunals. The Tokyo IMT was composed of eleven judges, nine where signatory States to the Japanese surrender, namely Australia, China, Canada, France, the Netherlands, New Zealand, the UK, the US, and the Soviet Union while the other two judges were from India and the Philippines[180]. The President of the panel was Sir William Webb, an Australian judge, who exercised a firm but highly criticized hand over the proceedings. Joseph Keenan, the chief of Counsel elected by the U.S., was sustained by associate prosecutors chosen by "any United Nation with which Japan has been

at war."[181]. Kenzo Takayanagi, a professor of Anglo-American law, and Ichiro Kyose, lawyer and politician, took the defense of the accused. More than a half of the judgements were pronounced in November 1948 and all the accused were found guilty, "although not on all the counts with which they were charged."[182]. In a panel formed by eleven judges, disagreement has to be considered in the equation of prosecution, however the animosity and disunity among judges reached an unprecedented level. The best example is the confrontation between Judge Pal, from India, and Judge Jaranilla, from Philippines. The former gave a notorious

[179] International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, 531-547, *14 November 1945-1 October 1946.* (1947).
[180] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 121 (Cambridge Cambridge University Press 2019).
[181] Tokyo Charter, Article 8.
[182] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 121 (Cambridge Cambridge University Press 2019).

dissenting judgements not only taking into consideration substantial law, but also procedural provisions. According to Pal, the trial and the proceedings were unfair and impartial[183], and prosecution highly deceptive; therefore he would have acquitted all the defendants[184], since he widely accepted the defence claim that Japan's actions were only reactions to Western powers' provocations[185]. After analyzing the defence case, he concluded that Japan was acting to liberate Asia from colonialism[186]. On the other hand, Jaranilla disapproved entirely Judge Pal's view in his concurring opinion: he affirmed the proceedings were fair and that Pal could not discuss the existance of the substantial law used as ground for the trial, after having accepted the appointment under the Tokyo Charter[187]. Furthermore, since only seven defendants were sentenced to death, he sustained the idea that the sentences were too lenient[188]. Jaranilla's appointment, however, was debatable: he witnessed the Bataan Death March as a victim, therefore the probabilities of him being biased against the defendants were significant. As mentioned before, both Tribunal are considered to be classic models of "victor's justice". The concept is not defined yet, but it entails different considerations:

- the trial and its procedural provisions do not guarantee fairness and impartiality;
- judges have the tendancy to favour one part over the other;

[183] Radhabinod Pal, Akira Nakamura and International Military Tribunal For The Far East, *Dissentient Judgment of Justice Pal = 東京裁判・原典・英文版パール判決書 : International Military Tribunal for the Far East / Dissentient Judgment of Justice Pal : International Military Tribunal for the Far East* (Kokusho-Kankokai 1999), Dissenting Opinion, 280 – 384.
[184] *Ibid*., 1226.
[185] *Ibid.*, 349 – 1014.
[186] Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal : Charter, Indictment and Judgments*, documents lxxx - lxxxi (Oxford University Press 2008).
[187] Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal : Charter, Indictment and Judgments*, Concurring Opinion of the Member of the Philippines, (Oxford University Press 2008).
[188] *Ibid.*

- the substantial law is designed to ensure a conviction;
- judging States are usually not indicted for having committed similar acts;

Starting with the Nuremberg trial, the fact that there was an inconvenient dependance on affidavit evidence[189], and the means allocated to the defence were far less than the means available to the prosecutors. However, as previously said in paragraph 2, the trial was "fair", since the lack of standards did not provide a benchmark to evaluate the work of the Nuremberg commission. Lastly, the last aspect of the "victor's justice" problem has to be quickly analyzed since it brought outstanding consequences: no indictments were issued for the German Blitz over the UK, in view of the possibility of *tu quoque* claims[190] raised from Germany over the UK bombing. As a general rule, Germany was not prosecuted for crimes that the Allies committed during WWII. As for the final aspect of victor's justice, it is true that the defence could not raise the issue of crimes committed. For the Tokyo Tribunal, it is undeniable that some judges were chauvinistic and the entire trial was dominated by misconception and indifference. Furthermore, the trial was riddled with malpractices. The United States, for example, granted immunity to the members of the Japanese chemical weapon unit, Unit 731, in return for data on the experimentations[191]. On the procedural aspect the Tokyo trials were not as "fair" as the Nuremberg proceedings: the former were affected by serious delays, given by the fact that it was complicated to obtain translated documents from Japanese to English.

[189] A written sworn statement of evidence
[190] A "*tu quoque" claim* is an argument in which the accused turns an allegation back on the counterpart, creating a logical fallacy.
[191] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure,* 123 (Cambridge Cambridge University Press 2019).

At last, another element that should not be underestimated is the interference of politics during the proceedings: in the Tokyo proceedings the Emperor was openly left out, in consideration of his relevance for Japanese stability post WWII. During the 90s, the judge "character" developed: the ICTY and ICTR Justices had strictly adversarial features with a few exceptions that granted them an active role to the proceedings: this marks the rise of the so called "Managerial Judging System".[192]. Powers such as ordering the parties to hand out evidence and calling witnesses *ex officio* and the presence of rules concerning the preparation of trials are a clear sign of this significant change[193]. This new system is more focused on accelerating the proceedings, which is understandable since both the ICTY and ICTR had an impressive numbers of cases to deal with. For the sake of clarity it is better to look into this two courts at the same time, since they reseamble almost entirely. The ICTY was created with Resolution 827(1993) after the Secutity Council drafted its Statute. It was formed by

- the Registry, the administrative organ
- the Office of the Prosecutor
- the Chambers, consisting of three Trial Chambers and one Appeals Chamber[194].

As aforementioned the number of cases was critical and the Trial Chambers, each composed of a president and two other judges, could not keep the pace with the amount of workload. Moreover the Appeals Chamber, a seven-member panel, had the authority on matters of law

[192] Maximo Langer, "The Rise of Managerial Judging in International Criminal Law" [2004] SSRN Electronic Journal.
[193] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 430 (Cambridge Cambridge University Press 2019).
[194] The ICTY Statute, Article 11.

and could therefore overthrow first instance judgements, with the consequence of extending proceedings. It has to be noticed, that, when the ICTR was established, in order to have a constant jurisprudence between the Courts, both of them shared the same Appelas Chamber, located in the Hague. This is way, at the beginning of the 21st century, the ICTY came up with the "completion strategy" and asked the Security Council the permission to implement it. This strategy has three main features that should be analyzed:

- the establishement of "itinerant" judges, also called *ad litem*, who would cooperate with other judges for one case[195].
- the assistance of lawyers with a certain degree of expertise, in order to prepare the trial and carry out all the formalities attached to pre-trial issues;
- the expansion of the Appeals Chamber;
- the revision of Rule 11bis of the RPE which allowed the ICTY to transfer investigations and prosecutions to domestic courts[196];

The Security Council approved both the first request, granting twenty-seven *ad litem* judges, and the last very quickly[197], while the second one was satisfied a later on. As a consequence, the estimated time of conclusion of investigations shortened significantly from 2016[198] to

[195] International Criminal Tribunal for the Former Yugoslavia Annual Report to the General Assembly and Security Council (2000), para. 340
https://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2000_en.pdf
[196] Michael Bohlander, "Referring an Indictment from the ICTY and ICTR to Another Court—Rule 11bis and the Consequences for the Law of Extradition" (2006) 55 International and Comparative Law Quarterly 219.
[197] UN SC Res. 1329, 2000
[198] International Criminal Tribunal for the Former Yugoslavia Annual Report to the General Assembly and Security Council (2000), paras. 126-128
https://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2000_en.pdf.

2004[199]. Furthermore, the revision of Rule 11bis, gave the chance to domestic courts to be active in the proceedings and they could not only prosecute low-level offenders, but also high profiled ones[200]. Despite the fact that the vast majority of the defendants in 2002 were willing to plead guilty and that the Federal Republic of Yugoslavia, at last, began to cooperate with the Tribunal, the ICTY kept having difficulties to stick to its timetable; Therefore the Security Council, with Resolution 1534(2004) encouraged the ICTY to concentrate "on the most senior leaders suspected of being most responsible"[201] for the prosecutable crimes under the Court's jurisdiction. Setting aside the fact that the Tribunal Independence was somehow affected by the just mentioned Resolution, the completion strategy was applied, and then severely criticized by judges from both the ICTY and ICTR. As far as the ICTY is concerned, the Court was limiting the defence rights[202] for the sake of speed; as Judge Hunt affirmed, however, "the Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy […], but by the fairness of its trials."[203]. The Court might have been too dismissive on some crucial aspects of the law[204], resulting in quick convictions, but overall most of its decisions were not questioned by other Countries, on the contrary they were well received by the International Community and they had an impressive

[199] "International Criminal Tribunal for the Former Yugoslavia Annual Report to the General Assembly and Security Council" (2002), para. 7
https://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2002_en.pdf
[200] *Krštić*, ICTY, T.Ch. I, 2 August 2001
[201] UN SC Res. 1503, 2003.
[202] P Robinson, "Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia" (2000) 11 European Journal of International Law 569.
[203] *Milošević*, ICTY, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement (Majority Decision Given 30 September 2003), 21 October 2003, paras. 21 – 22
[204] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals*, 13 – 8 (Oxford University Press 2006).

impact on Customary Law[205]. Others are the downsides we should enlist for the ICTY: some judges were considered to have a tendancy for one of the sides of the war[206], and that prosecutors were playing the parts of diplomats in order to have the cooperation of States[207]. Finally the ICTY was also accused to be expensive[208], and far away from the population of Former Yugoslavia[209], but these aspects will be analyzed in detail in the following paragraphs. Moving on to the ICTR, the method of implementation[210] and the critiques over the completion strategy are exactly the same. There is not to be surprised, since the structure of both Courts are almost identical[211]. The only difference was that the Trial Chamber was only one in the ICTR. Setting aside the constituency, far too distant from Rwanda, and the costs, the ICTR was condemned for the contents of the judgments, not always of quality[212], the delays created by the judges themselves[213], and the inconvenience of the continuos replace of defence counsels by the defendants. Moreover, victims were not considered with enough simpathy and sometimes the standards of treatment were completely unsatisfactory[214]. At last,

[205] R Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study" (2006) 11 Journal of Conflict and Security Law 239.
[206] "Hague Disqualifies 'Biased' Judge From Seselj Trial" (*Balkan Insight*, August 29, 2013) https://balkaninsight.com/2013/08/29/icty-disqualify-harhoff-for-being-bias/
[207] Victor Peskin, *International Justice in Rwanda and the Balkans Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press 2008).
[208] R. Zacklin, "The Failings of Ad Hoc International Tribunals" (2004) 2 Journal of International Criminal Justice 541.
[209] Laurel E Fletcher and Harvey Weinstein, *"A Word unto Itself: The Application of International Criminal Justice in Former Yugoslavia",* (in Eric Stover and Harwey Weinstein eds).
[210] UN SC Res. 1329, 2000.
[211] Registry, Office of the Prosecutor, and the Trial Chambers.
[212] Larissa Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Nijhoff 2006)
[213] "International Criminal Tribunal for Rwanda Annual Report to the General Assembly and Security Council" (2001) para. 14, https://unictr.irmct.org/sites/unictr.org/files/legal-library/010914-annual-report-en.pdf.
[214] Göran Sluiter, "The ICTR and the Protection of Witnesses" (2005) 3 Journal of International Criminal Justice 962.

the role of judges in the ICC is less adversarial in nature. Article 34 of the Statute gives us a framework of the organs that compose the ICC, which are namely:

- The Presidency;
- An Appeals Division, a Trial Division and a Pre-Trial Division;
- The Office of the Prosecutor;
- The Registry

Part IV of the Statute really lays down a complete and exhaustive procedure for the selection of judges: 18 Judges shall serve the ICC, even if the President "may propose an increase in the number of judges, […] indicating the reasons why this is considered necessary and appropriate"[215], and then the proposal has to be considered approved after a vote of two thirds majority of the Assembly State Parties. The nominees are also held by other principles, such as gender balance, global representation[216], and impartiality and integrity[217]. As said before, judges are granted a more active role during ICC proceedings, leading to a better protection of the rights of the indicted, but if the judge is given more power, the prosecution might be "robbed" of some of its own typical functions[218]. Moreover, even though the procedures of Part IV of the Statute are very clearly expressed, criminal procedures are not. Much is left to the judge creativity, and that endangers both the prosecution and the defence which are at the mercy of the law-making judge. To some extent, this could be acceptable if we consider

[215] The ICC Statute, Article 36.
[216] The ICC Statute, Article 36, 8(a)
[217] The ICC Statute, Article 36, 3(a)
[218] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 430 (Cambridge Cambridge University Press 2019).

"creativity" the activity of filling gaps in international law, not to be confused with "activism" which would be the deliberate production of rules without existing foundation in customary law[219].

b. The composition of a Tribunal: prosecutors

It is clear that Prosecutors shall be independent and free of making their own choices regarding which crimes shall be prosecuted or not; however it is also agreed that a certain level of judicial supervision over the activities of prosecutors shall be granted. As implied in paragraph 2a, the ICC has a pregnant approach in this kind of supervision, therefore prosecutorial discretionality is narrower than the one which was acknowledged to the ICTY and ICTR prosecutors. To stress the similarity between the latters, it must be noted that when created, the ICTR did not have its own prosecutor, and shared the one of the ICTY until 2003, when the ICTR prosecutor was nominated[220]. In order to give a general framework, the powers of Prosecutors may vary from court to court, but generally they can be grouped in two main categories: the decision of which crimes are to be prosecuted and the initiation and the conduction of the investigations. The Prosecutor is an ambiguous actor in the proceeding; they serve a public interest, but they also shall seek the truth[221]. Their activities might shape the

[219] Joseph Powderly, "Distinguishing creativity from Activism: International Criminal Law and the Legitimacy of Judicial Development of the Law", 223 – 250, in William A Schabas, Yvonne Mcdermott and Niamh Hayes, *The Ashgate Research Companion to International Criminal Law : Critical Perspectives* (Ashgate 2013).
[220] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 139 (Cambridge Cambridge University Press 2019).
[221] Christopher Keith Hall, "The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight against Impunity" (2004) 17 Leiden Journal of International Law 121.

practice and the Courts themselves, therefore it is crucial to find the right balance in order to create a strong legacy for future Tribunals.

c. The Composition of a Tribunal: defendant and defence counsels

Suspects and accused shall be granted a position of parity in respect of the other parties in the proceeding. In order to do so, fundamental rights shall be recognised to them, as for example the right to remain silent, to be assisted by a counsel and to request translations if needed. Every Statute or RPE of the courts that have been analyzed so far, has provisions that prescribe the aforementioned rights: the ICTY Statute, article 18(3) affirms that: "If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands"[222], and similar provisions can be found in both the ICTR and ICC Statutes[223]. Some of the provisions contained in the Statutes, however, have their roots in international human rights instruments and have been transposed to ensure a total and complete protection of the person subject to the proceeding: examples are the principle of equality stated in article 21 and 20 of respectively the ICTY and ICTR Statues, as well as the list of rights guaranteed in article 67 before the ICC[224]. The latter, in particular, resembles to article 14 of the ICCPR[225]. It has to be noted that, despite the fact the ICTY and ICTR are

[222] The ICTY Statute, Article 18(3)
[223] The ICTR Statute, Article 17(3) and the ICC Statute Article 55(2)
[224] The ICTY Statute, Article 21, the ICTR Statute, Article 20 and the ICC Statute, Article 67.
[225] "International Covenant on Civil and Political Rights" (ICCPR), (1985) 7 Human Rights Quarterly 132, Article 14.

adversarial Courts in nature and the ICC is leaning toward inquisitorial, the procedural model for the defence case is exactly the same: defendants shall present their own case before the Courts and that usually entails investigations carried out by the defendant themselves. Under this perspective, it is obvious to think that defendants shall be legally assisted throughout the proceeding, and indeed international jurisprudence has consistently enforced the right to counsel[226]. Defence Counsels shall meet qualifications which vary depending on the jurisdictions where they should exercise their powers. Usually, they shall be either Professors of Law or experienced lawyers and have a proficiency knowledge of at least one of the official languages of the Court[227]. Usually, the administrative organ of Tribunals keeps a list of qualified counsels; anyway as far as the ICC is concerned, it is possible to choose counsels not included in the list, as long as they meet the requirements and are willing to be enlisted[228]. Defence counsels shall not only prepare the defence case, but also monitor the proceeding at the procedutral level, checking that the fundamental rights of the defendant are guaranteed, namely: to be informed of the charges, to be tried without delay, to request an interpreter and translated documents, to examine witnesses on their behalf on the same condition of the one against them, and so on[229]. Moreover, counsels also serve the purpose of ensuring "reasonably

[226] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 431 (Cambridge Cambridge University Press 2019).
[227] International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 Rules of Procedure and Evidence (ICTY RPE) 1994 (Criminal Law Forum) 651, and International Criminal Tribunal for Rwanda Rules of Procedure and Evidence (ICTR RPE) (1996) https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf, Rule 44 and International Criminal Court Rules of Procedure and Evidence (ICC RPE) (2014) https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf, Rule 22.
[228] ICC RPE, Rule 22 and International Criminal Court, "Regulations of the Court" (ICC Regulations) (2004) regs. 69 – 79 https://www.icc-cpi.int/resource-library/Documents/RegulationsCourt_2018Eng.pdf. See also Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge Cambridge University Press 2019).
[229] The ICC Statute, Article 67.

expeditious proceedings."[230]. Although legal assistance is highly recommended and the defendant can only benefit from it, the right to self-representation cannot be entirely restrained. The ICTY found a compromise stating that this right shall be ensured, but it can be limited to ensure efficient trials[231]; for this reason the right to self-representation shall not be considered absolute and sometimes counsels have been appointed without consent of the defendant[232]. This approach does not go uncriticized[233], but for now the majoritarian jurisprudence supports the idea that legal rappresentation is essential and shall be considered the model to follow, while self-representation should be applicable only if necessary and on a case by case basis[234].

d. The Composition of a Tribunal: witnesses and victims

Victims and witnesses are key elements for criminal proceedings; unfortunately in both the ICTY and ICTR their roles were not particularly emphasized, while the ICC has changed this trend completely. Indeed the formers, being adversarial in nature, could not interfere in the collection of evidences, therefore only the prosecution and the defence could call witnesses. The ICC, on the other hand, has granted itself some inquisitorial elements as the power to call the "witnesses of the Court."[235]. However, the real element of innovation is the double-role that the witness-victim plays before the ICC: the International Community over the years has

[230] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 431 (Cambridge Cambridge University Press 2019).
[231] *Milošević*, ICTY A.Ch., 1 November 2004, paras. 17 – 18.
[232] *Ibid.*
[233] Jarinde Temminck Tuinstra, "The ICTY's Continuing Struggle with the Right to Self-Representation" [2011] The Legacy of the International Criminal Tribunal for the Former Yugoslavia 345.
[234] Gideon Boas, "Self-Representation before the ICTY: A Case for Reform" (2010) 9 Journal of International Criminal Justice 53.
[235] *Lubanga*, ICC PTC I, 8 November 2006, para. 26

focused on the victims and how to bring justice to them, shifting from a retributive school of thought to a more empathetic approach, supporting restorative justice. In regard of the latter, victims are the core of the trial and the accused moves to the background. The ICC has adopted this new approach as the quite exhaustive system provided by its own Statute clearly shows[236]; however, the scheme has some flaws that it is paramount to analyze. First of all, according to the ICC RPE a victim is a "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."[237]. This definition includes also "organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."[238]. As already mentioned, victims are granted an active role during the trial, therefore they have the possibility to partecipate to seek justice for specific instances or generally[239]. This is not a surprise for civil law lawyers, since it is possible for the victims to be given the status of "*parte civile*" during a criminal proceeding; anyway these two notions shall not be confused: indeed victims do not assume the classic civil law status, therefore it is crucial to balance the right of the victims to participate and the huge amount of victims that could be potentially affected by the crimes[240]. First of all, victims might choose to partecipate for a number of reasons: "contribute to the prosecution and obtain restitution or reparation and other forms of

[236] The ICC Statute, Part VI.
[237] The ICC RPE, Rule 85.
[238] *Ibid.*
[239] The ICC Statute, Articles 15(3), 19(3) and 68(3) and ICC RPE Rules 89 – 93.
[240] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 488 (Cambridge Cambridge University Press 2019).

satisfaction"[241] are the most common. The ICC Statute does not have a provision enlisting the purposes of the participation, therefore the Court itself assess if "the objectives [that the victims shall pursue] are realistic, possible to implement […] and consistent with the right of defence and the overall procedural system."[242]. Many scholars focused on the aims reachable through victims' participations: victims shall not only present their "views and concerns"[243], but they could also "ensure that the truth is exposed and that a just punishment is imposed"[244]. Moreover victims feel closer to the process[245], and this helps avoiding victim alienation and makes the accused more conscious of the charges and the suffering that the victims endured[246]. Finally, it has to be remebered that victims can commence a proceeding, but if their claims are general their rights as participants are limited, while if they have specific claims they have all the powers reserved to parties, for example the right to appeal[247]. As already mentioned both the ICTY and the ICTR did not consider the role of victims to be relevant at all. One of the critiques moved toward both Courts was the distance of the trials from the population, not only the geographical one, and the non involvement of victims. The ICTY completely overlooked the problem and when local offenders were able "distort matters"[248], nothing

[241] *Ibid.*, 489 (Cambridge Cambridge University Press 2019).
[242] *Ibid.*
[243] The ICC Statute, Article 68(3).
[244] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 489 (Cambridge Cambridge University Press 2019). See also Mikaela Heikkilä and Åbo Akademi (1918-). Institutet För Mänskliga Rättigheter, *International Criminal Tribunals and Victims of Crime : A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status*, 141 – 142, (Institute For Human Rights, Åbo Akademi University 2004).
[245] Hans-Peter Kaul"Victims' rights and peace" in Thorsten Bonacker and Maria Safferling, *Victims of International Crimes : An Interdisciplinary Discourse*, 223 – 229, (TMC Asser Press 2013).
[246] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 489 (Cambridge Cambridge University Press 2019).
[247] *Ibid*.
[248] Mirko Klarin, "The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia" (2009) 7 Journal of International Criminal Justice 89.

could be done if not creating "outreach programmes."[249]. As far as the ICTR is concerned, none of the measures adopted, including the outreach programmes the establishment of a television station and a radio, where sufficient in order to get closer to the Rwandan and make them feel part to the proceedings. In the case of the Rwandan genocide this huge gap brought to a significant slowdown, hence five years passed before the first conviction was issued. This new system adopted by the ICC seems to have all the potential to empower victims but, as it is now, it might endanger the "sustainability, effectiveness and efficiency"[250] of proceedings. For example, in the *Bemba case*[251] more than 5,000 victims were allowed to the trial and this considerably affected the principle of the reasonable duration of the process. The solution seems to rest in the balance between victims' participation and effectiveness of the proceeding.

[249] David Tolbert, "PDF | the International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings | ID: 3484zt54v | Tufts Digital Library" (*dl.tufts.edu*, 2002) http://hdl.handle.net/10427/76941.
[250] The Assembly of the States Parties, "Resolution ICC-ASP/10/Res.5 Strengthening the International Criminal Court and the Assembly of States Parties" para. 49, (2011), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.5-ENG.pdf.
[251] *Bemba*, A.Ch. Decision on the Participation of Victims in the Appeal against the "Decision on Applications for Provisional Release" of Trial Chamber III, 14 July 2011.

3. The Evidence

The principle of a fair and impartial trial has many facets and entails many concepts, but one that it has been not yet explored is the equality between parties, also called "equality of arms.". This parity shall be surely reached on the substantial level granting mirroring provisions to both defendants and prosecutors, but also under the procedural point of view. "A high evidentiary standard is important for the legitimacy of any court"[252], since they have "the heavy burden of establishing incredible facts by means of credible evidence."[253]. It is crucial, however, to understand the divergences in the management and disclosure of evidences in inquisitorial and adversarial systems; the former shows a much simpler procedure, characterized by a "dossier" where all the evidence, incriminating or exonerating, is gathered and then presented to the judge. The defendant and the counsel can have access to the file, and can prepare their defence case according to the documents already collected. As it is clear, disclosure is essential for the offender to exercise the right of defence. On the other hand, adversarial systems are much more complex. Since both the prosecution and the defence have to prepare separate cases, it would be reasonable to think that both parties have the same obligations to disclose information, but this is not the case. Indeed, the defence has less stringent obligations and it is possible to procrastinate disclosure until the prosecution showed the evidence collected at trial. In adversarial Courts, whoever reveals the evidence first is usually disadvantaged, since the counterpart is going to construe its arguments to undermine the others'. Looking at the evidentiary system of the ICTY, the ICTR, and the ICC, parties have the responsibility of producing evidence,

[252] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 468 (Cambridge Cambridge University Press 2019).
[253] *Kupreškić et. al.,* ICTY T.Ch. II, 14 January 2000, para. 758.

although the judge can intervene and ask for additional exculpatory or incriminating proofs[254]. As for the admissibility or the exclusion of evidence, adversarial systems tend to exclude them to "protect the fact finder from unreliable or improper evidence"[255], while inquisitorial are guided by the principle of the free evaluation of evidence, therefore most of them have to be presented before the Court[256]. As mentioned in the previous paragraphs[257], the ad-hoc Tribunals are adversarial in nature and the ICC is hybrid, since it is adversarial but it has significant inquisitorial elements that do not allow a categorization. The obvious consequence would be finding different evidentiary standards and provisions according to the system adopted by the Courts; however, against all odds the evidentiary procedures are mostly omogeneous and they tend to the inquisitorial system. For the sake of clarity, it has to be noted that at the ICC it is not possible for the Prosecutor to instruct witnesses[258], while in the ad-hoc Tribunals this practice was constantly used. Having that said, the rules contained in the ICTR and ICTY RPE have been transposed to the ICC RPE[259] and the principles established by the ad-hoc Tribunal's judgments, in particular *Brđanin and Talić*[260] case, have heavily influenced the ICC Statute. Let's have a quick look at the main provisions regulating evidence and how they developed over time: Tribunals had the power to "admit any relevant evidence which it deems to have probative value" and to reject evidence "if its probative value is substantially outweighed by the need

[254] *Katanga and Ngudjolo Chui*, ICC A.Ch., 16 July 2010, para. 86.
[255] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 468 (Cambridge Cambridge University Press 2019).
[256] Mirjan Damaska, "Free Proof and Its Detractors" (1995) 43 The American Journal of Comparative Law 343.
[257] See paragraph 2a
[258] *Lubanga*, ICC PTC I, 8 November 2006. See also Sergey Vasiliev, "Proofing the Ban on `Witness Proofing': Did the ICC Get It Right?" (2009) 20 Criminal Law Forum 193.
[259] For example, ICTR and ICTY RPE Rule 89(A) is transposed to the ICC Statute, Article 69(8) and to the ICC RPE, Rule 63(5).
[260] *Brđanin and Talić,* ICTY T.Ch. II, 15 February 2002. It laid down specific guidelines for evidence,

to ensure a fair trial"[261], or it was acquired with "methods which cast substantial doubt on its reliability"[262] If reliability is another feature to consider in the standard of proof, besides the relevant and probative aspects[263], further elements need to be assessed as, for example, "the origin, content, corroboration, truthfulness, voluntariness and trustworthiness of the evidence."[264]. The ICC takes the same approach, with a few divergences: admissibility and exclusion rely both on the "probative value of the evidence and the prejudice that it may cause to a fair trial"[265], and the methods of acquisition[266]. Reliability is requirement at the ICC, but corroboration is not compulsory[267]. Finally, the sentencing is based only on the proofs that have been discussed at trial, including ""discussed" written documents submitted to the Court[268]. This brings up the last controversial aspect related to the evidentiary standards: the use of written statements instead of oral testimony[269]. Written statements are not solid evidence; they can be used as a tool in legal proceeding, but there is no way to assess whether the witness is telling the truth or not, and anyway no sanction is provided in case of a witness commits perjury. Some scholars encourage the use of this instrument[270], anyway oral testimony is still preferred at the ICC[271].

[261] The ICTY RPE, Rule 89(C) – (D).
[262] The ICTY RPE and ICTR RPE, Rule 95.
[263] The evidence is relevant if connected to the claims, and probative if it has the potential to prove a fact.
[264] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 468 (Cambridge Cambridge University Press 2019). See also *Tadić*, ICTY T.Ch. II, 5 August 1996, paras. 15 – 19.
[265] The ICC Statute, Article 69(4).
[266] The ICC Statute, Article 69(7).
[267] The ICC RPE Rule 63(3).
[268] The ICC Statute, Article 74(2); see also *Lubanga*, ICC T.Ch. I, 14 March 2012, para. 98.
[269] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 469 (Cambridge Cambridge University Press 2019).
[270] Donald Piragoff, "Article 69" in Otto Triffterer, *Commentary on the Rome Statute on the International Criminal Court : Observers' Notes, Article by Article* (Nomos 1999). See also Susana SáCouto and Katherine Cleary, "Expediting Proceedings at the International Criminal Court" 35 – 45 (2011). https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-14-expediting-proceedings-at-the-international-criminal-court/.
[271] The ICC Statute, Article 69(2).

a. Back to Syria: The IIIM and the evidence

The focus of this thesis is to establish which are the possible solutions to bring justice to the Syrian population through the establishment of a Court. Not much has been done yet to take action since the conflict is still on going and for the moment, shows no signs of haulting. However, it is crucial to analyze the efforts of the International Community and in particular, the establishement of the "International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011"[272], (from now on the IIIM). These kind of Mechanisms are not unusual at the international level: before the ICTY was set up, the Security Council created a commission to investigate international crimes in former Yugoslavia, through resolution 780(1992)[273]. The organ was not supported, financially and materially speaking, and M. Cherif Bassiouni, second chairman of the commission, had to gather resources from privates. Anyway, the mechanism proved efficient in the collection of evidence[274]. Same pattern was followed for the ICTR: first a commission was created[275], and then the Tribunal itself. It seems logical to establish mechanisms which are in charge to collect evidence and information for the entire length of the conflict: indeed, they will be able to provide future Tribunals with relevant documents

[272] "UN GA Res. 71/248 Terms of Reference of IIIM" (January 11, 2017) https://iiim.un.org/terms-of-reference-of-iiim/.
[273] UN SC Res. 780, 1992.
[274] M Cherif Bassiouni, "The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)" (1994) 88 The American Journal of International Law 784. See also, Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure,* 128 (Cambridge Cambridge University Press 2019).
[275] UN SC Res. 935, 1994.

and reliable testimonies in order to prepare cases. Of course, the impartiality of these organs and the procedures through which evidence is collected, organized and preserved must be fair, or the entire prosecution could be negatively affected. Created by Resolution 71/248 of the UN General Assembly[276], the IIIM has two main tasks:

- "To collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses;
- To prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law."[277].

In the first part of the mandate, as far as collection is concerned, the IIIM shall gather all data coming from international organizations and UN related entities, such as the Organization for the Prohibition of Chemical Weapons and the Independent International Commission of Inquiry on the Syrian Arab Republic. States and civilians might also collaborate with the Mechanism; moreover, the evidence collected shall have peculiar characteristic: the alleged crimes must be linked to a specific offender through the modalities of criminal responsibility recognized under International Criminal Law and should be probative of mens rea[278]. Such evidence would contain all the elements of war crimes that have been analyzed in the previous chapter[279], and that would

[276] "UN GA Res. 71/248 Terms of Reference of IIIM" (January 11, 2017) https://iiim.un.org/terms-of-reference-of-iiim/
[277] *Ibid.*
[278] *Ibid.*, I(A)1
[279] Chapter 1, para 3.a, the elements of war crimes

lead to a strong and successful prosecutions. However, such proofs are hard to get. The second aspect is the consolidation and analysis of the collected evidence: this step includes "a preliminary assessment of the information, documentation and evidence […] based on its reliability and probative value" in order to fill the gaps by recquiring, if needed, additional information[280]. Lastly, preservation of evidence is crucial in order to maximize admissibility in a proceeding: "an uninterrupted chain of custody"[281], for example, enhances the reliability of the evidence, therefore judges would be more inclined to admit it during a process. Another important aspect of preservation is also the place where proofs are located: in principle the IIIM has the adequate spaces for the storage, but it has also the power to enter agreements with States that are in possess of the evidence. Therefore the IIIM can be granted "access to safe, secure and reputable entities […], with all due guarantees of security and strict confidentiality."[282]. Moving on to the second assignement, once that the information have been collected, assesed, analyzed and preserved, the IIIM prepares dossiers containing "both inculpatory and exculpatory" evidence regarding the suspects, "without any distinction based on their affiliation or official capacity."[283]. As it is clear from the provision, the system adopted at the IIIM is inquisitorial in nature and it reflects perfectly the pattern already followed by the ad-hoc Tribunals and the ICC. Regarding the sharing of evidence with other Organization and Tribunals, the IIIM can share information, at request or motu proprio, "with national, regional or international courts or

[280] "UN GA Res. 71/248 Terms of Reference of IIIM" (January 11, 2017) https://iiim.un.org/terms-of-reference-of-iiim/
[281] *Ibid.*, I(A)3;
[282] *Ibid.*
[283] *Ibid.*, I(B)1

tribunals that have or may in the future have jurisdiction over these crimes."[284]. This provision reveals the reseamblance of the Syrian Mechanism with the ones established for the ICTY and ICTR and also its real aim: to serve a Tribunal for future prosecutions. Furthermore, it is probably not a coincidence that the Head of the IIIM is Ms. Marchi-Uhel, former Senior Legal Officer and Head of Chambers at the ICTY and judge at the Extraordinary Chambers in the Courts of Cambodia (ECCC): 27 years of experience in the field and, in particular, in International Criminal Tribunals improve the approach of the Mechanism under both the perspectives of evidence and procedures. It goes without saying that standars of procedures must be respected, or the evidences will not be admissible in Court. Unfortunately The Terms of Reference of the IIIM provide only guidelines and a general reference to the UN policies on "information sensitivity, classification and handling."[285]. However, the procedural requirements that should be adopted in the next future regard "confidentiality and personal circumstances of victims" such as age, sex, and gender, " [the] establishment of a witness and victim protection unit", "referral pathways so that vulnerable victims […] are provided with appropriate medical and psychosocial support" and finally " [the] chain of custody issues, data protection, information management, case management and archiving and security issues."[286]. In conclusion, it has to be noted that the Mechanism is not the Office of the Prosecutor and it must

[284] *Ibid*., I(B)2
[285] "Secretary-General's Bulletin ST/SGB/2007/6" (*undocs.org,* February 12, 2007) https://undocs.org/ST/SGB/2007/6
[286] "UN GA Res. 71/248 Terms of Reference of IIIM" (January 11, 2017) https://iiim.un.org/terms-of-reference-of-iiim/

not be considered a Court itself[287]; therefore all the work of the IIIM could be frustrated if a Tribunal will not be granted jurisdiction over the crimes in Syria.

[287] *Ibid.*

4. Cooperation with States, individuals, and organization

Cooperation is the external part of the judicial activity and it significantly determines the results achieved by Courts and Tribunals. Indeed it has to be remembered that enforcement powers, such as the power of implementing a sentence or to enforce the law through police forces, are not "inherent"[288] in a Court, therefore they must be explicitly specified in Statutes or RPEs. The obligation to cooperate has many facets and it shall be analyzed taking into consideration the subject from whom the collaboration is asked. Starting from States, the *Blaškić* decision stated that there are different types of cooperation[289], and that the State-Tribunal one is "vertical" in nature. The ICTY and ICTR were organs of the UN, granted with the powers to "make decisions that are binding on sovereign States."[290]. The obligation to cooperate extends to all the UN Member States and also non-members which entered an agreement with the Tribunal in order to collaborate. Probably, the ICTY overstepped its competence when, in the *Karadžić and Mladić*[291] case, concluded that also "non-recognized entities which exercise governamental functions"[292] are bound to cooperate, but despite the criticism[293] the theory is accepted. The ICC, on the other hand, is indipendent, it has international legal personality and it has "the authority to make requests to States Parties for cooperation."[294]. Part 9 of the ICC Statute enlists various forms of cooperations that must be implemented at the national

[288] *Blaškić*, ICTY A.Ch., 29 October 1997, para. 25.
[289] *Ibid*. paras. 47 and 54
[290] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 518 (Cambridge Cambridge University Press 2019). See also *Blaškić*, ICTY T.Ch. II, 18 July 1997, para. 18 – 23.
[291] *Karadžić and Mladić,* ICTY T.Ch. I, 11 July 1996, para. 98.
[292] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 518 (Cambridge Cambridge University Press 2019).
[293] See Göran Sluiter, Jurist, *International Criminal Adjudication and the Collection of Evidence : Obligations of States* (Intersentia 2002).
[294] The ICC Statute, Articles 4 and 87.

level by State Parties according to article 88 of the Statute: unfortunately the Court cannot go beyond the methods of collaboration explicited, however article 93 provides a catch-all formula: "any other type of assistance which is not prohibited by the law of the requested State" can be requested as long as it serves the purpose of "facilitating the investigation and prosecution of crimes within the jurisdiction of the Court."[295]. Of course States might also entered into agreement with the ICC[296], or collaborate on a voluntary basis. Taking into consideration individuals, Tribunals can submit orders called *subpoena ad testificandum.* These commands are also considered a declination of the use of "inherent powers" of a Tribunal[297]. The ICTY adopted the view that *subpoenas* could not be issued directly to individuals acting in their official capacity for a State, they rather had to be addressed to the State itself[298]. For the ICC, the cooperation of individuals is more complex; part 9 of the Statute does not provide any rule on the matter, however article 64(6)(b) of the ICC Statute allows the Trial Chamber to call for witnesses[299]. Unfortunately, that creates a loophole: "it appears that the ICC might have the power to order a witness to appear before the Court, but cannot demand that a State deliver a witness who does not comply"[300], due to the lack of an explicit provision in Part 9[301]. As for now, shifting our attention to the Syrian situation, there is no such problem of cooperation between the States and the Tribunal, since the latter has not been established. However, States can still cooperate with the IIIM during the phase of investigations: this is the reason why the Terms of Reference of the

[295] The ICC Statute, Article 93(1)(l).
[296] *Ibid*., Article 54(3)(d)
[297] *Blaškić*, ICTY A.Ch., 29 October 1997, paras. 47 and 55.
[298] *Ibid.*, paras. 29 – 44
[299] The ICC Statute, Article 64(6)(b).
[300] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 522 (Cambridge Cambridge University Press 2019).
[301] This issue is perceived as a serious weakness of the ICC; see Claus Kreß and Kimberly Prost, "article 87" in Otto Triffterer, *Commentary on the Rome Statute on the International Criminal Court : Observers' Notes, Article by Article* (Nomos 1999).

Mechanism layed down some principles in order to smooth and accelerate the procedures. All States, including the UN States Members and the parties to the conflict in Syria, are requested to "fully cooperate", "providing […] any information and documentation that they might possess, as well as any other forms of assistance pertaining to the mandate", and "to promptly respond to any request, including access to all information and documentation."[302]. Moreover the IIIM has also the power usually granted to Courts to enter agreements of cooperation[303]. Anyway, the methods of work are yet to be established[304].

5. *Conclusions*

As already explained in the Introduction, this chapter was dealing with historical issues of the ad-hoc Tribunals and the problems that the ICC is still facing during its own prosecution. The willingness to create a flawless Court is a honorable ambition, but unfortunately no such Court will ever exist. We shall take into consideration the fact that Tribunals are usually the compromise of legal and political powers: this usually leads to hybrid common-civil law systems that have their pros and cons. Indeed, if inquisitorial and adversarial provisions can co-exist usually the entire system, and therefore the Court becomes stronger, while if rules are not compatible, the risk of creating loopholes and gaps is higher and the prosecution is heavily endangered. As far as the IIIM is concerned, the Mechanism was basically created as a preamble for a future Tribunal and even though it shall not be considered a Prosecutor Office or a Court, their activities have the potential to enhance future prosecutions of

[302] The IIIM terms of reference, the mandate II; https://iiim.un.org/terms-of-reference-of-iiim/
[303] *Ibid.*
[304] *Ibid.*

war crimes. Bearing this in mind, the next chapter will analyze four potential mechanisms for the prosecution of war crimes in Syria, namely an ad-hoc Court established by the UN, an internationalized domestic Court, a domestic Court established with international support and finally the ICC. However, when speaking of justice, the insitutional response cannot be disregarded: therefore a general study of the means used by the UN institutions in the last decades will follow.

CHAPTER 3

After examining the elements of war crimes and the most renowned past and present Tribunals, this chapter will focus on four potential mechanisms for prosecuting IHL violations committed in the territory of Syria, more specifically war crimes, and assess which one could be the best option to ensure a succesfull prosecution. On this matter, the legal and political aspects are two sides of the same coin: to approach the problem in a pragmatic way, both elements will be studied in order to reach a compromise that will fulfill all the needs and expectations. The first Court that will be examined is the ICC, since it is the only existing Court that might have jurisdiction by referral over Syrian war crimes; then, internationalized domestic Courts and domestic Courts established with intenational support will be analyzed: the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) will be brought as example of the former, while the Iraqi High Tribunal and the War Crimes Chamber of Serbia will be examined as models for the latter. Lastly, it shall be determined whether an ad-hoc Tribunal for Syria can be established and, if not, the reasons behind the impracticability of this choice. Regarding the prospects for accountability, the last paragraph of this chapter will focus on alternative ways to prosecute war crimes, and mainly on the institutional response of the UN.

1. The ICC

The Nuremberg promise of setting a permanent Tribunal for the prosecution of international crimes was honoured only after many years, when in 1998 the negotiations for the creation of the International Criminal Court started in Rome. The conferences was given five weeks time in order to

reach an agreement of the Statute of the said Court, and during these period many were the challenges, legal and political, that the Countries participating at the Conference had to face. However, the Statute was approved by a vote of 120 to 7, with 21 abstentions[305]. Before focusing on the Syrian situation and assess whether the ICC could ever have jurisdiction over war crimes, the trigger mechanisms and the issues about juridiction shall be examined. Let's start with the first.

a. The trigger mechanisms

According to articles 13, 14, and 15 of the ICC Statute, there are three ways to present the Court with a matter and they are:

- The referral by a State Party[306];
- Initiation of the investigations proprio motu by the Prosecutor[307];
- The referral by the Security Council[308];

The first method of referral can only be implemented by State Parties to the Rome Statute; in this case the Prosecutor might be asked to initiate investigations on crimes committed in violation of the Statute itself[309]. The phrasing of article 14 of the ICC Statute is clear, however some doubts arised when "self-referrals" were taken into consideration. In particular, some authors have not accepted the theory according to which a State might refer to the ICC crimes

[305] Michael P Scharf, "Results of the Rome Conference for an International Criminal Court | ASIL" (*asil.org*, August 11, 1998) https://asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court.
[306] The ICC Statute, Article 14.
[307] *Ibid*., Article 15.
[308] *Ibid*., Article 13.
[309] *Ibid*., Article 14.

committed on its own territory[310]. However, the Statute does not limit referrals[311]; on the contrary, it rather encourages this behaviour since it enhances cooperation and it helps perceiving investigations as not invasive[312]. The second mechanism allows the Prosecutor to start to investigate "on the basis of the information on crimes within the jurisdiction of the Court",[313] anyway, for the sake of clarity, a few clarifications are needed. First, the Prosecutor assess "the seriousness of the information received"[314], and in case of a negative evaluation he shall not proceed. However, if the analysis of the evidence is positive the Prosecutor can submit the documents to the Pre-Trial Chamber and ask for an authorization which, if granted, will start the phase of investigations[315]. It goes without saying that then power to trigger the proceeding was highly debated during the negotiations[316]: indeed ensuring the Prosecutor such a great power, gave the Court a certain degree of autonomy and independence but, on the other hand, whithin the hands of the Prosecutor lies the control to start politically-motivated proceedings. This is the reason why the Pre-Trial Chamber overlooks the Prosecutor's activity: it shall grant the fairness of the trial, and assess whether the situation in regard to the evidence and jurisdiction is favourable for a prosecution[317]. Last, and more complex, way to refer a matter to the ICC is by the Security Council, acting under Chapter VII of the UN

[310] William Schabas, "'First Prosecution at the International Criminal Court'" [2006] Human Rights Law Journal.
[311] The ICC Statute, Article 14.
[312] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 166 (Cambridge Cambridge University Press 2019).
[313] The ICC Statute, Article 15.
[314] *Ibid*., Article 15(2).
[315] *Ibid*., Article 15.
[316] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 164 (Cambridge Cambridge University Press 2019).
[317] *Ibid.*

Charter[318]. It shall be remebered that the ICC Statute does not extend the prerogatives of the Council or viceversa. When referring a matter the Council is putting it in front of the Court as it exists: therefore the Council cannot alter the rules laid down in the Statute. It is indisputable, however, that the obligations on States deriving from the membership to the UN are cumulative with the ones laid down in the ICC Statute[319].

b. Conceptual matters on jurisdiction

The ICC "has potentially worlwide jurisdiction, but this will be fully realized only after all States become parties to its Statute"[320]. When speaking of jurisdiction, article 12 affirms that State Parties have already accepted the ICC Jurisdiction over the core crimes enlisted in the Statute but in case of a referral by a State or the commencement of investigations by the Prosecutor, two prerequisites must be respected in order for the Court to exercise jurisdiction. At least one of the following States must be Party to the Statute or have briefed its voluntary submission to the jurisdiction of the ICC:

- "The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- The State of which the person accused of the crime is a national."[321].

[318] The ICC Statute, Article 13.
[319] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 164 (Cambridge Cambridge University Press 2019).
[320] *Ibid.*, 166
[321] The ICC Statute, Article 12(2).

In case of referral by the Security Council, of course the ICC would have jurisdiction even if none of the Countries that are object of the referral are member States of the ICC. Moreover, it is possible for non-State Parties to accept the Court jurisdiction through consent; after the declaration is submitted to the Registry, the State has all the obligations enunciated in Part 9[322]. However, there is a limit: the declaration itself does not count as a referral. Therefore, after it, there shall be a referral from the accepting State or the initiation of the investigations by the Prosecutor *proprio motu*, or the declaration will basically have no effect. Another limit is given by the *ratione temporis* of the jurisdiction: "The Court has jurisdiction only […] after the entry into force of [its] Statute."[323]. If a non-State Party becomes a member, than the Statute applies from its entry into force, except in the case of a declaration of jurisdiction[324]. Finally, the last restraint to jurisdiction pertains the Security Council. Article 16 gives the possibility to defer investigations or prosecutions at the ICC; to fully understand this rule, it is important to give some historical background: initially the draft of the ICC Statute contained a provision that "would have removed jurisdiction over any matter which was being considered by the Security Council, unless the Council agreed otherwise."[325]. As it is clear, that would have created an unacceptable interdependence between the two institutions. Consequently, it was decided that the best method to concile the powers of the ICC and the Security Council was allowing the latter to interfere in the judicial activities, but only through

[322] *Ibid*., Article 12(3).
[323] *Ibid*., Article 11.
[324] *Ibid*., Article 11(2).
[325] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 164 (Cambridge Cambridge University Press 2019). See also Morten Bergsmo and Jelena Pejic, "Article 16" in Otto Triffterer, *Commentary on the Rome Statute on the International Criminal Court : Observers' Notes, Article by Article* (Nomos 1999).

a positive decision to defer the proceeding. It has to be remebered that in order to have a positive decision in the Security Council, nine positive votes are required and permanent members shall not exercise their veto power. The deferral lasts one year, but it can be requested *ad libitum*[326].

c. Syria and the prospect for accountability at the ICC

Considering all the aspects of the previous paragraphs, let's see whether the ICC culd exercise jurisdiction over the war crimes committed in Syria. Unfortunately most of the actors involved in the conflict[327] are State Parties of the ICC Statute: hence, Syria could not refer the situation before the Court ex article 13 of the ICC Statute as well as the "main" actors participating to the war, namely Russia, Turkey, and the US. Having that said, two are the remaining ways for the Court to exercise jurisdiction: through its Prosecutor or by referral of the UN Security Council. As beforementioned, in order for the proprio motu investigations to begin one of the States involved in the conflict, either actively or passively, shall be Party to the Statute or must have submitted the declaration of acceptance, otherwise the Prosecutor shall not commence the proceedings. It is unlikely, however, that in the next future, the actors concerned will be willing to be prosecuted for the commission of the war crimes committed in the territory of Syria. Therefore, the last chance would be the referral of the Council but, unfortunately, it is a result that has already been proven to be difficult to achieve. The Russian Federation and China, two out of the five permanent members, vetoed the referral on 22 May

[326] The ICC Statute, Article 16.
[327] See the Introduction, para. 3.

2014[328]. Nevertheless, an estimate of 20,000 foreign nationals were fighting in the territory of Syria as in 2015[329], many under the Joint Task Force lead by the US, the CJTF-OIR. This circumstance can be a double-edged sword: on one hand, it gives the possibility to signatory countries of the ICC Statute, such as France and the UK, to refer the matter to the Court. On the other, such countries might prosecute their own nationals at the domestic level. The latter approach is totally acceptable under article 17 of the ICC Statute, which states that "the Court shall determine that a case is inadmissible" when a State that has jurisdiction is already dealing with the investigations and the prosecution[330]. Needless to say, that the provision is completely in line with the principle of complementarity: the ICC was "intended to be a Court of last resort"[331], hence it shall respect the sovereignty and the primary jurisdiction of States. In case the State Parties decide to refer the matters or the Prosecutor decides to start the prosecution over nationals of the signatory countries, "the ICC might be able to prosecute only low-level perpetrators"[332], and this is exactly the contrary of what the Court shall strive for[333]. To have a positive impact on both jurisprudence and public opinion, the ICC shall be able to have jurisdiction over the entire range of war crimes committed in Syria, which is highly unlikely since territorial jurisdiction has to be excluded. Prosecuting only foreign-fighters related

[328] United Nations, "Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution | Meetings Coverage and Press Releases" SC/11407, (*Un.org*, 22 May 2014) https://www.un.org/press/en/2014/sc11407.doc.htm.
[329] ICSR Team, "Foreign Fighter Total in Syria/Iraq Now Exceeds 20,000; Surpasses Afghanistan Conflict in the 1980s - ICSR" (*ICSR*, January 26, 2015) https://icsr.info/2015/01/26/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/
[330] The ICC Statute, Article 17.
[331] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 154 (Cambridge Cambridge University Press 2019). See also, the ICC Statute Preamble, para. 6
[332] Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, "A Step towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria" (2015) https://syriaaccountability.org/library/a-step-towards-justice/.
[333] *Ibid*., (the ICC was established to try those with the greatest responsibility for atrocities).

crimes could deem the prosecution as unfair and impartial and that will have negative effect on Syrians. A possibility that has to be evaluated is the creation of a domestic court in Syria with jurisdiction over war crimes that will cooperate with the ICC: applying the principle of complementarity, the two Courts might share prosecutions according to their own jurisdictions[334]. Obviously, the risks of shortcomings has to be taken into consideration.

[334] *Ibid.*

2. *Internationalized Domestic Courts*

The 90's were a florishing period for International Criminal Tribunals; however, the quick change in the nature of conflicts in the 21st century required a change in the nature of the Courts as well: the International Community, in order to meet the demands brought by the new century challenges, decided to establish Internationalized Domestic Courts, also called hybrid Courts. For grater clarity, it should be stressed the difference between internationalized domestic Courts and domestic Courts created with international support; usually the former entails an agreement with the UN, while the latter does not. Anyway the second will be discussed in the following paragraph. At this point, the attention should be drawn to both the Special Court of Sierra Leone, from now on the SCSL, and the Extraordinary Chambers in the Courts of Cambodia, the ECCC or Khmer Rouge Tribunal. Another example could be the Special Tribunal for Lebanon, the STL. Bordering with Syria, the STL could be considered to be one of the existing Courts that could have jurisdiction over war crimes committed in said country, but unfortunately, for the limitation of its mandate[335], the Court is not conceived to prosecute crimes against humanity, genocide, and war crimes[336]. Therefore, let's start our analysis with the Courts established by a UN-State agreement.

a. *Special Court for Sierra Leone*

[335] "UN SC Res. 1757 Attachment Statute of the Special Tribunal for Lebanon", (2007) https://www.stl-tsl.org/sites/default/files/documents/legal-documents/statute/Statute_of_the_Special_Tribunal_for_Lebanon___English.pdf.
Article 1 states that the tribunal has jurisdiction "over persons responsible for the attack of 14 February 2005 resulting in the death of the former Lebanese prime minister Rafik Hariri and in the death or injury of other persons"
[336] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 181 (Cambridge Cambridge University Press 2019).

The first Court to examine is the SCSL: by request of the President of Sierra Leone, the Security Council, with Resolution 1315/2000[337], started the negotiations for the establishment of the Court. Two years after, the SCSL was established by treaty[338] and it began its mandate[339] "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law."[340]. As far as war crimes are concerned, article 3 of the Statute reproduces almost literally article 3 of the ICTR[341], and it references Common Article 3 of the Geneva Conventions. However, the Statute did not allow the prosecution of war crimes if committed in IACs. The choice is not unreasonable, given the fact that Sierra Leone had to deal mainly with NIACs, however the Court found it too narrow an approach and with the Fofana judgement[342], it extended its own jurisdiction to IACs, but only regarding war crimes. Interestingly, the SCSL included in article 5 of the Statute a set of crimes prosecutable under two main Sierra Leonean Acts: the "Prevention of Cruelty to Children Act"[343], and the "Malicious Damage Act"[344]; these crimes are related to sexual abuse of girls and to the random devastation of protected targets[345]. Despite the fact that the SCSL used to be predominant in the legal order, it has to be remembered that the Court itself was not part of it. Indeed, when the Country adopted the the Ratification Act of

[337] UN SC Res. 1315, 2000.
[338] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, (Cambridge Cambridge University Press 2019), 182.
[339] The SCSL Statute, 16 January 2002, http://www.rscsl.org/Documents/scsl-statute.pdf
[340] *Ibid.*, Article 1 http://www.rscsl.org/Documents/scsl-statute.pdf
[341] See Chapter 1, para. 3.a.
[342] *Fofana*, SCSL, A.Ch., 25 May 2004.
[343] "Prevention of Cruelty for Children 1926 - Sierra Leone Web" https://www.refworld.org/pdfid/477e65c42.pdf.
[344] Malicious Damage Act 1861" (*Legislation.gov.uk*, 2011) https://www.legislation.gov.uk/ukpga/Vict/24-25/97/contents. This Act is part of the legacy of the colonization of the UK in Sierra Leone.
[345] The SCSL Statute, Article 5 http://www.rscsl.org/Documents/scsl-statute.pdf

the Court[346], it specified the SCSL could not be classified among the other Sierra Leonean Courts. That carries its weight, if considering that the Court is neither an organ of the UN security Council[347]. It is hard to give this Tribunal a legal status; however it is unquestionable that the Court was meant to cooperate with the institutions already present on the territory of Sierra Leone. Therefore, it was established there and it had concurrent jurisdiction; nevertheless in case of jurisdictional conflict, the SCSL had supremacy over national courts[348]. The SCSL, with its nature of hybrid Court, brought many elements of innovation that will be appraised altogether with the ones of the ECCC and the domestic courts in Iraq and Serbia. Anyway, the real turning point in the history of the internationalized domestic courts is represented by the ECCC and that will be explained in the next paragraph.

b. The Extraordinary Chambers in the Courts of Cambodia

As before mentioned, the negotiations for the establishment of the SCSL resulted in a smooth process that concluded only after two years from the first Resolution issued by the Security Council[349]. The same cannot be said for the creation of the ECCC. After four years of terror under the Khmer Rouge regime, Vietnamese forces deposed Pol Pot; Cambodia asked the UN for assistance during the post-war scenario and the Organization came up with a team of

[346] "Special Court Agreement, 2002 (Ratification) Act, 2002 | Sierra Leone Legal Information Institute" (*sierralii.org*, April 25, 2002) https://sierralii.org/sl/legislation/act/2002/9
[347] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 183 (Cambridge Cambridge University Press 2019).
[348] The SCSL Statute, Article 8.
[349] UN SC Res. 1315, 2000.

experts who advocated for the creation af an ad-hoc Tribunal[350]. The Cambodian government did not accept the resolve, demanding a domestic court to be created. The discussions began in 1999 only to collapse in 2002, when the UN Secretary-General deemed the future Cambodian Court to-be as not objective and not independent enough to grant the principles of impartiality and fairness to be respected[351]. Although the setback, the Secretary-General was required to undergo the negotiations once again by Resolution 57/228A of the General Assembly[352], and to comply with the desire of Cambodia, namely to insitute domestic chambers. Finally in 2003, the UN and the Cambodian Government reached an arrangement[353], which was later on ratified by the Cambodian National Assembly[354]. Even if the agreement reached between the UN and Cambodia seems similar to the one adopted in Sierra Leone, the main difference is the legal status of the Courts themselves: the SCSL was neither a domestic Court nor part of the domestic system[355]; the ECCC, instead, is domestic in nature and it applies entirely its own civil law system[356]. Nevertheless, the ECCC stated that it was a completely "independent entity within the Cambodian Court structure."[357]. In order to understand the issues related to the ECCC, it is crucial to understand the organization

[350] Helen Horsington, 'The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal', MelbJlIntLaw 18; 5(2) Melbourne Journal of International Law 462" (*www.austlii.edu.au, 2004*) http://www.austlii.edu.au/au/journals/MelbJIL/2004/18.html

[351] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 186 (Cambridge Cambridge University Press 2019).

[352] UN GA Res. 57/228A, 2002.

[353] UN GA Res. 57/228B, 2003.

[354] "Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea", Articles 2 and 31, (2003) https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf

[355] See para. 2.a.

[356] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 186 (Cambridge Cambridge University Press 2019).

[357] *Kaing Guek Eav (Duch)*, ECCC PTC, 3 December 2007, paras. 17 – 20.

of the Court itself: both the Chambers and the prosecution is indeed mixed with nationals and international actors: the former are selected by the Cambodian Supreme Court of Magistracy, while the latters by the UN Secretary General[358]. The Prosecutor, a Cambodian national, is assisted by two international Co-Prosecutors, while the Chambers[359] are composed by a majority of national judges. Even if the decisions require a qualified majority[360], there is no equality and that brings tensions during the proceedings. The divide became so unbereable that part of the international staff gave their demissions, among them two judges[361]. This can only damage the credibility of the ECCC, and in particular the impartiality of national judges that are now perceived as biased. Finally, the struggle of the Court in using civil law procedural rules in an "internationalized" environment must be taken into consideration. As soon as it was established, the Cambodian rules of procedures showed too many gaps and flaws; therefore, the ECCC adopted its own Internal Rules of Procedure[362]. Leaving aside the fact that judges in civil law shall not have the power to create rules, this new procedures brought even more uncertainty[363]: if in one hand they help to smooth the process, on the other impartiality and independency are at stake[364], since the ECCC ruled the supremacy of its own

[358] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 187 (Cambridge Cambridge University Press 2019).
[359] Both the Trial and the Supreme Chamber
[360] "Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea", Articles 3 and 4, (2003) https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf.
[361] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 188 (Cambridge Cambridge University Press 2019).
[362] Anees Ahmed and Robert Petit, "A Review of the Jurisprudence of the Khmer Rouge Tribunal, 8 Nw" (2010) 8 Northwestern Journal of International Human Rights 165 https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=1097&context=njihr.
[363] Sarah Williams, "The Cambodian Extraordinary Chambers: A Dangerous Precedent for International Justice?" (2004) 53 International and Comparative Law Quarterly 227.
[364] *Ibid.*

rules over the Cambodian law[365]. As aforementioned, the assessment on the prospect of accountability will be discussed right after the analysis of the Iraqi Tribunal and the Chambers of Serbia which follows in the next paragraphs.

3. Domestic Courts established with International support

Domestic Courts established with the support of the International community are another sort of hybrid Courts. The only difference with the ones examined in the previous paragraph is the lack of a formal agreement between the UN and the Country that wishes to start the prosecution. The two main examples are the Iraqi High Tribunal and the War Crimes Chamber of Serbia.

a. The Iraqi High Tribunal

This Tribunal might have some international features, however, since it was neither created by the UN nor by a treaty, it is nothing like Courts established by an official agreement. Entirely domestic in nature, was established by the Interim Governing Council in 2003, after Saddam Hussein was ousted by coalition forces[366]. The international character of the Tribunal, of course, lies down in the Statute[367]. The establishment brought many concerns about the legitimacy of the Tribunal itself which were addressed and solved only in 2005[368], when a different Statute was adopted. The organization behind the Iraqi Tribunal is the Coalition

[365] *Nuon Chea*, ECCC PTC, 26 August 2008, paras.14 – 15.
[366] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 195 (Cambridge Cambridge University Press 2019).
[367] The Statute is attached to the Coalition Provisional Authority Order N. 48 of 10 December 2003.
[368] Charles Garraway, "the Statute of the Iraqi Special Tribunal" in Susan Carolyn Breau, Agnieszka Jachec-Neale and British Institute Of International And Comparative Law, *Testing the Boundaries of International Humanitarian Law* (British Institute Of International And Comparative Law 2006).

Provisional Authority: it support the Court on all the main aspects, namely "funding, training, security, and personnel."[369]. Obviously the staff is entirely composed by Iraqi nationals, even though it is possible for international judges to be appointed if one of the party involved in the proceeding is a State[370], and for international actors in general to cooperate in the prosecution[371]. Many States and Organizations, however, are not inclined to collaborate since the Tribunal can inflict death penalties, a policy not endorsed[372].

b. The War Crimes Chamber of Serbia

For the sake of exhaustiveness, a quiclky examination of the War Crimes Chamber of Belgrade will follow. It was a national Court, created by the Organization for Security and Co-operation in Europe (OSCE)[373]. It was established mainly to cooperate with the ICTY: indeed, the ad-hoc Tribunal referred some cases, for example Vladimir Kovaćević case[374]. Despite this secondary role, until 2012 the Chamber was not succeeding in its prosecutions: victims were not protected, evidence was lacking, high-profile criminals got away, and this brought to a drastic drop of accusations[375].

[369] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 196 (Cambridge Cambridge University Press 2019).
[370] "National Implementation of IHL - Law No. 10 of 2005 Establishing the Supreme Iraqi Criminal Tribunal" Articles 4 and 28 (*ihl-databases.icrc.org*, October 18, 2015), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/62dfa419b75d039cc12576a1005fd6c1/.
[371] *Ibid*., Articles 7, 8, and 9.
[372] Tom Parker, "Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal" (2005) 38 Cornell International Law Journal 11 https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1660&context=cilj
[373] OSCE Mission to Serbia and Montenegro, "Law N. 67/2003 on the Organisation and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes" (2003) https://www.refworld.org/pdfid/4b56ce4d2.pdf
[374] *Vladimir Kovaćević,* ICTY Referral Bench, 17 November 2007.
[375] Humanitarian Law Center Belgrade, "Report on War Crimes Trials in Serbia in 2012" (2012) http://www.hlc-rdc.org/wp-content/uploads/2013/01/Findings-on-WC-Trials-in-2012-ENG1.pdf

c. Hybrid Courts: an appraisal

As already said in paragraph 2, hybrid Courts were born to satisfy the needs of the new millennia, and in great part they did. The SCSL, although it had to deal with unprecedented atrocities, through very well-written judgements shaped the jurisprudence, the principles and the theories of International Law, while developing the concept of "Court" itself[376]. Moreover, the fact that the constituency of the Court was inside the Country where the crimes were committee enhanced significantly the possibility of a successful prosecution; indeed, as mentioned in chapter 2 paragraph 3, the role of the witnesses/victims is essential. Having the headquarter of the Court in the Country where the afflicted population is, it means the Prosecutors can instruct their own witnesses, if the Statute so allows[377]. The ICTR and ICTY had their constituency far from the population they were suppose to bring justice to, and that showed by the lack of trust that both Rwandians and Yugoslavs felt for the ad-hoc Tribunals. Anyway, this particular aspect of the ICTY and ICTR will be discussed further. Back to the SCSL, it is worth saying that the Court itself was part of a plan for the "re-building" of the Sierra Leone legal order and social fabric, the so called "legacy project."[378]. This is the main benefit of hybrid Courts: they are either modelled on the pre-existing judicial system or conceived to work with national courts and their aim is to assist "in building local capacity, enhancing respect for the rule of law and […] be an example for the future."[379]. Unfortunately

[376] Chacha Murungu, "Prosecution and Punishment of International Crimes by the Special Court of Sierra Leone", in Chacha Murungu and Japhet Biegon, *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011).
[377] This practice is not allowed at the ICC.
[378] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 185 (Cambridge Cambridge University Press 2019).
[379] *Ibid*., 200

not always said aims are reached: the ECCC and the Iraqi Tribunal had to go over many hurdles, before finding stability; the latter was a domestic court dealing with the seriousness and the complications of an international prosecution[380], while the former seemed to be riddled with flaws since the beginning, when the impartiality and credibility of the Chambers were called into question by the UN Secretary-General. However the real disadvantage that these type of Courts have lies in the funding system; indeed flow of cash that enters the Courts established by the Security Council cannot be compared with the "voluntary contributions by State in money, personnel and equipment"[381]: indeed the ICTY costed more than 2 billion US dollars[382], and the ICTR closed its annual financial reports at 270 million US dollars, budgets that cannot be expected to be put a disposal of hybrid Courts. The system of financing, however, determines the fairness of the trials: the rights of the defence and of the accused are granted, delays are manageable and the Court can still be effective and efficient. The SCSL was vainly challenged under this point of view in the *Norman* case[383]. This aspect shall not be underestimated: both the ECCC and the SCSL risked to cease judicial activities for financial issues[384]. The second limit is the lack of an obligation to cooperate with the hybrid Courts. Under Chapter VII of the UN Charter Member States of the UN are compelled to assist the Court created by the Security Council, but the same cannot be told for hybrid Courts that in order to oblige cooperation must enter single agreements with single States or organizations.

[380] *Ibid.*, 197.
[381] *Ibid.*, 199. See also Thordis Ingadottir, "The Financing of Internationalized Criminal Courts and Tribunals" [2004] Internationalized Criminal Courts 271.
[382] David Wippman, "The Costs of International Justice" (2006) 100 American Journal of International Law 861.
[383] *Norman*, SCSL A.Ch., 13 March 2004.
[384] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 200 (Cambridge Cambridge University Press 2019).

Since any arrangement could have different features from the others, the chances of a heterogeneous framework of collaboration are high. Third and last restraint is the impact that political actors might have on the judicial system. Being mostly domestic, these Courts are both influence from their national system and politics: if the Country is already suffering from a post-conflict scenario, it is likely that the prosecution will be hindered and the international features of the Court will not be enough to counterbalance the disadvantage[385]. Having outlined the pros and cons of the institute, it is time to analyze which are the prospect for accountability in a Hybrid Court it it was ever to be established in Syria.

d. Syria and the prospect for accountability in Hybrid Courts.

Three are the options in order to implement an hybrid Court in Syria:

- The creation of a "buffer zone" within the territory of Syria where to locate the Tribunal;
- The establishment of the Court in a neighbouring country;
- The institution of the Court in the territory Syria;

Let's start with the first alternative. First of all, in order to have a "buffer zone" a certain stability has to be reached within the borders of the Country and for the moment, there are too many factions to grant security. Therefore, it is likely that a no-fly zone can be created under

[385] *Ibid.*

the guidance of an *interim* Government[386], in a post-conflict scenario. However Turkey has long suggested the creation of such zones in the nothern area of Syria and the UN-Under-Secretary-General for Humanitarian Affairs has affirmed that any kind of assistance will be given if such areas came into existance[387]. Anyway many will be the problems related to such choice: first, there must be some kind of agreement between Syria and the UN. If an *interim* Government is instituted, then either the Security Council (as already seen for the SCSL) or the General Assembly (as for the ECCC) can enter into negotiations for the creation of the Hybrid Court. However, it is not likely that such administration will have jurisdiction all over the territory: the Syrian Opposition Coalition, for example, established an *interim* government, but its supremacy extends within the limits of the Aleppo Governorate. The situation gets even worse, if thinking that such Tribunal can be established without the presence of an interim Government. In this case the Tribunal could clearly be perceived to be under the control of foreign powers. Moreover, if the buffer zone was to be insituted at the Northern border of Syria, Turkey is going to be classified as the invader. Secondly, there is no criminal penal code widely accepted in Syria[388]. Therefore, there would be no substantial law to implement, international law would be the only available choice and this is certainly not the scope of an hybrid Court. The second option is to create a Syrian tribunal in a neighbouring country. As

[386] Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, "A Step towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria" (2015) https://syriaaccountability.org/library/a-step-towards-justice/

[387] Jonny Hogg, "U.N. Would Offer Humanitarian Support in Syria Safe Zones: Amos" *Reuters* (October 20, 2014) https://www.reuters.com/article/us-mideast-crisis-syria-un-idUSKCN0I91O720141020

[388] Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, "A Step towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria" (2015) https://syriaaccountability.org/library/a-step-towards-justice/

already mentioned in paragragh 2 of this chapter, the Special tribunal for Lebanon is not a viable solution for the problem. The League of Arab States severely condemned the conflicts in Syria[389], however it never took action. In the case at stake, either a Security Council or General Assembly Resolution is required and one of the confining States of Syria shall give its consent to establish a Court. Being outside the territory of Syria Beth Van Schaak, former deputy at the US department, examined the pillars for the constitution of the hybrid Tribunals, which are namely the principle of universal jurisdiction, the protective principle and the effects doctrine[390]. Briefly explaining the concepts, extraterritorial jurisdiction gives a State the legitimacy to prosecute crimes committed in another country in respect of their gravity[391]; if those crimes had a major negative impact on the neighbouring country, then the country itself can invoke the effects doctine and the protecive principle to assure security and protection to its own citizens[392]. here, the problem of the substantial law applicable is easily circumvented, since the Tribunal will adopt the law of the neighbouring country and International Criminal Law. Anyway, it has to be considered that the political commitment and the challenges that the accepting Country will endure will be significant, and some States might not be willing to undertake such burden[393]. Finally, the third option will be setting up a

[389] Aryeh Neier, "Opinion | An Arab War-Crimes Court for Syria" *The New York Times* (April 4, 2012) https://www.nytimes.com/2012/04/05/opinion/an-arab-war-crimes-court-for-syria.html
[390] Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, "A Step towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria" (2015) https://syriaaccountability.org/library/a-step-towards-justice/
[391] *Ibid.*
[392] American Law Institute, *Restatement of the Law, Third: The Foreign Relations Law of the United States* (The Institute 1987), paras. 402-3.
[393] Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, "A Step towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria" (2015) https://syriaaccountability.org/library/a-step-towards-justice/

Hybrid Tribunal in Syria. It could seem as a political non-starter at first. Indeed, it is not likely that the UN Security Council will start the negotiations for such Tribunal, as well as it is nearly impossible, nowadays, to obtain the consent of Syria to enter an agreement with the UN. The Security Council can create a Tribunal similar to the one created in Sierra Leone: a treaty based, *sui generis* one, neither a part of the national system, nor a subsidiary organ of the UN, completely able to prosecute crimes, since the Security Council acts under Chapter VII of the UN Charter. However, it is hard to reach a decision when almost all the Permanent Members (from now on P5) are involved in the Syrian conflict and none of them wish to be prosecuted. Nonetheless, if adopting the model of the ECCC then a General Assembly Resolution is more than sufficient. Indeed, even though the General Assembly cannot establish a subsidiary organ that will prosecute war crimes, it still has the power to make arrangements with third countries in order to assist a substantially domestic prosecution[394]. Now, the real question is: can the General Assembly overstep the Security Council in case on an impasse and establish a Tribunal, acting under Chapter VII? The matter will be discussed in detail in tha last paragraph, when considering the institutional responses on the prosecution of war crimes.

4. The Ad-Hoc Court

Throughout the thesis the ICTY and ICTR have been discussed at length. Therefore, this paragraph will be just a quick summary of all the aspects already mentioned. First of all, ad-hoc Tribunal are established through Security Council Resolutions, hence they are supplementary institutions of the

[394] *Ibid.*

UN itself. This entails a series of advantages: first, states retaining the UN membership are obliged to cooperate with such Tribunals; second, the financial aid given to them is noteworthy[395], and lastly their judicial practice is well-established in the International Criminal Law framework. However, these Courts are perceived distant from the population both geographically and metaphorically[396]: the ICTY headquarter was in the Hague, while the ICTR started in the Hague, only to end up five years later in Arusha, Tanzania in 1995[397]. That brought a significant delay, and the first indictment was confirmed only after a few months later of the same year[398]. Considering the gravity of the crimes committed in Rwanda, five years for an indictment could be deemed a failure. However, timing is not the only factor to take into account, and results are far more valuable. Under this point of view both the ICTY and ICTR changed the course of history with some groundbreaking judgments, such as the Akayesu and Tadić cases[399]. However, these courts are dated and they lack the retributive aspects and the attention on victims that developed in subsequent Courts[400]. Therefore, is it possible to establish this kind of Tribunal for the prosecution of war crimes in Syria? And most importantly, how?

a. Syria and the prospect for accountability in a Syrian Ad-Hoc Court

The mechanism already outlined in paragraph 3.d. is the same that shall be applied: in this case, however, it is not a treaty that shall constitute the legal basis for the creation of the Court, rather a Resolution; in such situation, the Syrian ad-hoc Tribunal wuold have the same legal

[395] See para. 3.c.
[396] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 144 (Cambridge Cambridge University Press 2019).
[397] UN SC Res. 977, 1995.
[398] "International Criminal Tribunal for Rwanda Annual Report to the General Assembly and Security Council" (1996) para. 12, https://unictr.irmct.org/sites/unictr.org/files/legal-library/960924-annual-report-en.pdf.
[399] *Tadić*, ICTY A.Ch., 2 October 1995. *Akayesu*, ICTR T.Ch. I, 2 September 1998.
[400] *Lubanga*, ICC T.Ch. I, 7 August 2012 was the first decision on reparations.

status of the ICTY and ICTR. Nonetheless, the same consideration for the hybrid courts apply to the case at stake: if one of the P5 exercise its veto power, then the UN's hands are tied. The organization itself has been searching for a way out of this kind of impasse, answering the need for an effective action in order to "maintain international peace and security", hence "to take effective collective measures for the prevention and removal of threats to the peace."[401]. Within this framework, the "Uniting for Peace" Resolution[402] and the management of the North Korean case[403] in 2014 within the Security Council shall be analyzed thoroughly.

b. The institutional response of the UN

Let's examine the "Uniting for Peace" Resolution first. This resolution provides an alternative to take action in case one, or more, P5 members use their veto to boycott decisions in the Security Council. In this case, since the Security Council will not be able to fulfill its own responsabilities, the General Assembly "shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures."[404]. The initiative for this Resolution was taken by the US[405], in order to bypass the conduct of the Soviet Union, that at the time was hindering the intervention of the UN in the Korean War[406]. However it

[401] "Charter of the United Nations" (The UN Charter), Article 1, 1945, https://treaties.un.org/doc/publication/ctc/uncharter.pdf
[402] UN GA Res. 377 A, "Uniting for peace Resolution", 1950.
[403] "Letter from the Permanent Representatives of Australia, France and the United States of America to the United Nations Addressed to the President of the Security Council S/2014/276" (2014) See also "Letter from the Representatives of Australia, Chile, France, Jordan, Lithuania, Luxembourg, the Republic of Korea, Rwanda, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council S/2014/872" (2014).
[404] UN GA Res. 377 A, "Uniting for peace Resolution", 1950.
[405] Walter L Williams, *Intergovernmental Military Forces and World Public Order*, 284 (AW Sijthoff ; Dobbs Ferry NY 1971).
[406] The Korean War lasted three years (1950 – 1953)

was used for the first time during the Suez Crisis against the UK and France, the main actors in the conflict with Egypt. The mechanism was implemented with Resolution 119[407]. The resolution was proposed the 31st of October 1956 and it was voted; being a procedural vote no veto was allowed[408], and the issue was referred to the General Assembly the next day. For the sake of the creation of a Tribunal, this procedure can be promising. The General Assembly is invested of the power to overrule the Security Council[409], but to which extent? It seems that the former could have a sort of final responsibility over matters of peace and security, therefore it could potentially use this power extensively under Chapter VII of the Charter. Furthermore, it has to be remembered that the referral to the General Assembly must be decided with at least nine votes and no veto power. It does not seem difficult to reach this objective and establish an ad-hoc Syrian Court. However, the real doubt is whether the UN as a whole is ready to take such a risk: creating a Court through the mechanism of Resolution 377 A is a revolutionary precedent[410], and a burden that the organization shall be willing to take. As for the second method already adopted, it is crucial to analyze the inclusion of the situation in the Democratic's People Republic of Korea (DPRK) situation Security Council agenda of 2014[411]. The Australian Judge Michael Kirby, chairman of the UN Commission of Inquiry on Human Rights, played a key role "in bringing to the Council's attention the horrific

[407] UN SC Res. 119, 1956.
[408] "Charter of the United Nations" (The UN Charter), Article 27, 1945, https://treaties.un.org/doc/publication/ctc/uncharter.pdf. See also "Provisional Rules of Procedure of the Security Council", Rule 40, https://www.un.org/en/sc/repertoire/46-51/46-51_01.pdf.
[409] Secretary General, "UN GA Report on the Evitalization of the Work of the General Assembly A/52/856" (1998).
[410] Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, "A Step towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria" (2015) https://syriaaccountability.org/library/a-step-towards-justice/.
[411] "Agenda Items in 2014-2015 (Part I of the Repertoire) | United Nations Security Council" https://www.un.org/securitycouncil/content/repertoire/agenda-items-2014-2015-part-i-repertoire.

mass human rights violations by the DPRK."[412]. The scale and gravity of the violations of human rights were critical[413], therefore the representatives of Australia, France and the US through a letter sent to the president of the Security Council[414], and then after a few months ten out of fifteen of the mebers of the Security Council asked for the situation to be added in the Council's agenda[415]. The General Assembly pushed even further and not only submitted the aforementioned report to the Security Council, but also requested the Security Council to consider a referral to the ICC[416]. Anyway, on December 22, 2014 the Council, with a procedural vote, included the DPRK situation on its agenda[417], and it was also confirmed for the next year[418]. To use the words used by the Australian speaker at the meeting, Gary Quinlain, "the meeting [is] an historic step forward for the international community"[419], because it shows that it is somehow possible to pressure the Council, politically speaking, to consider and annex situations to its own agenda, that otherwise would not be examined. In against humanity, genocide, and aggression. It does not seem much, but it has to be noted that

[412] Australian Government Department of Foreign Affairs and Trade, "Highlighting Human Rights in Democratic People's Republic of Korea | DFAT" (*www.dfat.gov.au*) https://www.dfat.gov.au/international-relations/international-organisations/un/unsc-2013-2014/Pages/highlighting-human-rights-in-dprk

[413] UN General Assembly, "Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea A/HRC/25/63" (2014).

[414] "Letter from the Permanent Representatives of Australia, France and the United States of America to the United Nations Addressed to the President of the Security Council S/2014/276" (2014)

[415] "Letter from the Representatives of Australia, Chile, France, Jordan, Lithuania, Luxembourg, the Republic of Korea, Rwanda, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council S/2014/872" (2014).

[416] UN GA "A/RES/69/188", 2015 (*undocs.org*) https://undocs.org/en/A/RES/69/188

[417] Security Council Meeting SC/11720, "Security Council, in Divided Vote, Puts Democratic People's Republic of Korea's Situation on Agenda Following Findings of Unspeakable Human Rights Abuses | Meetings Coverage and Press Releases" (*www.un.org*, December 22, 2014) https://www.un.org/press/en/2014/sc11720.doc.htm.

[418] "Agenda Items in 2014-2015 (Part I of the Repertoire) | United Nations Security Council", para. 18 https://www.un.org/securitycouncil/content/repertoire/agenda-items-2014-2015-part-i-repertoire.

[419] Security Council Meeting SC/11720, "Security Council, in Divided Vote, Puts Democratic People's Republic of Korea's Situation on Agenda Following Findings of Unspeakable Human Rights Abuses | Meetings Coverage and Press Releases" (*www.un.org*, December 22, 2014) https://www.un.org/press/en/2014/sc11720.doc.htm.

Syria is already in the agenda of the Security Council[420]: therefore, it seems that once again procedural votes are the key to overcome the deadlock represented by the veto power. Having considered also the institutional responses to the problem of the establishment of a Court in Syria, in the next and final paragraph of this thesis, the conclusions are going to be drawn.

[420] See as examples SC agenda Repertoire of the Practice of the Security Council, 2014-2015 and SC Agenda, Repertoire of the Practice of the Security Council 21st Supplement, 2018.

CONCLUSION

As already mentioned in the introduction, the purpose of the thesis was to find the perfect way to prosecute war crimes in order to bring retributive justice to the 13.1 million people afflicted by this neverending conflict[421]. Unfortunately flawless prosecution does not exist, and every single method examined in the last chapter has its advantages and disadvantages. Let's summarize them and assess which Tribunal is more suitable for the task. The ICC is not a feasible option: indeed it is likely that, according to article 17 of the ICC Statute, the Court will not have jurisdiction on the entire Syrian situation; the fragmentation has to be avoided at all costs, since the risk of creating gaps and to let high-level perpetrators get away with their crimes is not affordable. Syrians have to trust the institution and perceive it as efficient and fair. Moreover, low-level offenders in particular foreign fighters are not likely to be prosecuted[422]. In regard to Hybrid Courts, "offer the flexibility to combine international and domestic laws and processes, while also potentially allowing for the prosecution of a greater number of perpetrators."[423]. They seem to fit perfectly in the framework described in Chapter 1. However, for internationalized courts an agreement between the UN and the consent of the State where the prosecution must take place is needed. The UN can issue a General Assembly Resolution[424] or negotiate a treaty[425]: either way a Court could be created. Nevertheless, consent from Syria could not be easy to obtained at the moment and this may jeopardize the entire process. The creation of a

[421] The United Nations Office for the Coordination of Humanitarian Affairs OCHA, "'The Syria Crisis in Numbers'" (*Exposure*) https://unocha.exposure.co/the-syria-crisis-in-numbers
[422] They might be prosecuted by the State who granted them citizenship, leading again to fragmentation.
[423] Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, "A Step towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria" (2015) https://syriaaccountability.org/library/a-step-towards-justice/
[424] See the ECCC, Chapter 3 para. 2b
[425] See the SCSL, Chapter 3 para. 2a

"buffer zone" or the establishment of a Court in a neighbouring State woul not help the cause: in both cases the Tribunal might be perceived as governed by foreign powers distant from the population. Prosecutions carried out on the field proved way more effective, since witnesses and victims could be instructed in order to create a "stronger" case and the population was willing to collaborate with the Office of the Prosecutor[426]. Moreover, even though there are mechanisms such as the IIIM that are already collecting, evaluating and preserving evidences[427], being close to the places where the violations of IHL took place is an advantage for the reconstruction of events. Therefore, another element that cannot be sacrificed would be the consituency of the Tribunal in the territory where the crimes were committed. National courts set up with international support did not prove efficient, or better: they are if backed up by international courts. In this way, the workload can be split up between the international and domestic court rendering trials more expeditious. However, since no international court in charge of prosecuting crimes in Syria exists, this is not our case. The last and viable option appears to be the creation of an ad-hoc Court. Established by a Security Council Resolution, these courts have a powerful background: indeed they are not only financially covered, but also supported by the entirety of the International Community, thanks to the obligation for the UN Member States to cooperate with subsidiary organs of the UN. In this case, no formal consent of Syria would be necessary; however it would be highly recommended: creating a connection with the population, helping them rebuilding their own country are valuable aspects that have been underestimated in the ICTY and ICTR. Therefore "despite the urgency of pursuing accountability

[426] Compare the SCSL and the ICTR. See Chapter 2, and Chapter 3 para 3.a
[427] See Chapter 2, para 3.a

immediately, postponing justice is preferable"[428] in order to avoid disillusionment and poor prosecutions. However, the Security Council has been experiencing a crisis since 2014[429]. The P5 power of veto has blocked the work of the Council in various situations, but as far as Syria is concerned the veto was used once: by Russia and China, May 2014. To counterbalance, the UN came up with some innovative responses that have increased the number of procedural votes, since they are not subject to the veto. The examples exposed in the last paragraph of the thesis, namely the DPKR situation and the mechanism of the "Uniting for Peace" Resolution, are palliatives to the problem but for now, they are ensuring the basic functions of the UN, therefore it is not impossible that they could grant the creation of an ad-hoc Tribunal through a General Assembly Resolution. This analysis suggests that an ad-hoc Court might have all the qualities required for a fair, impartial,efficient prosecution. An aspect that should be implemented is, however, the reparation of victims. The ICTY and ICTR Statutes did not contain any provision on the matter and "Syrians are eager for retribution both for redress and for the current stalemate to end."[430]. Having that said, it is worth mentioning that according to some authors ad-hoc Courts were a trend in the 90's and that nowadays the flow has changed and the International community is moving away from them[431]. This might be correct: the hystorical background and the evolution of the Courts throughout the centuries[432] proves that the

[428] Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, "A Step towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria" (2015) https://syriaaccountability.org/library/a-step-towards-justice/
[429] "Procedural Vote, UN Security Council Working Methods:" (*Securitycouncilreport.org*, 2020) https://www.securitycouncilreport.org/un-security-council-working-methods/procedural-vote.php
[430] Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, "A Step towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria" (2015) https://syriaaccountability.org/library/a-step-towards-justice/
[431] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 593 (Cambridge Cambridge University Press 2019).
[432] See Chapter 2, para. 2 and Chapter 1 para. 4

International Community was able to fulfill the requests of more complex scenarios by creating new, innovative Courts. However, just because dated, it does not mean that an ad-hoc Court will not be capable of serving the purpose written in its Statute. Learning from the past, it is possible to create an almost flawless Court. A Syrian ad-hoc Court, built in the Syrian territory, under the auspices of the UN and an *interim*, post-conflict Government, with new provisions taking into account the involvement of witnesses and victims and including retributive justice into its own Statute[433] could be the right compromise to bring the perpetrators to justice and restore Syria. If only there was the political will.

[433] See Chapter 2, para 2.d.

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