TURUN YLIOPISTO

Redrawing the Red Line

Researching Possibilities of International Law to Secure Accountability for the Use of Chemical Weapons in Syria Through Individual Criminal Responsibility

Sannimari Veini

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The topic of this research is the use of chemical weapons (CW) in the Syrian Civil War, and it studies their prohibition in international law, different channels for individual criminal responsibility, and different efforts taken to contribute to the accountability within the Syrian context. In addition, through problem-oriented case analysis, this research analyses where the most significant issues in holding perpetrators of the CW attacks accountable are located by comparing the regulatory framework to the actions taken in Syria. Finally, based on the analysis's outcome, this research considers how well-adapted the current system is to hold perpetrators of CW attacks accountable and further, how the system could be strengthened.

Sources of this research include, most importantly, diverse legal literature, documents of the United Nations, and international treaties, especially the Rome Statute of the International Criminal Court. In addition, especially to map the situation and actions taken in Syria, a wide range of different news sources and reports are utilized.

To form a basis for the analysis, this research briefly introduces the events relating to CWs during the Syrian Civil War (chapter 2) and studies their regulation and avenues for accountability under international law (chapter 3). After this, actual actions taken by different actors in Syria are introduced and compared to the existing regulatory framework (chapter 4). The comparison is then used as a starting point for further analysis of obstacles to international accountability (chapter 5). Finally, development possibilities based on the pointed problems are considered (chapter 6).

This research concludes that the prohibition of the use of CW has a solid base in international law and that several avenues for accountability exist, but in the case of Syria, severe gaps in accountability remain. Based on the analyze this research considers that the biggest obstacles for accountability include the distribution of responsibilities in the UN, the role and veto power of the UNSC, state sovereignty, and relating to the principle of universal jurisdiction: the unclarity of its scope and lack of a venue for its effective enforcement. Based on these considerations, suggestions to strengthen the system include: reorganizing the UN, enhancing the R2P doctrine, clarifying the scope of the universal jurisdiction, and considering an independent body for its implementation, as well as utilizing the framework of the CWC.

Key words:

International criminal law, chemical weapons, Syrian Civil War, international courts, jurisdiction, accountability, war crimes

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Työn aiheena on kemiallisten aseiden käyttö Syyrian sisällissodassa ja se tutkii, miten niiden käyttöä säännellään kansainvälisessä oikeudessa, minkä kanavien kautta rikosoikeudellinen vastuu voidaan toteuttaa ja millaisiin keinoihin Syyrian suhteen on ryhdytty kemiallisiin iskuihin syyllisten vastuuseen saattamiseksi. Ongelmakeskeisen tapaustutkimuksen kautta työ analysoi, mitkä ovat järjestelmän keskeisimpiä ongelmia vertailemalla olemassa olevaa sääntelyä Syyriassa käytettyihin keinoihin ja aitoihin mahdollisuuksiin. Analyysin perusteella punnitaan, kuinka hyvin nykyinen sääntely soveltuu saattamaan kemiallisten aseiden käyttäjät vastuuseen kansainvälisellä tasolla ja miten sääntely-ympäristöä olisi mahdollista kehittää.

Työn keskeisimpiin lähteisiin lukeutuu laajasti erilaista oikeuskirjallisuutta, YK:n asiakirjoja sekä kansainvälisiä sopimuksia, joista Kansainvälisen rikostuomioistuimen Rooman perussääntöön on kiinnitetty erityistä huomiota. Syyrian tapahtumien selvittämiseksi myös erilaisia uutislähteitä ja raportteja on hyödynnetty laajasti.

Ensin työ kuvaa lyhyesti kemiallisiin aseisiin liittyviä vaiheita Syyrian konfliktissa (kappale 2), jonka jälkeen se selvittää millaista kemiallisten aseiden sääntely on ja miten rikosoikeudellinen vastuu voidaan kansainvälisessä ympäristössä toteuttaa (kappale 3). Kappaleessa 4 työ keskittyy erilaisiin toimiin, joihin kemiallisten aseiden käytön vuoksi on Syyrian tapauksessa ryhdytty, ja vertailee näitä keinoja sääntelyn tarjoamiin mahdollisuuksiin. Vertailun pohjalta kappaleessa 5 analysoidaan nykyisen järjestelmän suurimpia haasteita käytännön tilanteessa. Lopuksi esitetään joitakin kehitysedotuksia kappaleen 5 pohdintoihin perustuen.

Tutkimus osoittaa, että kemiallisten aseiden kielto on kansainvälisessä järjestelmässä vahva ja että järjestelmä tarjoaa erilaisia reittejä rikosoikeudelliselle vastuulle, mutta ainakin Syyrian tilanteessa, järjestelmässä on vakavia aukkoja. Analyysin pohjalta tutkimus tulee tulokseen, että suurimmat ongelmat nykyisessä järjestelmässä ovat vastuunjako YK:n eri toimijoiden välillä, erityisesti turvallisuusneuvoston rooli, valtioiden suvereniteetti, sekä universaaliperiaatteen näkökulmasta sen sisällön epäselvyys ja tehokkuuden puute. Näiden ongelmien valossa esitetään, että systeemiä olisi mahdollista vahvistaa YK:n uudelleenjärjestelyllä, vahvistamalla suojeluvastuun doktriinia, selkeyttämällä universaaliperiaatteen sisältöä ja punnitsemalla mahdollisuutta periaatteen toimeenpanoa vahvistavalle toimijalle, sekä hyödyntämällä kemiallisten aseiden kieltosopimuksen tarjoamia mahdollisuuksia.

Asiasanat:

Kansainvälinen rikosoikeus, kemialliset aseet, Syyrian sisällissota, kansainväliset tuomioistuimet, toimivalta, rankaisemattomuus, sotarikokset

"*The international community has pledged to prevent any such horror from recurring,*

yet it has happened again."[1]

1 Secretary-General Ban Ki-moon, 'Secretary-General's remarks to the Security Council on the report of the United Nations Missions to Investigate Allegations of the Use of Chemical Weapons on the incident that occurred on 21 August 2013 in the Ghouta area of Damascus' (16 September 2013)

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List of Abbreviations

CoI	Independent International Commission of Inquiry on the Syrian Arab Republic
CSP	Conference of the States Parties of the OPCW
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Chemical Weapons Convention
FFM	OPCW Fact-Finding Mission
Geneva Protocol	Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare
HRC	Human Rights Council
IAC	International armed conflict
ICJ	International Court of Justice
ICL	International criminal law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IIIM	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

IIT	Organisation for the Prohibition of Chemical Weapons' Investigation and Identification Team
JIM	OPCW-UN Joint Investigative Mechanism
NGO	Non-governmental organization
NIAC	Non-international armed conflict
OPCW	Organization for the Prohibition of Chemical Weapons
R2P	Responsibility to protect
Rome Statute	Rome Statute of the International Criminal Court
SG	United Nations Secretary-General
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UN Charter	Charter of the United Nations
WMD	Weapons of mass destruction

1. Introduction

In March 2021, 10 years had passed since the beginning of the Syrian Civil War. Although the end of the conflict has been speculated to be near as the Government Forces have gained back most of the territory,[2] the road to the end of the conflict, and especially to peace and accountability, is still long.

The conflict started in 2011 as peaceful uprisings following the events of Arab Spring demanding economic, political, and social reforms, spread across the country and were answered by brutal force by the Government.[3] The situation escalated fast, and already in 2012 the International Committee of the Red Cross (ICRC) declared that the situation in Syria had reached the threshold of an armed conflict.[4] Since then, several different actors, Government Forces, non-governmental armed groups, Islamic extremists, such as terrorist organization ISIS, and third states, among them superpowers such as Russia and the United States, have become involved in the conflict.[5] Civilians have been exposed to a wide range of horrors, such as arbitrary arrests, torture, deliberate and indiscriminately attacks, prohibited weapons, enforced disappearances, sexual violence, summary executions, and pillaging, committed by different parties to the conflict.[6]

As a result of the conflict, the Syrian infrastructure is mostly destroyed, the country's healthcare system and economy have collapsed,[7] and people lack the basic needs for living, such as food and clean water.[8] It is estimated by the UNHCR that by 2021 the conflict has forced 13,4 million people to leave their homes and that the amount of Syrian refugees is approximately 6,6 million,

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2 Steven A. Cook, 'Top Conflicts to Watch in 2021: What's Next for Syria' (Council on Foreign Relations, 21 January 2021)
3 Bahmani Airin, Jäntti Bruno, Syyrian sota – Demokratiatoiveet diktatuurin ja islamismin ristitulessa (Tammi 2018) 31-32, 77-78 and Ferris Elizabeth, Kirişci Kemal, The Consequences of Chaos, Book Subtitle: Syria's Humanitarian Crisis and the Failure to Protect (Brookings Institution Press 2016) 14
4 'Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting' (International Committee of the Red Cross, 17 July 2012)
5 Bernard Vincent, 'Conflict in Syria: Finding Hope Amid the Ruins' (2017) 99 International Review of the Red Cross 866
6 'Syria Events of 2020' (Human Rights Watch)
7 Bernard Vincent, 'Conflict in Syria: Finding Hope Amid the Ruins' (2017) 99 International Review of the Red Cross 865
8 'Syria Events of 2020' (Human Rights Watch)

in addition to 6,7 million internally displaced persons.[9] In addition, more than 400 000 people are estimated to have lost their lives during the devastating conflict.[10]

In the midst of the humanitarian disaster, also weapons of mass (WMD) destruction – chemical weapons – have been used as a method of warfare, the first time since the Iran-Iraq war in 1980-88.[11] Indeed, the use of chemical weapons in Syria has been one of the most devastating elements of the conflict. The use of chemical weapons is prohibited by the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (CWC), by the *Rome Statute of the International Criminal Court* (Rome Statute), by the international humanitarian law (IHL), by some other treaties and by the customary international law.[12] Chemical weapons are also considered to belong to the group of WMDs together with nuclear, biological, and radiological weapons, which are by their nature indiscriminate in addition to the "unnecessary pain and suffering" their use causes.[13] Despite the universal nature of the prohibition of the use of chemical weapons,[14] since 2012, chemical weapons, at least sarin, sulfur mustard, and chlorine, have been used in Syria allegedly over 300 times, mostly by the Government forces but also by other actors.[15]

In 2013 after a chemical weapons attack in Ghouta that killed over a thousand people,[16] Syria assented to joining the CWC and destroying its chemical weapons arsenal under international verification to avoid possible military response. Despite this, the use of chemical weapons continued and led to a strong international condemnation, diverse efforts of the international community, mainly the *United Nations* (UN), the *Organization for the Prohibition of Chemical Weapons* (OPCW), and individual states to make Syria follow its treaty obligations. Different

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9 'Syria crisis is still on going' (UNHCR)
10 'Civil War in Syria' (Council of Foreign Relations, last updated May 26 2021)
11 Bahmani Airin, Jäntti Bruno, Syyrian sota – Demokratiatoiveet diktatuurin ja islamismin ristitulessa (Tammi 2018) and Thakur Ramesh, 'Prohibiting chemical and biological weapons' in Ramesh Thakur and Ere Haru (eds), The Chemical Weapons Convention: implementation, challenges and opportunities (United Nations University Press 2006) 6
12 ICRC rule 74
13 Bassiouni Cherif M., A Manual on International Humanitarian Law and Arms Control Agreements (Transnational Publishers 2000) XVII-XVIII
14 Bernard Vincent, 'Conflict in Syria: Finding Hope Amid the Ruins' (2017) 99 International Review of the Red Cross 871
15 Universal Jurisdiction in Sweden: Victims of Syria's Chemical Weapons Attacks Demand Justice' 3
16 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)

efforts include several international mechanisms to investigate the attacks and indicate responsible ones, efforts to refer the case of Syria to *the International Criminal Court* (ICC) and even military strikes by the United States, United Kingdom, and France in 2017 and 2018.[17] As of the latest developments, the OPCW temporally froze Syrian rights under the CWC,[18] and some European countries have initiated proceeding against the chemical weapons attacks in their national courts.[19] Still, new evidence of the continuous use and production of chemical weapons continues to appear,[20] and accountability has not yet been possible.

From the viewpoint of the credibility of international law, the situation is complicated. While the apparent and severe breaches of international law continue years after years, and perpetrators cannot be held accountable, even the prohibition of the use of chemical weapons is considered as one of the strongest prohibitions in international law, the situation seems disturbingly problematic. While the reasons for the lack of efficient action have been mainly political, the situation in Syria has raised difficult questions about the practical efficiency of international law and international organizations' capability to maintain respect to common rules. Breaches of law do not tell much about the quality of the law itself, as especially in an international system guided by state sovereignty, its possibilities to stop breaches inside the borders of a cantankerous state are limited. However, the gap in accountability of individual perpetrators cuts the ground from the system of international law.

As the current situation seems unbearable from the point of view of the credibility of the system, it is crucial to research reasons for the difficulties of the international community to fill the accountability gap. Therefore this research focuses on possibilities of international law to hold individual perpetrators of chemical weapons attacks accountable for their actions. Especially, this work examines how the use of chemical weapons is prohibited in international law, through which channels individual criminal responsibility can be guaranteed in the international system,

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17 ‘The Rule of Law: Retreat from Accountability’ (2019) Security Council Report No. 3 7
18 Conference of the States Parties adopts Decision to suspend certain rights and privileges of the Syrian Arab Republic under the CWC (OPCW, 22 April 2021) and OPCW C-25/DEC.9 Decision Addressing the Possession and Use of Chemical Weapons by the Syrian Arab Republic 21 April 2021
19 ‘New Complaint Filed in Sweden Against High-Ranking Assad Officials for Chemical Weapons Attacks In Syria’ (Open Society Justice Initiative, 19 April 2021)
20 SC/14512 (6 May 2021) UNSC Press release: Syria Must Declare All Chemical Warfare Agents Produced at Former Production Facility, Says High Representative in Briefing to Security Council

and what kind of efforts there has been to contribute to the accountability of the perpetrators of the chemical weapon attacks in Syria. In addition, based on these examinations, the research analyzes where the problems lie when considering the possibilities of international law to hold perpetrators accountable and, further, how well-adapted the current state of international law is to hold perpetrators of chemical weapons attacks accountable. Finally, based on the analysis, some considerations are given on how the system could be strengthened from the point of view more effectively secure accountability for the use of chemical weapons by different actors.

As a lot of academic discussion relating to possibilities of individual responsibility in Syria has taken place, comprehensive practical research of the issues has its place, since the existence of international law is traditionally separated from its enforcement,[21] and effective enforcement of its rules in practice is the only way to secure the credibility of the system. The situation in Syria works as a current and illustrative example of the functioning of international law in practice. As the limits of international law and mandates of different organizations have been stretched during the quest to solve the accountability gap, and new approaches have been actively searched, the conflict offers a possibility to research existing possibilities and limits of the current system from a comprehensive point of view.

Chosen approach to mirror the existing regulation to actions taken makes it possible to research the shortcomings and possibilities of the system in practice and clarify what elements in practice prevent or affect impunity within the international system. Therefore, this research aims to deepen the understanding of the practical functioning of international law and look out for possibilities for it to function more effectively in the future within the admittedly political environment. If the actual obstacles for accountability are found, and the Syrian accountability gap can be solved, the same approaches can be used to strengthen and further develop the international justice system.

Although countless amounts of different war crimes and even crimes against humanity have been committed during the conflict in Syria, the prohibition of the use of chemical weapons works as a great example when researching the possibilities of international law, as it is

21 Kritsioti Dino 'International law and the relativities of enforcement' in James Crawford and Martti Koskenniemi (eds), The Cambridge companion to International law (Cambridge University Press 2012) 245

considered among the strongest prohibitions within the system due to the strong background in the treaty and customary law. Therefore, it is justifiably to ask, what are the possibilities of the international community to act in the case of other breaches of its laws, if not even the compliance with the prohibition this clear cannot be guaranteed? For this reason, the conclusions and considerations of this research can be to some extent generalized to other fields of international law. Furthermore, it is in the general interest of the international community to be able to set down an effective prohibition for the use of chemical weapons and other WMDs, and although the CWC is generally considered a great success, the case of Syria shows that serious issues remain.

As it discusses individual criminal responsibility, this research links most importantly with the field of international criminal law (ICL) and public international law more generally. In addition, international humanitarian law (IHL), the law of international organizations, the law of arms control, and the law of peace and security are to some extent present. Also, it is essential to keep in mind the continuous presence of international politics, as it is inseparable from international law.

As this research aims to discuss accountability possibilities for the use of chemical weapons through individual criminal responsibility, considerations of state responsibility and perspective of the use of chemical weapons as a treaty breach of a State are left to be researched in some other context. However, as the topic here is chemical weapons, the CWC and actions taken by the OPCW cannot be passed, or the picture given was not complete. Therefore, considerations relating to the actions of the OPCW and the CWC are included to the extent they are considered to contribute to the individual criminal responsibility. The viewpoint of the importance of complete disarmament, however, is outside the scope of this research.

Within the framework of individual criminal responsibility, this research, in addition to possibilities for eventual court proceedings, considers actions taken to contribute to eventual prosecutions of the perpetrators, mostly meaning different types of Fact-Finding Missions that have been present in Syria. As an important limitation to the scope of this research, different mechanism relating to terrorisms, possibilities of terrorism charges, and considerations of terrorism as a crime at the international level are outside of the scope of this work, although the

aim is to discover avenues for accountability of everyone who has committed chemical weapons attacks in Syria. In addition, as the research focuses on international law, approaches based on national laws and, for example, the judicial system in Syria are not considered. In this regard, it is, however, important to remember that it is generally held that states bear the primary responsibility to prosecute and punish perpetrators, and international approaches are seen to possibly stepping in if the national measures fall.

This research is conducted by using qualitative methods, and most importantly, this study follows the tradition of legal dogmatics. As the goal is to understand the functions of international law and monitor, as well as explain the ways it works in practice, the research is structured as a type of problem-oriented case-analysis, as the actual situation in Syria and action therein (law in action) are compared to existing rules (law in books). Answers to research questions are searched through this analysis to understand practical issues of international law better. Mainly, the research is *de lege lata* -study, but particularly in Chapter 6, the focus is turned into *de lege ferenda* – approach while it is considered how the current system and regulation could be changed.[22] In some parts, this research can also be described as legislation analysis, as the interest is paid to treaties, and their problems and targets of development are considered.[23]

The research also follows the tradition of the critical approach because it aims to improve the current system and searches for ways to do so.[24] Also, as the political context is tightly related to the topic of this research, the research also leans to the sociology of law in a sense that attention is also paid to social – primarily political – causes and effects, and it is importantly recognized that international law does not exist in a vacuum.[25]

The research is addressed to all the professionals and students interested in issues of international criminal law and possibilities to make the system better. Ideally, some considerations of this research could also find their place in the considerations of new

22 Alvesalo Anne, Ervasti Kaijus, Oikeus yhteiskunnassa: näkökulmia oikeussosiologiaan (Edita 2006) 11
23 Ibid. 43
24 Ibid. 18
25 Ibid. 9

approaches or policies to answer the issues discussed. Sources of this research include, most importantly, diverse legal literature, official documents of the United Nations, as well as international treaties and relevant cases of international courts and tribunals. In addition, especially to map the situation in Syria, several news sources, reports, and articles are used.

This research aims to meet its goal to locate the practical issues, offer suggestions to solve them, and analyze and clarify some of the greatest issues of the current system, by first introducing the chemical weapons use during the Syrian conflict (chapter 2), then by introducing the international criminal system, relevant rules to the use of chemical weapons and the avenues for accountability under international law (chapter 3). After this, the actual actions taken by different actors in Syria are discussed and compared to the existing regulation (chapter 4). The comparison is then used as a starting point for further analysis about obstacles to international accountability and about the benefits of each possible accountability avenue (chapter 5). Finally, possibilities for development based on the pointed problems are considered in chapter 6.

At the time of writing, the conflict in Syria is still ongoing. This research is based on the information available before May 2021.

2. Chemical Weapons and Conflict in Syria

First, to understand the subject and issues discussed in this research, it is relevant to offer background information about the chemical weapons use in Syria and brief reactions to their use. Therefore, in this chapter, the incidents involving the use of chemical weapons and relevant reactions to them are briefly introduced. Other elements of the complex and long-lasting conflict are not discussed here, but their importance should not be underestimated because the use of chemical weapons is – of course – only one element of the conflict.

The possibility of the appearance of the chemical weapons in the conflict of Syria resurfaced in 2012 when Syria admitted first time that it possessed chemical weapons, even it was suspected

for years by foreign intelligence services.[26] In the same breath, it was, however, assured that Syria would never use its chemical arsenal against its own people, but only "against external aggression."[27] The first allegations of the use of chemical weapons in Syria, however, occurred only months after, when it was claimed that chemical weapons attack, allegedly committed by the Government of Syria, killed seven people in Homs.[28]

While the conflict in the country kept on spreading, new allegations of chemical weapons use occurred already in March 2013. This time, the attack allegedly killed 25 people and left dozens injured in the Aleppo neighborhood and the Damascus suburb. Despite the United Nations Secretary-General's (SG) announcement that the investigative team would be sent to Syria, allegations of new chemical attacks continued. When the SG team was finally allowed to enter Syria in August to investigate previous allegations of chemical weapons use, a new, much wider scale sarin gas attack took place in Ghouta, outskirts of Damascus, only days after the arrival of the team, allegedly killing over thousand people.[29]

Barack Obama, then the President of the United States, had in 2012 announced his "red line" against the use of chemical weapons by stating that their use would not be without consequences,[30] and after the Ghouta attack startled the world, a military strike by the United States started to look possible.[31] However, to avoid military escalation, Russia – Syrian long-term ally – and United States managed to reach an agreement about the situation in Syria in September 2013, according to which Syria voluntarily joined the CWC and bound itself to declare its chemical weapons stockpiles within a week, allow the OPCW and the UN to access to its chemical weapons sites and to destroy its stockpiles under international verification by June 2014.[32] According to the agreement, Syria declared its stockpiles, OPCW-UN Joint

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26 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)
27 Ibid.
28 Ibid.
29 Ibid.
30 Barack Obama, 'Remarks by the President to the White House Press Corps' (The White House, Office of the Press Secretary, 20 August 2020)
31 Francesco Femia and Caitlin Werrell, 'The Use of Chemical Weapons in Syria and the Need for Unity Against Them' (Council on Strategic Risks, 29 April 2021)
32 Makdisi Karim, Pison Hindawi Coralie, 'The Syrian chemical weapons disarmament process in context: narratives of coercion, consent, and everything in between' (2017) 38 Third World Quarterly 1697

Mission, which was quickly formed to oversee the destruction of the chemical weapons in Syria,[33] was allowed to enter the country,[34] and in October 2013, the destruction of Syrian chemical weapons started under international verification.[35]

In December 2013, the SG team confirmed that chemical weapons were indeed likely used in Syria in five different attacks, and in April 2014, yet new allegations of the use of chemical weapons occurred.[36] When the allegations of the use of chemical weapons in Syria did not fall silent, in 2014, the OCPW decided to establish the Fact-Finding Mission (FFM) to investigate the alleged chemical weapons attacks and to confirm if they were used, but its mandate did not include identification of the perpetrators of the attacks.[37] The FFM conducted several investigations in Syria[38] and reported that chemical weapons, especially chlorine but also sulfur mustard and sarin, were used as weapons in several incidents in Syria.[39] These reports were the first time the use of chemical weapons by a state party to the CWC was confirmed.[40]

Even Syria missed some deadlines agreed on the destruction plan of its chemical arsenal, already in October 2013, Syrian declared chemical weapons facilities were destroyed or made inoperable,[41] and by June 2014, all Syrian declared chemical weapons had been shipped out of the country to be destroyed outside its borders under strict international monitoring.[42] In September 2014, the Join Mission completed its mandate when the destruction of 98% of Syrian

33 'Mandate and timelines' (OPCW)
34 Francesco Femia and Caitlin Werrell, 'The Use of Chemical Weapons in Syria and the Need for Unity Against Them' (Council on Strategic Risks, 29 April 2021)
35 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)
36 Ibid.
37 'Fact-Finding Mission' (OPCW)
38 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 969
39 Kelle Alexander, 'Power in the chemical weapons prohibition regime and the Organisation for the Prohibition of Chemical Weapons' (2018) 55 International Politics. 415-16, 'Chronology of Events Syria' (Security Council Report, 2 April 2018)
40 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 969
41 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)
42 Kelle Alexander, 'Power in the chemical weapons prohibition regime and the Organisation for the Prohibition of Chemical Weapons' (2018) 55 International Politics 414

declared chemical weapons was complete,[43] and destruction of remaining chemical weapons, which was concluded in January 2016,[44] was secured by the OPCW.[45]

Due to some inconsistencies with a Syrian declaration of its chemical weapons, the OPCW established the Declaration Assessment Team (DAT) in 2014 to resolve the issues and verify the declaration.[46] DAT visited the country several times between 2014-16 and found evidence of undeclared chemical weapons,[47] specifically traces of sarin and VX gas, from the non-declared facility.[48]

While the FFM reported alleged uses of chemical weapons in Syria in 2015, the United Nations Security Council (UNSC) decided to establish a Joint Investigative Mechanism (JIM) to further investigate FFM reports and identify perpetrators of those attacks.[49] Before the continuation of JIM's mandate was vetoed[50] by Russia in the UNSC in late 2017, it found the Syrian government responsible for three different chlorine attacks in 2015 and 2016, and terrorist organization ISIS responsible for two attacks with sulfur mustard in 2015 and 2016.[51]

During 2016 new allegations of the use of chemical weapons occurred in Aleppo and in Hama,[52] and United Nations General Assembly (UNGA) in late 2016, voted to establish *the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law*

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43 Kelle Alexander, 'Power in the chemical weapons prohibition regime and the Organisation for the Prohibition of Chemical Weapons' (2018) 55 International Politics 413
44 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 967
45 'Background' (OPCW)
46 'Declaration Assessment Team' (OPCW)
47 Francesco Femia and Caitlin Werrell, 'The Use of Chemical Weapons in Syria and the Need for Unity Against Them' (Council on Strategic Risks, 29 April 2021)
48 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)
49 'Fact-Finding Mission' (OPCW)
50 According to the Article 27 (3) of the UN Charter all substantive decisions of the UNSC must be made with "the concurring votes of the permanent members"
51 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 972
52 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)

Committed in the Syrian Arab Republic since March 2011 (IIIM) to investigate chemical weapons attacks in Syria and to preserve evidence of them.[53]

In April 2017, a new wider-scale sarin attack, which killed more than 80 people and injured 500, took place in Khan Sheikhoun, northern Idlib.[54] Even the Government of Syria, again, declined its responsibility, the United States answered the attack by missile strike to Syrian airbase from where the chemical weapons attack was believed to be launched from. The sarin attack in Khan Sheikhoun and also in Ltamenah in March 2017 were later confirmed by the FFM, and responsibility was assigned to the Syrian Government by the JIM.[55]

In January, February, and March 2018, several different chemical weapons attacks by chlorine were reported in Douma, and in April, a larger attack took place, killing several dozens of people. Due to political difficulties in the UNSC, a resolution to condemn the attacks failed, and as a consequence, the United States, United Kingdom, and France attacked three Syrian chemical weapons facilities with missiles.[56]

During 2018 and 2019, the FFM and *the Independent International Commission of Inquiry on the Syrian Arab Republic* (CoI) established by *the Human Rights Council* (HRC) already 2011 confirmed new chemical weapons attacks committed by chlorine in 2018.[57] The CoI reported that it had documented in total 34 chemical weapons attacks in Syria since 2013, and in May 2019, new allegations of chlorine use in Idlib came to light.[58]

Following the new reports, and also allegedly motivated by the chemical attack in the United Kingdom,[59] the Conference of States Parties of the OPCW (CSP) voted in June 2018 to grant the OPCW a mandate to establish a mechanism to also attribute responsibility of chemical

53 'Syria: UN approves mechanism to lay groundwork for investigations into possible war crimes' (UN News, 22 December 2016), 'Mandate' (IIIM)
54 Francesco Femia and Caitlin Werrell, 'The Use of Chemical Weapons in Syria and the Need for Unity Against Them' (Council on Strategic Risks, 29 April 2021)
55 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)
56 Ibid.
57 Ibid.
58 Ibid.
59 Read more about the incident for example from: 'Incident in Salisbury' (OPCW)

weapons attacks confirmed by the FFM.[60] Investigations of the new *Investigation and Identification Team* (IIT) began in June 2019, and by May 2021, the IIT has issued two reports (in 2020 and 2021) and confirmed the Syrian Air Forces responsible for sarin and chlorine attacks in Ltamenah in March 2017,[61] and on chlorine attack in Saraqib in February 2018.[62]

As an answer to the IIT's first report in 2020, the Executive Council of the OPCW gave Syria a 90-day deadline to declare its still existing chemical weapons and chemical weapons facilities,[63] but Syria missed the deadline.[64] In April 2021, following the second IIT report, failure of Syria to act in accordance with the given deadline and its continuing treaty breaches, the second session of the 25th Conference of the States Parties to the Chemical Weapons Convention passed a historical decision to suspend certain rights and privileges, such as voting, standing for elections and holding offices of Syria under the CWC,[65] until it would complete requirements specified in the OPCW decision in 2020.[66]

3. Prohibition of the Use of Chemical Weapons and Avenues for Accountability in International Law

3.1 System of International Criminal Law

In this chapter, before diving into the regulation of chemical weapons and possible avenues for accountability in international law, the role of the international criminal law (ICL) and its relation to other branches of international law are described to set the context for upcoming considerations.

60 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)
61 'OPCW Releases First Report by Investigation and Identification Team' (OPCW, 8 April 2020)
62 Ibid.
63 OPCW EC-94/DEC.2 Decision: Addressing the Possession and Use of Chemical Weapons by the Syrian Arab Republic 9 July 2020
64 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)
65 Conference of the States Parties adopts Decision to suspend certain rights and privileges of the Syrian Arab Republic under the CWC (OPCW, 22 April 2021)
66 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)

The ICL is a relatively new branch of public international law, and it deals with proscribing, prosecuting, and punishing international crimes through individual criminal responsibility.[67] The ICL is considered to have objectives to contribute to international peace and security by securing that human rights and IHL are respected, to punish those who commit international crimes, and to create a "historical record of atrocities."[68]

After the Nuremberg and Tokyo tribunals after the Second World War, the ICL lived quite quietly until the 1990s, when *ad hoc* international tribunals, *the International Criminal Court* (the ICC), and several other hybrid and internationalized tribunals were established to deal with international crimes.[69] As the ICL is mainly carried out through different international tribunals, it differs from national systems but is, however, dependent on states and other actors' collaboration, as the international courts and tribunals do not have their own enforcement capabilities.[70]

The statutes of the tribunals serve as the main source for their functions, as they describe the mandate, jurisdiction, and working methods. In addition, sources of ICL include international treaties, the jurisprudence of international courts and tribunals, other international instruments such as binding UNSC resolutions, and international customary law, as, for example, international courts and tribunals often look for the content and scope of international rule from custom.[71]

Even the ICL is a branch of the general public international law, their relationship is not straightforward. At the fora of public international law, state sovereignty and peaceful coexistence are the guiding principles,[72] and it is mainly understood as one of the ways to govern relations and actions of sovereign states.[73] Due to the need for international law to take into

67 Cassese Antonio, International Criminal Law (Oxford University Press 2003) 15
68 Sluiter Göran, Friman Håkan, Linton Suzannah, Vasiliev Sergey and Zappala Salvatore, International Criminal Procedure - Principles and Rules (Oxford University Press 2013) 56
69 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 671
70 'International humanitarian law' (The Geneva Academy, 26 September 2017)
71 Cassese Antonio, International Criminal Law (Oxford University Press 2003) 27- 29
72 Cassese Antonio, International Criminal Law (Oxford University Press 2003) 20
73 Orford Anne 'Constituting order' in James Crawford and Martti Koskenniemi (eds), The Cambridge companion to International law (Cambridge University Press 2012) 271

account the interests of states and political factors,[74] the importance of clear and precise rules is weaker than within ICL, where they are crucial, for example, due to the need to secure the rights of the accused.[75] As the ICL sets down responsibilities that breach entails criminal responsibility, it is coercive and includes specific rules and at least aims to stay outside of political considerations.[76]

International criminal responsibility may be established when individuals breach fundamental international values by committing serious crimes. At least currently, states are not considered to be criminally responsible. What is breached in a case of international crimes is not (solely) a national but international norm that binds all the individuals regardless if those norms are incorporated in national legal systems or specific treaties,[77] although crimes in question are often described in the Statutes of international tribunals – or in national laws.[78] Unlike the case often is with common criminality, the international criminality is not "*incidental and episodic*" but rather "*conscious, deliberate, extending over time and highly damaging*."[79]

International crimes that can awake individual criminal responsibility are serious crimes that endanger international order and peace and breach the core values of the international system.[80] Generally, the core international crimes are considered to include at least war crimes – that require the existence of an armed conflict –, crimes against humanity and genocide.[81] Also often torture and piracy, and sometimes crime of aggression are included in the list. According to this narrow view, only customary crimes can be included in international crimes.[82]

However, according to the broad definition of international crimes, they include all acts that are defined as crimes in international treaties or in international customary law. The narrow view,

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74 Arbour Louise, War crimes and the culture of peace (University of Toronto Press 2002) 26
75 International Criminal Law, Antonio Cassese, Oxford University Press, 2003, p. 20
76 Arbour Louise, War crimes and the culture of peace (University of Toronto Press 2002) 27
77 Cassese Antonio, International Law (2nd ed. Oxford University Press 2005) 144-145
78 Kimpimäki Minna, Kansainvälinen rikosoikeus (Kauppakamari 2015) 29
79 Heikkilä Mikaela, Coping with international atrocities through criminal law, A study into the typical features of international criminality and the reflection of these traits in international criminal law (Åbo Akademi University Press 2013) 33
80 Kimpimäki Minna, Kansainvälinen rikosoikeus (Kauppakamari 2015) 31
81 Revill James, Katz Rebecca, Fasoli Elena, Mohammed Einas, Shiotani Himayu, Menon Aditya, 'Tools for Compliance and Enforcement from Beyond WMD regimes' (Unidir 2021) 29
82 Kimpimäki Minna, Kansainvälinen rikosoikeus (Kauppakamari 2015) 28

however, is more widely accepted, and according to it, crimes that are based only on treaties and not in custom are only national crimes.[83] There indeed exists treaties, such as treaties considering terrorism, illicit trafficking of drugs and arms, and money laundering, that require states to criminalize the specific conduct on their national laws, but in these cases, the obligation and rules, however, derive from treaty obligations, not customary law.[84] If not also part of the custom, these crimes cannot be seen as truly international, as the treaties only bind their state parties. These crimes are also usually committed against states, and states are not involved in their commitment, as often – not always – is the case with the first-mentioned types of international crimes.[85]

International crimes, as serious breaches of international order, also often involve state responsibility, but there does not exist a criminal regime for state responsibility,[86] and it is dealt with different mechanisms than individual criminal responsibility.[87] Also here, the relationship of the ICL with public international law is interesting: as most international crimes are also violations that may lead to state responsibility, and even the types of responsibility do not exclude each other, the latter is often dismissed due to political considerations,[88] as individuals are also punished on acts they committed as state organs.[89]

This chapter has introduced the basic elements of the international criminal system to offer a legal context for further considerations. In the following chapters, the prohibition of the use of chemical weapons is located in the field of international law, and avenues for individual criminal responsibility are introduced.

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83 Ibid.
84 Cassese Antonio, International Criminal Law (Oxford University Press 2003) 24
85 Heikkilä Mikaela, Coping with international atrocities through criminal law, A study into the typical features of international criminality and the reflection of these traits in international criminal law (Åbo Akademi University Press 2013) 19
87 Bonafè Beatrice I, The Relationship Between State and Individual Responsibility for International Crimes (BRILL 2009) 11
87 Ibid 17
88 Cassese Antonio, International Criminal Law (Oxford University Press 2003) 19
89 Cassese Antonio, Gaeta Paola and Jones John R.W.D. (eds), The Rome Statute of the International Criminal Courts: A commentary, Vol. I (Oxford University Press 2002) 533

3.2 Prohibition of the Use of Chemical Weapons

As mentioned in chapter 1, the prohibition of the use of chemical weapons has a strong stand in international law, and it is prohibited by different treaties and customary law. In addition, the use of chemical weapons breaches the core principles of IHL.

In this chapter, the origin of the prohibition of the use of chemical weapons is located in different treaties for creating an understanding of its origins and importance. First, the prohibition within the early treaties and in the CWC is introduced, and after that, its role in customary law and the field of IHL is considered. The prohibition of the use of chemical weapons by the Rome Statute will be discussed later in chapter 3.3.2.

3.2.1 Regulation of Chemical Weapons Before the Chemical Weapons Convention

In this chapter, first treaties to prohibit the use of chemical weapons are shortly introduced, as they serve as an important basis for the current consideration that the use of chemical weapons is also prohibited by customary law. Although after the establishment of the customary rule and entering into force of the CWC, these mechanisms do no longer have special importance as a source for the prohibition, recognizing their existence is important for the comprehensive understanding of the issue.

The use of chemical weapons has been prohibited for centuries, and the first international agreement that dealt with chemical weapons was *the Strasbourg Agreement* (1675) that limited the use of poison bullets. The use of chemical weapons was also discussed while negotiating the *Brussels Convention on the Law and Customs of War* (1874) that never entered into force but was an attempt to prohibit the use of poison and poisoned weapons, as well as arms, projectiles, and material that cause "unnecessary suffering."[90]

The Hague Declaration Concerning Asphyxiating Gases of 1899 (IV, 2) was the first wider attempt to prohibit the use of chemical weapons as it prohibited the use of "*projectiles the sole*

90 Thakur Ramesh, 'Prohibiting chemical and biological weapons' in Ramesh Thakur and Ere Haru (eds), The Chemical Weapons Convention: implementation, challenges and opportunities (United Nations University Press 2006) 6

object of which is the diffusion of asphyxiating or deleterious gases."[91] Also, the *Hague Regulation concerning the Laws and Customs of War on Land* of 1899 prohibited employment of poison or poisoned weapons,[92] and the prohibition was reinforced in the revised version of the Declaration in 1907.[93] The Hague Declaration, which today is part of the customary law, is, however, only binding between parties of the treaty and is in force only during international armed conflicts (IAC) between contracting parties.[94]

Even the prohibition of chemical weapons existed already before World War I chemical weapons were widely used during the war,[95] where the first wide uses of chemical weapons occurred.[96] During the war, chemical weapons killed around 90 000 and injured more than a million people.[97] As a reaction to this, the *Treaty of Versailles* (1919) prohibited poison gas in Germany, and the treaty relating to the *Use of Submarines and Noxious Gases in Warfare* (1922) was negotiated even if it did not enter into force.[98]

Because of the clear weaknesses of the existing regulations, more effective prohibition was attempted to reach by *the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* (Geneva Protocol) of 1925[99] and it is the foundation for later regulation of chemical (and biological)

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91 Declaration (IV,2) concerning Asphyxiating Gases. The Hague, 29 July 1899.
92 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 Art. 23
93 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Art. 23
94 Mahasiko Asada, 'A Path to a Comprehensive Prohibition of the Use of Chemical Weapons under International Law: From The Hague to Damascus' (2016) 21(2) Journal of Conflict and Security Law 155
95 Bassiouni Cherif M., A Manual on International Humanitarian Law and Arms Control Agreements (Transnational Publishers 2000) 27
96 Cammarota Luca, Legality of the threat or use of weapons of mass destruction (Juridiske fakultet, Universitetet i Bergen 2003)17
97 Kelle, Alexander, Prohibiting Chemical and Biological Weapons: Multilateral Regimes and Their Evolution (Boulder, CO: Lynne Rienner Publishers 2013) 12, 25 and Thakur Ramesh, 'Prohibiting chemical and biological weapons' in Ramesh Thakur and Ere Haru (eds), The Chemical Weapons Convention: implementation, challenges and opportunities (United Nations University Press 2006) 6
98 Bassiouni Cherif M., A Manual on International Humanitarian Law and Arms Control Agreements (Transnational Publishers 2000) 27 and Treaty relating to the Use of Submarines and Noxious Gases in Warfare. Washington, 6 February 1922
99 Mahasiko Asada, 'A Path to a Comprehensive Prohibition of the Use of Chemical Weapons under International Law: From The Hague to Damascus' (2016) 21(2) Journal of Conflict and Security Law 156

weapons.[100] Relating to the chemical weapons, the Geneva Protocol prohibits "' *the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices.*"[101] The Geneva Protocol is in force only during the IACs,[102] and it allows reservations, which several states also issued.[103] The Geneva Convention is, however, still in force, has 142 States Parties, and by today many of the reservations have been withdrawn.[104] The importance of the Protocol, however, diminished importantly after the entry into force of the CWC, which we will discuss in the next subchapter.

Despite the Geneva Protocol, chemical weapons were still used during the Second World War in Asia and in Nazi concentration camps.[105] After World War II, in 1947, many Peace Treaties between the Allied and Associated Powers and several countries also contained provisions about the use of chemical weapons.[106] In the 1960s, attempts to negotiate again a new convention to ban chemical and biological weapons emerged,[107] but negotiations were separated and led only to *the Biological and Toxin Weapons Convention* (BWC) in 1972.[108]

In the 1980s, an *ad hoc* -working group on chemical weapons was established, and after the Halabja attacks where thousands of people were killed in a sarin and mustard gas attacks to Kurdish town by Iraqi forces,[109] the need for a new treaty to ban the chemical weapons got stronger.[110] Before accomplishing the negotiations leading to the CWC, an Australia Group

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100 Kelle, Alexander, Prohibiting Chemical and Biological Weapons: Multilateral Regimes and Their Evolution (Boulder, CO: Lynne Rienner Publishers 2013) 14
101 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925 (Geneva Protocol)
102 Dekker Guido den, 'The Law of Arms Control: International Supervision and Enforcement' (Martinus Nijhoff Publishers 2001) 220
103 Thakur Ramesh, 'Prohibiting chemical and biological weapons' in Ramesh Thakur and Ere Haru (eds), The Chemical Weapons Convention: implementation, challenges and opportunities (United Nations University Press 2006) 7
104 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925 (Geneva Protocol)
105 'Chemical Weapons' (The United Nations)
106 Practice relating to rule 74
107 Cammarota Luca, Legality of the threat or use of weapons of mass destruction (Juridiske fakultet, Universitetet i Bergen 2003) 18
108 Kelle, Alexander, Prohibiting Chemical and Biological Weapons: Multilateral Regimes and Their Evolution (Boulder, CO: Lynne Rienner Publishers 2013) 14
109 Hamish de Bretton-Gordon, 'Remembering Halabja chemical attack' (Al Jazeera, 16 March 2016)
110 Cammarota Luca, Legality of the threat or use of weapons of mass destruction (Juridiske fakultet, Universitetet i Bergen 2003) 19

(AG) was established to harmonize state parties' export controls in order to prevent the spreading of chemical and biological weapons and to serve as a temporary arrangement while the CWC was negotiated. The AG is, however, still existing, and its activities and participation have expanded.[111] After AG also other voluntary mechanisms, such as *the Proliferation Security Initiative* of 2003,[112] have been established mainly to focus on the proliferation of chemical weapons and other WMDs.

This chapter has introduced the brief history of the regulation of chemical weapons to create a historical context for the importance of the prohibition. In the next chapter, a closer look is taken at the main tool of today's chemical weapons control regime, the Chemical Weapons Convention.

3.2.2 The Chemical Weapons Convention

Concerning chemical weapons, the most important element of their control regime today is *The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (CWC) that according to the ICRC, has been "*a remarkable success.*"[113] By May 2021, the CWC had 193 State Parties, 1 Signatory State that has not yet ratified the Convention (Israel), and only 3 non-signatory States (Egypt, North Korea, and South Sudan),[114] and by April 2021, the work of the *Organization for the Prohibition of Chemical Weapons* (OPCW), the implementing body of the CWC, had led to the destruction of 98.6% of world's declared chemical weapons stockpiles.[115] Due to its almost universal reach and advanced and comprehensive obligations, the CWC has been called a "*unique achievement in the field of multilateral disarmament*."[116] This chapter briefly introduces the main elements of the CWC.

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111 Kelle, Alexander, Prohibiting Chemical and Biological Weapons: Multilateral Regimes and Their Evolution (Boulder, CO: Lynne Rienner Publishers 2013) 16
112 Ibid. 214
113 Twenty-Second Session of the Conference of the States Parties to the Chemical Weapons Convention, 'Statement by the International Committee of the Red Cross' (27 November – 1 December 2017, The Hague, the Netherlands)
114 'OPCW by the Numbers' (OPCW)
115 Ibid.
116 Thakur Ramesh, 'Foreword' in Ramesh Thakur and Ere Haru (eds), The Chemical Weapons Convention: implementation, challenges and opportunities (United Nations University Press 2006) viii

As mentioned in the previous chapter, the negotiations of the CWC had started already in the 1960s, and one of the reasons they were only concluded in the 1990s was that until that time, chemical weapons had still a role in the military strategies of the North Atlantic Treaty Organization (NATO) and Warsaw Pact. After the long negotiation process, the CWC was finally signed in 1993, and it entered into force on 29.4.1997.[117]

The CWC is consisted in Preamble, 24 Articles and 3 Annexes on Chemicals, Verification and Confidentiality, and most importantly, it prohibits its State Parties "*never under any circumstances: To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; To use chemical weapons; To engage in any military preparations to use chemical weapons; To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention*."[118] The wide obligation means that the prohibitions are in force in all situations, and for example, the existence of the armed conflict is not relevant.

More than that, State Parties are obliged to destroy their chemical weapons and their production facilities within specific time limits.[119] The CWC also requires State Parties to criminalize and punish "*the development, production, stockpiling or use of chemical weapons*" for any natural or legal person under their jurisdiction, to prohibit from them activities that are prohibited for a State Parties.[120] The CWC also prohibits and limits the trade of certain chemicals,[121] and all member states are obliged to provide protection and assistance if one of the State Parties is subject to the threat of a prohibited act or an object of a chemical weapons attack.[122]

Also, the definition of chemical weapons in the CWC is wide, and they are defined only through their tended purpose. Therefore, according to the CWC, "*any toxic or precursor chemical is*

117 Kelle, Alexander, Prohibiting Chemical and Biological Weapons: Multilateral Regimes and Their Evolution (Boulder, CO: Lynne Rienner Publishers 2013) 14
118 Chemical Weapons Convention Art. 1 (1)
119 Ibid. Art. 1(2)(4)
120 Bassiouni Cherif M., A Manual on International Humanitarian Law and Arms Control Agreements (Transnational Publishers 2000) 842, 843, Chemical Weapons Convention Art. VII
121 Daryl G. Kimball, 'The Chemical Weapons Convention (CWC) at a Glance' (Arms Control Association, April 2020)
122 Thakur Ramesh, 'Foreword' in Ramesh Thakur and Ere Haru (eds), The Chemical Weapons Convention: implementation, challenges and opportunities (United Nations University Press 2006) viii, ix

regarded as a chemical weapon unless it has been developed, produced, stockpiled or used for purposes not prohibited, and only as long as types and quantities are consistent with such purposes."[123] Purposes not prohibited include different peaceful purposes such as medical, agricultural, research, or industrial uses.[124]

However, as the CWC is a treaty between states and does not contain criminal provisions in itself but only requires state parties to penalize the actions in their national laws, its provisions have effect only through national legal systems.[125] In a case state party fails to follow its obligations, the OPCW can take "*necessary measures*," such as restrict State Parties' rights under the CWC. In serious cases of incompliance, collective measures may be recommended, and in cases of "*particular gravity*," the issue might be brought before the UNGA or UNSC.[126]

This chapter has briefly introduced the CWC and its main requirements. In addition, it is explained that because the CWC sets down the obligation for state parties to criminalize and punish the use of chemical weapons in their national legislations, the CWC in itself is not of special importance from the viewpoint of individual criminal responsibility in international law. In the future chapters, different actions taken by the OCPW relating to the case of Syria are, however, introduced.

3.2.3 Chemical Weapons in Customary Law

The customary law has been named as one of the sources of the international law in the Statute of the *International Court of Justice* (ICJ),[127] and as previous chapters have introduced the treaty framework surrounding chemical weapons, this chapter discusses the prohibition of chemical weapons as a customary rule.

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123 Trapp Ralf, 'The Chemical Weapons Convention -- multilateral instrument with a future' in Ramesh Thakur and Ere Haru (eds), The Chemical Weapons Convention: implementation, challenges and opportunities (United Nations University Press 2006) 19-20
124 'What is a Chemical Weapon?' (OPCW)
125 Mahasiko Asada, 'A Path to a Comprehensive Prohibition of the Use of Chemical Weapons under International Law: From The Hague to Damascus' (2016) 21(2) Journal of Conflict and Security Law 206
126 Chemical Weapons Convention Art XII
127 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) Art. 38

The basic difference between customary law and treaty-based law is that while treaties can only bind their state parties, rules of the customary international law bind all states.[128] To be formed, the customary rules require general, uniform, and consistent state practice[129] that needs to include actual actions of states, as well as *opinion iuris*,[130] meaning that States' should consider the particular action to be a legal obligation.[131] *Crawford* has listed several material sources for the custom, and according to him, the elements of custom include duration and consistency of the practice, generality, and the acceptance of the rule as a law, but complete uniformity or consistency are not required.[132]

As the requirements for the custom may be hard to establish and as the customary law is unwritten, proving the existence of a customary rule is difficult.[133] For the same reasons, the content of the customary rules is not always clear,[134] which is also the case considering the prohibition of chemical weapons as a customary rule. To clarify the rules of customary international law, the ICRC has committed a study of existing customary rules.[135]

What comes to the use of chemical weapons in customary law, rule 74 of the beforementioned ICRC study states that "*the use of chemical weapons is prohibited in international and non-international armed conflicts*."[136] In addition, rule 72 prohibits the use of poison or poisoned weapons in all circumstances,[137] and rule 70 includes poison in the list of weapons considered indiscriminate in certain or all contexts.[138] Also, rule 156, which lists war crimes of customary

128 Cassese Antonio, International Law (2nd ed. Oxford University Press 2005) 157
129 Dekker Guido den, 'The Law of Arms Control: International Supervision and Enforcement' (Martinus Nijhoff Publishers 2001) 62
130 Cassese Antonio, International Law (2nd ed. Oxford University Press 2005) 157
131 Charlesworth Hilary, 'Law-making and sources' in James Crawford and Martti Koskenniemi (eds), The Cambridge companion to International law (Cambridge University Press 2012) 193
132 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 24-25
133 Czaplinski Wladyslaw, 'Customary International Law as a Basis of an Individual Criminal Responsibility' in Krzan Bartlomiej (ed), Prosecuting International Crimes – A multidisciplinary approach (Brill Nijhoff 2016) 53
134 Dekker Guido den, 'The Law of Arms Control: International Supervision and Enforcement' (Martinus Nijhoff Publishers 2001) 62
135 Henckaerts Jean-Marie 'ICRC Study on Customary Rules of International Humanitarian Law' (ICRC, 5 March 2005)
136 'Rule 74. Chemical Weapons' (ICRC, Customary IHL Database)
137 'Rule 72. Poison and Poisoned Weapons' (ICRC, Customary IHL Database)
138 'Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering' (ICRC, Customary IHL Database)

international law, states that the use of prohibited weapons is a war crime in international (IAC) and non-international (NIAC) armed conflicts, as is the "*launching an indiscriminate attack resulting in death or injury to civilians*."[139] However, as the ICRC study is not a binding legal source, foundations for the customary role of the prohibition need to be further clarified.

In general, the prohibition of the use of chemical weapons in war was condemned already by the League of Nations Council and League of Nations Assembly in 1938,[140] and it is generally accepted that the use of chemical weapons is undoubtedly prohibited in IACs, but the status of the rule in NIACs has been to some degree questioned.[141]

However, for example, the *International Criminal Tribunal for the former Yugoslavia* (ICTY) determined the use of chemical weapons as prohibited also in NIACs,[142] and the updated ICTY Statute also counted the "*employment of poisonous weapons or other weapons calculated to cause unnecessary suffering*" as a violation of the laws or customs of war, and therefore as a crime under its jurisdiction.[143] Similarly, the use of chemical weapons is prohibited by the Rome Statute, discussed further in chapter 3.3.2 in IACs and also in NIACs. Also, as mentioned before, the almost universal reach of the CWC implies wide acceptance of the prohibition.[144]

Also, the UNSC has in its several resolutions called the use of chemical weapons as a war crime also in NIACs.[145] Similar implies the wide international condemnation of the use of chemical weapons by Iraq against the Kurds in the 1980s and in Syria in the 2010s. Statements that support the prohibition have, in addition to states, been delivered, for example, by several international organizations, conferences, and different judicial and quasi-judicial bodies. One important feature when determining the customary status of the rule is also that there does not

139 'Rule 156. Definition of War Crimes' (ICRC, Customary IHL Database)
140 'Rule 74. Chemical Weapons' (ICRC, Customary IHL Database)
141 Van Schaak Beth, 'Mapping War Crimes in Syria' (2016) 92 International Law Studies 313 - 314
142 Prosecutor v. Dusko Tadic a/k/a "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) 2 October 1995 124
143 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia' (September 2009) Art. 3(a)
144 Mahasiko Asada, 'A Path to a Comprehensive Prohibition of the Use of Chemical Weapons under International Law: From The Hague to Damascus' (2016) 21(2) Journal of Conflict and Security Law 205
145 Van Schaak Beth, 'Mapping War Crimes in Syria' (2016) 92 International Law Studies 313 - 314

exist contrary official practice. According to ICRCs study, there are no states that have claimed that the use of chemical weapons in any kinds of conflicts would be lawful.[146]

Indeed, even it is quite difficult to establish customary rules, especially in the field of arms control as weapons relate importantly to states' security interests,[147] the extensive and practically uniform state practice[148] indicates, that today the use of chemical weapons is prohibited by the customary law in any kind of armed conflict.[149]

This chapter has discussed the role of the prohibition of the use of chemical weapons as a customary rule and concluded that the state practice implies that the use of chemical weapons has become prohibited by the customary law in IACs and NIACs, respectively. Next, the role of the prohibition is discussed from the viewpoint of IHL.

3.2.4 Chemical Weapons in International Humanitarian Law

This chapter introduces the prohibition of the use of chemical weapons from the viewpoint of international humanitarian law (IHL). Generally, the concept of laws of war is divided into three different categories. *Ius ad bellum* regulates the action to start a war, importantly the use of force as regulated in the *Charter of the United Nations* (UN Charter). *Ius in bello* contains the rules of IHL and regulates the conduct of warfare without taking a stand if the start of the conflict was legal or not. The third track, *ius post bellum* contains the provisions of ICL and regulates the actions when the conflict is over, i.e., accountability of the possible breaches of IHL.

The IHL is generally seen as consisting of two different tracks: the Hague and the Geneva law. The Hague law is codified in the Hague Conventions of 1899 and 1907 and since supplemented by state practice and many conventions regulating the use of certain weapons. The second track is based on the Geneva Conventions, most importantly on the four conventions of 1949 and

146 Rule 74. Chemical Weapons' (ICRC, Customary IHL Database)
147 Dekker Guido den, 'The law of Arms Control: International Supervision and Enforcement' (Martinus Nijhoff Publishers 2001) 63
148 Ibid. 65
149 Mahasiko Asada, 'A Path to a Comprehensive Prohibition of the Use of Chemical Weapons under International Law: From The Hague to Damascus' (2016) 21(2) Journal of Conflict and Security Law 207

their additional protocols of 1977.[150] However, many IHL principles have also become parts of customary law, and as mentioned, it also includes several treaties dealing for example with the regulation of specific arms, such as chemical weapons (the Geneva Protocol, the CWC), biological weapons, anti-personnel mines, and treaties that protect cultural property or environment.[151]

Most importantly, the IHL binds all parties to an armed conflict, and its ultimate goal is to protect those not participating in hostilities and civilian objects, and it does so by limiting means and methods of warfare, meaning certain kinds of weapons and military tactics.[152] The four Geneva Conventions of 1949 protect especially wounded and sick members of armed forces in land warfare,[153] sick, wounded, and shipwrecked members of armed forces at sea,[154] prisoners of war,[155] and civilians,[156] and they are universally ratified. Additional Protocol I protects the victims in IACs,[157] and Additional Protocol II of NIACs.[158] As the four Geneva Conventions as well as Additional Protocol I apply to IACs, Additional Protocol II and common article 3 of Geneva Conventions apply in NIACs,[159] although the required threshold for NIAC of these instruments differs. The common article 3 describes the minimum standards that need to be always respected in armed conflicts by prohibiting "*murder, mutilation, torture, cruel, inhuman*

150 Bassiouni Cherif M., A Manual on International Humanitarian Law and Arms Control Agreements (Transnational Publishers 2000) 18-19
151 'International humanitarian law' (The Geneva Academy, 26 September 2017)
152 Ibid.
153 Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (Adopted 12 August 1949, entered into force 21 October 1950) 970 UNTS
154 Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea (Adopted 12 August 1949, entered into force 21 October 1950) 971 UNTS
155 Geneva Convention relative to the treatment of prisoners of war (Adopted 12 August 1949, entered into force 21 October 1950) 972 UNTS
156 Geneva Convention relative to the protection of civilian persons in time of war (Adopted 12 August 1949, entered into force 21 October 1950) 973 UNTS
157 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Adopted 08 June 1977, entered into force 23 January 1979) 17512 UNTS
158 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (Adopted 08 June 1977, entered into force 23 January 1979) 17513 UNTS
159 'International humanitarian law' (The Geneva Academy, 26 September 2017)

and degrading treatment, hostage taking and unfair trials."[160] Also, breaches of common Article 3 are considered war crimes, as confirmed by the Rome Statute and State practice.[161]

What comes to enforcement of the IHL, the obligation to do so rests primarily within states.[162] States are required to ensure respect to the IHL, but individuals who breach the rules can be held individually criminally responsible,[163] and the State Parties are even required to, within their jurisdiction to "*search for people accused of grave breaches*" and either prosecute them or extradite them for proceedings at another state.[164]

As the Geneva Conventions and their additional protocols regulate the effects of weapons, not specific weapons that are regulated in specific treaties,[165] such as in the CWC, use of chemical weapons is not specially mentioned in the Geneva Conventions of 1949 or Additional Protocols.[166] However, the use of such weapons is clearly against the core principles of the IHL, which include principles of distinction, military necessity, unnecessary suffering, and proportionality, and often a breach of one principle is also a violation of others,[167] since chemical weapons cannot distinguish between civilian and military objectives,[168] and their use is generally held to cause "*unnecessary pain and suffering*."[169]

From the point of view of the ICL, the IHL is relevant because war crimes are generally acts prohibited by the IHL,[170] and for example, the Rome Statute refers straight to the Geneva

160 'Non-international armed conflicts in Syria' (The Geneva Academy, 15 April 2021)
161 Kimpimäki Minna, Kansainvälinen rikosoikeus (Kauppakamari 2015)
162 The Markland Group (eds.), Treaty Compliance: Some concerns and remedies, (Kluwer law international 1998) 5
163 Australian Red Cross, International Humanitarian Law and the Responsibility to Protect: A handbook (Australian Red Cross 2011) 8
164 The Markland Group (eds.), Treaty Compliance: Some concerns and remedies, (Kluwer law international 1998) 12
165 Dekker Guido den, 'The Law of Arms Control: International Supervision and Enforcement' (Martinus Nijhoff Publishers 2001) 46
166 Bassiouni Cherif M., A Manual on International Humanitarian Law and Arms Control Agreements (Transnational Publishers 2000) 354, API art. 35.
167 Solis Gary D, The Law of Armed Conflict – International Humanitarian Law in War (Cambridge University Press 2010) 285
168 Australian Red Cross, International Humanitarian Law and the Responsibility to Protect: A handbook (Australian Red Cross 2011) 7
169 Bassiouni Cherif M., A Manual on International Humanitarian Law and Arms Control Agreements (Transnational Publishers 2000) 20
170 Kimpimäki Minna, Kansainvälinen rikosoikeus (Kauppakamari 2015) 47

Conventions in its war crime articles, even it also criminalizes other serious violations, and therefore the ICL works as a mean to enforce the rules of IHL. Not every breach of the IHL, however, constitutes a war crime.

This chapter has discussed the role of the IHL and the prohibition of the use of chemical weapons from its perspective. The chapter has concluded that as discrimination by nature, the use of chemical weapons is also against the principles of the IHL. A reference is also made to the ICL as a means to enforce the rules of the IHL, and in the next chapter, different avenues to enforce rules of international law are discussed.

3.3 Avenues for Accountability in International Law

In the previous chapter, it is stated that the use of chemical weapons is a breach of customary and treaty law. Now that it is clarified that the use of chemical weapons is prohibited in international law, this chapter studies through which channels individual criminal responsibility of the use of chemical weapons could be established. As noted before, the primary responsibility of the prosecution lies within national actors, but when a state fails to follow this obligation, as is the case with Syria, accountability may be sought at the international level.

As this research aims to discover channels through which accountability can be secured most comprehensive manner, the first subchapter is dedicated to clarifying over which actors the jurisdiction at the international level applies. After this, avenues offered by the International Criminal Court (ICC) and different *ad hoc* and hybrid tribunal mechanisms are discussed with a special focus on preconditions of their jurisdiction and its reach over different persons and the crime of the use of chemical weapons. Finally, the principle of universal jurisdiction is introduced, and possibilities to secure accountability through it are considered from similar premises. In addition, together with the discussion about the jurisdiction of the ICC, the use of chemical weapons as a crime under the court's jurisdiction is clarified.

3.3.1 Who Can Be Prosecuted at the International level?

As one of the goals of this research is to search for the most effective channel for equal accountability of all perpetrators of the use of chemical weapons, it is important to briefly

introduce some basic concepts and issues relating to prosecuting individuals in international law.

As noted before, ICL applies to *natural persons* and recognizes different ways to participate and commit crimes, such as planning, ordering, attempt or the joint criminal enterprise (JCE) doctrine, formed in ICTYs Tadic Appeals Chambers Judgment, that allows under certain conditions prosecuting persons for actions of the group fulfilling common plan or purpose.[171] In addition, according to the well-established ICL norm,[172] superiors may be prosecuted for the actions of their subordinates if they exercise "*effective control, command or authority*" [173] and fail to prevent or punish crimes their subordinates have committed.[174]

As the forms to be held individually responsible under international law are diverse, customary international law also recognizes a set of immunities that prevent possible criminal proceedings. In international law, two forms of immunity are recognized: functional immunity (i*mmunity ratione materiae*) and personal immunity (*immunity ratione personae*). Functional immunity applies to official acts of different state officials even when they have left their office.[175] Personal immunity, for its part, applies a more limited circle of high state officials and ceases after these persons left their office.[176] Circle of persons protected by personal immunity is often seen to include heads of states, prime and foreign ministers, as well as diplomats under a mission.[177]

171 Ambos Kai, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 Journal of International Criminal Justice 159
172 The Rome Statute of the International Criminal Courts: A commentary Volume I, p. 846-47
173 Cassese Antonio, International Criminal Law (Oxford University Press 2003) 208
174 Ibid. 203
175 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 688
176 Ibid. 689
177 Kimpimäki Minna, Kansainvälinen rikosoikeus (Kauppakamari 2015) 584

As the rationale behind the immunities is to protect the ability of a state to function and its officials to carry out their tasks,[178] the holder of the right is a state, and so it can waiver the immunity of its officials if it so decides.[179]

This chapter has briefly and at the general level answered the question who can be prosecuted at the international level. As there are different options available to be held criminally responsible, these possibilities are not further considered in a detailed manner, but it is enough to note that if a connection to a crime is proved and requirements stated in the statute of the court in question are fulfilled, as well as actual committers as officials ordering the commitment of the crime in question can be held criminally responsible. Question relating to immunities, on the other hand, often create difficulties for proceedings, especially at the national level, even when they are based on the universal jurisdiction, and these questions are further reverted to in forthcoming chapters.

3.3.2 The International Criminal Court

In this chapter, the jurisdictional preconditions, as well as temporal, personal, and material jurisdiction of the ICC, are shortly introduced. The following subchapters consider what crime under the ICC's jurisdiction the use of chemical weapons can establish.

The ICC was established by the Rome Statute in 1998, and it began functioning in 2002. The ICC deals with the individual criminal responsibility relating to specific serious international crimes: crimes of genocide, crimes against humanity, war crimes, and from 2018 onwards also the crime of aggression.[180] The court is not part of the UN system but an individual organ, and by 2021, the Rome Statute had 123 state parties.[181]

The ICC is the first permanent institution at the international level that can investigate and prosecute serious international crimes.[182] However, the jurisdiction of the court is

178 'National Courts and Foreign Policy: Prosecuting Foreign State Leaders for International Crimes' (2015) FIIA Briefing Paper 187
179 Kimpimäki Minna, Kansainvälinen rikosoikeus (Kauppakamari 2015) 584
180 Rome Statute Art. 6-8bis
181 'The States Parties to the Rome Statute' (International Criminal Court)
182 Australian Red Cross, International Humanitarian Law and the Responsibility to Protect: A handbook (Australian Red Cross 2011) 8

complementary to national jurisdictions, and it can investigate or prosecute crimes only when the state is unwilling or unable to do so.[183] As a treaty-based institution, the jurisdiction of the ICC is also limited to its state parties or states that have accepted its jurisdiction on a particular case by case declaration. In general, the ICC can investigate and prosecute crimes that are conducted on the territory of its state parties, on board a vessel or aircraft which has registered to a State Party, or that are allegedly committed by a national of its State Party.[184]

The exercising of the jurisdiction of the ICC is possible when the beforementioned conditions are fulfilled, and a State party refers the case to the ICC or the Prosecutor of the ICC herself decides to initiate an investigation. The referral can also be made by the UNSC under Chapter VII of the UN Charter, and in that case, the jurisdiction can be exercised even other bases for the proceedings are not present.[185] However, also in the case of State party or UNSC referral, the Prosecutor of the ICC conducts independent investigations, and the possibility to exercise jurisdiction over a particular case is decided by the ICC itself.[186]

The ICC can exercise its jurisdiction over crimes committed after the entry into force of the Rome Statute, and in case the State Party joined the Statute at a later time, over crimes committed after this time, except if a state grants the court jurisdiction over some specific situation by declaration.[187]

According to article 25 of the Rome Statute, the jurisdiction of the ICC applies to natural persons who commit the crime "*as an individual, jointly with another or through another person*," "*Orders, solicits or induces the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission*," or "*In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose*" when certain criteria are fulfilled, or if a person attempts to commit a crime and its failure depends "*of circumstances independent of the person's intentions.*" Also, relating to genocide, responsibility may arise if a person "*directly and publicly incites others to commit*

183 Ibid., Rome Statute Art 1, 17
184 Rome Statute Art. 12.
185 Ipid. Art. 13
186 Ipid. Art. 53
187 Ipid. Art. 11

genocide."[188] In addition, also the command responsibility is recognized in the Rome Statute in its article 28.

What comes to immunities mentioned in the previous chapter, article 27 of the Rome Statute states that any kind of official capacity does not exempt persons from the responsibility. In other words, immunities or other types of procedural rules relating to certain official capacities in national or international law do not bar the proceedings of the ICC.[189] The only limitation for the Court's personal jurisdiction is that it cannot exercise its jurisdiction over persons who were under 18 at the time of the alleged crime was committed.[190]

Denial of immunities is an important element for the ICC, as the court is designed to punish those, who bear the greatest responsibility of international breaches, and usually, this means the high officers or others high at the command circle. Due to the complementarity of the ICCs jurisdiction, other perpetrators can be held accountable at the national level.

This chapter has briefly introduced the preconditions and other relevant elements relating to the ICC's jurisdiction, and in the next subchapters, it is considered what crime under the Rome Statute the use of chemical weapons could establish.

3.3.2.1 Use of Chemical Weapons as a War Crime

According to article 8 of the Rome Statute, "*The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.*" Listed war crimes under the Rome Statute differ in IACs and NIACs. Next, a closer look is taken at the war crime paragraphs, and it is considered how the use of chemical weapons could be prosecuted under the Rome Statute.

The Article 8 (b) of the Rome Statute applies to *IACs*, and according to its paragraphs (xvii) and (xviii) "*Employing poison or poisoned weapons*" and "*Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices*" are war crimes under the ICC's

188 Rome Statute Art. 25
189 Ipid. Art. 27
190 Ipid. Art. 26

jurisdiction. Similar provisions are found in Article 8 (e) (xiii) and (xiv) respectively, which apply to NIACs "*that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.*"[191] These subparagraphs to paragraph 8 (e) were amendment to the Rome Statute in 2010 during the Kampala review conference and are currently in force for those State Parties who have ratified them.[192]

An additional requirement for the beforementioned article to apply can be found from the Elements of Crimes of the ICC, where it is required that the "substance *was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties*"[193] or "*the gas, substance or device was such* [– – –], *through its asphyxiating or toxic properties*."[194]

Even the above-mentioned provisions (8) (b) (xvii) and (xviii) and 8 (e) (xiii) and (xiv) would seem to refer clearly to the use of chemical weapons, some have argued that chemical weapons were in purpose left outside the scope of the ICC and therefore do not fall within the ICC's jurisdiction. The argument is, however, difficult to approve since the language follows the language used in the Geneva Protocol, and based on the wording of the provisions, it seems clear that the use of chemical weapons would fall within the beforementioned articles.[195]

However, an interesting discussion has taken place on whether the possible UNSC referral could also include amendment articles since, according to article 121 (5) of the Rome Statute, the amendments to article 8 come to force only to States that accept them. According to one point of view, even article 121 (5) makes the binding force of the amendments dependent on state consent, and since the UNSC referrals are not based on the consent, they cannot include amendments.[196] Also, article 121 (5) could have explicitly made an exception relating to UNSC

191 Rome Statute Art. 8 (f)
192 Van Schaak Beth, 'Mapping War Crimes in Syria' (2016) 92 International Law Studies. 312
193 Elements of Crimes Article 8 (2) (e) (xiii) 2 and Article 8 (2) (b) (xvii) 2
194 Ipid. 8 (2) (e) (xiv) 2 and Article 8 (2) (b) (xviii) 2
195 See for example, Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 981
196 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 982

referrals, but it does not do so.[197] From the opposite point of view, the UNSC referrals, in essence, expand the ICC's jurisdiction and do not need a state's consent, the situations or states that are subject are not bound by the Rome Statute at the first place before the UNSC has referred the case to the ICC. Since the referrals render it possible to apply the Rome Statute relating to persons or territories it would not otherwise apply to, this possibility logically includes also its amendments, as they are part of the Rome Statute.[198] So far, the ICC has not taken a stand on the issue, and it remains to be seen how the court will solve this puzzle in the future.

However, in addition to the beforementioned articles, it is also possible that the use of chemical weapons could, depending on the situation, be prosecuted in IAC's as an act of "*Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities*" or "*Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*."[199] In addition, Article 8(2)(b)(xx) prohibits the use of "*weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict*." However, before this provision is applicable, an annex that lists weapons the article refers to need to be agreed upon, and so far, this annex does not exist.[200] Also, relating to NIAC's the provision 8 (e) (i) contains a similar provision relating to intentional attacks against civilians as the beforementioned 8 (b) (i).

197 Dapo Akande, 'Can the ICC Prosecute for Use of Chemical Weapons in Syria?' (EJIL:Talk! 23 August 2013)
198 Ipid.
199 Rome Statute Article 8 (b) (i) and (iv)
200 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 982

In all of these cases, the use of chemical weapons as such would not be the core of the crime, but only a method a prohibited act would be committed. Therefore, it would not even be required to prove the use of chemical weapons *per se*.[201]

Some discussion has also taken place about the possibility of treating the use of chemical weapons as a form of torture.[202] Torture is listed among the war crimes in IAC's and in NIACs,[203] mentioned as a possible mean to commit a crime against humanity,[204] and in addition to the Rome Statute, it is also prohibited in specific treaties, but so far, there is no actual practice that would have analyzed the use of chemical weapons under the definition of torture.[205] As torture, however, is a completely different crime with its own treaty framework, this possibility is not discussed further within this research.

3.3.2.2 Use of Chemical Weapons as a Crime Against Humanity or as a Genocide

While the falling of the use of chemical weapons at least under the war crime articles 8 (2) (e) (xiii) (xiv) and Article 8 (2) (b) (xvii) (xviii) is clear, its qualification as a crime against humanity or as genocide is less clear. In these cases, the use of chemical weapons would only be mean to commit the crime, and the use of particular chemical weapons would be no means necessary. However, a short – and no means comprehensive – description of these crimes is given in this chapter to form a complete picture of different possibilities to prosecute the use of chemical weapons.

According to Article 7 of the Rome Statute, crime against humanity means the commitment of some of the listed acts "*as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*." As the listed acts are considered, the use of

201 Dapo Akande, 'Can the ICC Prosecute for Use of Chemical Weapons in Syria?' (EJIL:Talk! 23 August 2013)
202 Valutyte Regina, Mickeviciute Neringa, 'Remedying Torturous Effects of the Use of Chemical Weapons under International Law' in Krzan Bartlomiej, Prosecuting International Crimes – A multidisciplinary approach (Brill Nijhoff 2016) 130-31
203 Rome Statute Art. 8 (a) (ii)) and (8 (c) (i)) when "committed against persons taking no active part in the hostilities"
204 Ipid. Art. 7 (1) (f)
205 For this discussion see for Valutyte Regina, Mickeviciute Neringa, 'Remedying Torturous Effects of the Use of Chemical Weapons under International Law' in Krzan Bartlomiej, Prosecuting International Crimes – A multidisciplinary approach (Brill Nijhoff 2016) 115 – 132

chemical weapons could most likely fall under the act of murder[206] or "*Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*."[207] In addition, the other requirement would need to be fulfilled and, therefore, be committed against the civilian population, which also must be the primary target of the attack. Relating to chemical weapons, it could be argued that since they are indiscriminate by nature, their use in an area where civilians are present would fulfill this requirement.[208]

In addition, the "*attack*" must be "*widespread or systematic*," which in the context of chemical weapons means that their use would need to include several commissions and be related to "*State or organizational policy*."[209] In addition, the use would need to be targeted to a large area or alternatively be "*directed against a large number of civilians*."[210] Also, the "*attack*" needs to be either "*planned, directed or organized*," but it does not refer only to military attack, and the existence of the armed conflict is not required.[211] If these requirements were fulfilled, the use of chemical weapons could also be charged as a crime against humanity.

In addition, some discussion has also took place about the possibility to prosecute the use of chemical weapons as a crime of genocide under the Article 6 of the Rome Statute, according to which the genocide means "*any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.*" As is the case with the crime against humanity, the mean of using chemical weapons is not as such the central element for it to become charged as a genocide, and if they were used with an aim "*to destroy, in whole or in*

206 Rome Statute Art. 7 (1) (a)
207 Ipid. Art. 7 (1) (k)
208 Catherine Harwood, 'Guest Post: The Use of Chemical Weapons is not a Crime against Humanity' (Spreading the Jam, 18 September 2013)
209 Ipid.
210 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424 (Pre-Trial Chamber II Decision) 15 June 2009 82
211 Ipid.

part, a national, ethnical, racial or religious group" their use would certainly establish a genocide, as their use, if not kill the targets, at least causes "*serious bodily or mental harm"*.[212]

Although the use of chemical weapons clearly falls under the war crime paragraphs, it might become prosecuted also as a crime against humanity or as genocide if other elements were fulfilled. This has indeed happened in the past in the national proceedings, especially during the aftermath of the Second World War and relating to the Iraq chemical weapons attack against the Kurds in the 1980s.[213] However, it can in this context briefly be described that within the case of Syria, the use of chemical weapons within the conflict contains several elements that imply that they might amount to a crime against humanity. First, the attacks have been continuous, and chemical weapons have been used by the Syrian government in an organized manner deliberately against the civilian, mostly within opposition-controlled areas. Chemical weapons have also been developed in Government facilities, and the country has maintained a special program for their development. What comes to the genocide, as in Syria, chemical attacks have not been targeted especially against some specific group mentioned in the article, the attacks in Syria would not likely fall under the crime of genocide.[214]

This chapter has discussed the use of chemical weapons as a crime under the ICC's jurisdiction, and it can be concluded that there is no doubt that it would – in one way or another – establish a crime over which the ICC has jurisdiction. However, to be prosecuted at the ICC, also other jurisdictional preconditions would need to be fulfilled in a particular case. Next, other avenues for individual criminal responsibility are considered, starting from different *ad hoc* and hybrid tribunals.

3.3.3 *Ad hoc* and Hybrid Tribunals

In addition to the permanent ICC introduced in the previous chapter, also different *ad hoc* and hybrid tribunals have been established in specific cases. As these types of tribunals are established case by case, there are no general rules about their mandate, jurisdictional limits, or

212 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 983
213 Ibid. 987-88
214 Ibid. 983

composition. In this chapter, some general considerations are however given, and the possibilities to establish different types of international tribunals are introduced.

Ad hoc tribunals are tribunals established by the UNSC with its powers under Chapter VII of the UN Charter to investigate and prosecute serious crimes that are committed within a specific territory or within a specific timeframe.[215] They work with individual criminal responsibility, and their mandates are defined in their Statutes. After the Nuremberg (IMT) and Tokyo tribunals (IMTFE) established after the Second World War in 1945,[216] the UNSC has established the *International Criminal Tribunal for the Former Yugoslavia* (ICTY) in 1993 and *International Criminal Tribunal for Rwanda* (ICTR) in 1994 to investigate serious crimes that took place in former Yugoslavia and Rwanda and its neighbor states, and prosecute individuals who committed these crimes.[217] After the closure of these tribunals, *The International Residual Mechanism for Criminal Tribunals*, was established in 2010 to finish the remaining functions of ICTY and ICTR, such as conducting appeals and tracking and prosecuting fugitives still remaining.[218]

After ICTY and ICTR, no more *ad hoc* tribunals have been established, but instead, several so-called hybrid courts have been established to secure accountability in certain situations. Usually, these tribunals have jurisdiction over national and international crimes, they apply national and international law, and their personnel includes national and international staff. Also, these tribunals are often located near the area the crimes under their jurisdiction took place.[219]

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215 Biddiss Michael D, 'From the Nuremberg Charter to the Rome Statute: A historical analysis of the limits of international criminal accountability' in Thakur Ramesh and Peter Malcontent (eds), From Sovereign Impunity to International Accountability: The Search for Justice in a World of States (United Nations University Press 2004) 52

216 Rudolph, Christopher, Power and Principle (Cornell University Press 2017) 15

217 Radziejowska Maria 'Awaiting Justice: Prospects for Prosecuting War Crimes in Syria' (2013) The Polish Institute of International Affairs Policy Paper No. 31 3

218 'About' (United Nations International Residual Mechanism for Criminal Tribunals)

219 Public International Law & Policy Group, 'Hybrid Tribunals: Core elements. Legal Memorandum' (June 2013) 1

While ICTY and ICTR were established by the UNSC,[220] usually, hybrid courts are created with the consent of a State relating to crimes they are investigating.[221] Basically, hybrid courts can be established in several different ways. First, if the UN has established an international administration in an area under UNSC authority, it might also establish a hybrid tribunal, as was the case with the *Special Panels for Serious Crimes in East Timor* (SPSC),[222] and in Kosovo, where *United Nations Interim Administration Mission in Kosovo* (UNMIK) was also mandated to establish a hybrid tribunal *"Regulation 64" Panels in the Courts of Kosovo*.[223]

Second, hybrid tribunals may be established by a bilateral agreement between the UN and a State in question if the government is unable to agree about the establishment of a tribunal by itself, as was the case with the *Special Court of Sierra Leone,* which was established following the Presidents' request of assistance from the UN. After UNSC issued an allowing resolution, the SG entered negotiations of the establishment of the court, which was then formed by an agreement in 2002.[224] Similarly, *Extraordinary Chambers in the Courts of Cambodia* (ECCC) was founded with an agreement between the UN and Cambodia.[225]

Third, hybrid tribunals can be established as a domestic court with only some international elements. In this type of solution, international law is often applied, and some internationals personnel is present to supervise the proceedings.[226] Examples of these types of arrangements include *the War Crimes Chamber of the State Court of Bosnia and Herzegovina* and *the Iraq Special Tribunal*.[227]

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220 Elzayat Omar, 'Establishing an International War Crime Tribunal for Syria' (2020) 2
221 Mark Chadwick, 'Justice in Syria: five ways to prosecute international crime' (The Conversation, 10 July 2017)
222 Public International Law & Policy Group, 'Hybrid Tribunals: Core elements. Legal Memorandum' (June 2013) 7-8
223 Ibid.
224 Ibid. 9
225 Ibid 9-10
226 Ibid. 10
227 Public International Law & Policy Group, 'Hybrid Tribunals: Core elements. Legal Memorandum' (June 2013) 1-2

Fourth, clearly, the establishment of hybrid tribunals is also possible based on UNSC binding resolution, but so far, the *Special Tribunal for Lebanon* has been the only hybrid tribunal established by UNSC resolution.[228]

What especially differs *ad hoc* and hybrid tribunals from the ICC is that their mandate and jurisdiction are decided case-by-case and described in their Statutes, no general rules exist.[229] It is, however usual, that their jurisdiction is limited to some specific subject matters, according to some temporal and territorial, and sometimes even personal lines, depending on the context and circumstances.[230]

That said, it is, however, usual that the jurisdiction of the *ad hoc* and hybrid tribunals contains the most serious crimes and that it applies to natural persons who have been involved in crimes under the tribunals' jurisdiction directly or through some recognized form of responsibility, such as by ordering, planning, aiding or abetting. In addition, such as the case is with the ICC, the *ad hoc* and hybrid tribunals often bar the application of immunities.[231]

This chapter has briefly introduced different *ad hoc* and hybrid tribunals and ways to establish them. While general rules regarding their mandate do not exists, some common elements, such as barring the immunities and wide jurisdiction over natural persons, can be found. The next chapter discusses the possibility of establishing individual criminal responsibility through the principle of universal jurisdiction.

3.3.4 Principle of the Universal Jurisdiction

In the previous chapters, avenues for accountability through international tribunals were introduced. This chapter focuses on possibilities offered by the principle of universal jurisdiction, and it differs from the previous possibilities remarkably since it does not have an organizational frame, but it is applied through national courts.

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228 'About the STL' (Special Tribunal for Lebanon)
229 Radziejowska Maria 'Awaiting Justice: Prospects for Prosecuting War Crimes in Syria' (2013) The Polish Institute of International Affairs Policy Paper No. 31 3
230 Public International Law & Policy Group, 'Hybrid Tribunals: Core elements. Legal Memorandum' (June 2013) 17
231 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia' (September 2009) Art. 7

International law recognizes several principles of jurisdiction that most importantly include the principle of territoriality and the principle of personality.[232] In general, national courts can investigate crimes when there exists a link between the crime and the forum state.[233] The principle of territoriality refers to situations when the crime is committed at the territory of a State, and it is generally considered as the strongest basis for the jurisdiction of a State. The principle of passive personality means that a State can use its jurisdiction when the victim of a crime is its citizen, and active personality refers to situations when the alleged perpetrator is the national.[234] These principles are importantly based on the ground principle of international order, namely, the principle of state sovereignty. In addition to these, international law also recognizes some other principles of jurisdiction, the principle of universal jurisdiction among them.

Universal jurisdiction refers to the possibility for a state to investigate and prosecute crimes when no other grounds for jurisdiction, such as nationality or territory, are present. This means that if so stated in its national legislation, the state may use its jurisdiction also against non-citizens wherever the crime is committed without any kind of link to the forum country required. In the cases of universal jurisdiction, the basis for its use is the gravity of the crime,[235] as some international crimes are considered so serious that prosecution of their perpetrators is in the interest of all states[236] as they are harmful to the international community itself and affect every state.[237] It is held that when dealing with these crimes under the principle of universal jurisdiction, the states are not representing themselves but the international community.[238]

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232 Simma Bruno, Müller Andreas Th., 'Exercise and limits of jurisdiction' in James Crawford and Martti Koskenniemi (eds), The Cambridge companion to International law (Cambridge University Press 2012)
233 'Q&A: First Cracks to Impunity in Syria, Iraq Refugee Crisis and Universal Jurisdiction Cases in Europe' (Human Rights Watch, 20 October 2016)
234 Cassese Antonio, The Oxford Companion to International Criminal Justice (Oxford University Press 2009) 450
235 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 467, 687-88
236 Smeulers Alette, Fred Grünfeld, International Crimes and Other Gross Human Rights Violations: A Multi- And Interdisciplinary Textbook (BRILL 2011) 476
237 Simma Bruno, Müller Andreas Th., 'Exercise and limits of jurisdiction' in James Crawford and Martti Koskenniemi (eds), The Cambridge companion to International law (Cambridge University Press 2012) 144
238 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 25

Therefore, what is punished under the principle of universal jurisdiction, is the breach of international law, and a difference needs to be made to situations when a treaty *requires* states to investigate, prosecute and/or extradite alleged perpetrators of some acts when the alleged perpetrator is under their jurisdiction.[239] Within the latter case, the question is about treaty-based quasi-universal jurisdiction,[240] which cannot be seen as truly universal, as treaties only bind their State Parties. The basis for universal jurisdiction, however is on customary law, binding all states.[241]

It is generally held that the principle of universal jurisdiction permits but does not require states to use this possibility, and it is usually leaned on when other avenues are not possible.[242] Also, as every national system itself sets the rules for how it deals with international crimes, ways to apply the universal jurisdiction vary.[243] The principle in some form and extent is, however, according to the Amnesty report included in the laws of 163 states. Of these, 147 states have specifically described the universal jurisdiction relating to crimes under international law.[244]

The list of these crimes relating to which the universal jurisdiction applies is not undisputed but has generally been widened from the original crimes of piracy and slavery to "*core crimes of customary law*."[245] These core crimes include genocide, crimes against humanity, breaches of laws of war, and especially breaches of the Hague Convention 1907 and grave breaches of Geneva Conventions 1949. Also, torture is often included in the list.[246] In addition, some wider

239 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 467, 687-88
240 Ipid. 469
241 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 25
242 'Universal Jurisdiction' (International Justice Resource Center)
243 Cassese Antonio, International Criminal Law (Oxford University Press 2003) 25
244 'Universal Jurisdiction a Preliminary Survey of Legislation Around the World – 2012 Update' (2012) Amnesty International
245 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 468
246 Ipid.

interpretations have been presented,[247] sometimes also including, for example, the crime of aggression[248] and gross human rights violations.[249]

Some discussion has taken place about the applicability of the universal jurisdiction to war crimes committed in NIACs, but for example, the customary rule 157 of ICRC customary law study states that universal jurisdiction can be used relating to war crimes in NIACs,[250] and more usually than not, it is held, that the State practice has established a customary rule against war crimes also in NIACs. As stated in chapter 3.3.2. the use of chemical weapons is a war crime, and thus to be listed among the crimes, universal jurisdiction can be applied, allegedly also when committed in NIACs. This interpretation is also supported by the recent development of some countries investigating chemical weapons attacks based on the universal jurisdiction, which is discussed more in chapter 4.4.

However, immunities of customary international law briefly mentioned in chapter 3.3.1 may pose obstacles to the use of universal jurisdiction, as may some other limitations of national law, which are returned in chapter 5.1.3. Relating to the immunities, it should, however, be already noted that the question of whether immunities bar the prosecution of the most serious crimes remains somewhat unresolved.[251]

4. The Case of Syria – Efforts Towards the Accountability

4.1 Facts and Circumstances in Syria

So far, this research has discussed how chemical weapons are regulated, what crime they may establish, and through which channels the individual criminal responsibility could be reached at the international level. In this chapter, efforts towards accountability through individual criminal responsibility in the actual case of the use of chemical weapons in Syria are briefly introduced and compared to regulations described in the previous chapter. Based on this

247 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 26
248 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 468
249 Simma Bruno, Müller Andreas Th., 'Exercise and limits of jurisdiction' in James Crawford and Martti Koskenniemi (eds), The Cambridge companion to International law (Cambridge University Press 2012) 145
250 'Rule 157. Jurisdiction over War Crimes' (ICRC, Customary IHL Database)
251 Kimpimäki Minna, Kansainvälinen rikosoikeus (Kauppakamari 2015) 589-90

comparison, further analysis of the biggest obstacles for accountability is conducted in chapter 5.

The basic elements relating to the use of chemical weapons in Syria were introduced in chapter 2, but in this chapter, they are described more detailed manner. First, however, it is important to establish some circumstantial facts relating to the Syrian conflict, namely the classification of the conflict and the rules and treaties binding the Syrian Arab Republic at the time of the omissions to conclude which rules were actually breached in Syria when the chemical weapons were used. This is important as it has an effect on accountability possibilities available and helps to determine legal limitations in the given case.

After describing relevant facts surrounding the conflict, actual actions or attempts for action through the ICC, *ad hoc* or hybrid tribunals, or through universal jurisdiction are described. Finally, efforts of the UN, OPCW, individual states, and non-governmental organizations (NGOs) to contribute to the accountability during the Syrian conflict are shortly introduced to form a complete picture of different aspects relating to accountability efforts.

4.1.1 Classification of the Conflict and Rules Binding Syrian Arab Republic

This chapter briefly considers the classification of the Syrian conflict and rules binding Syria at the time of the commission of the chemical weapons attacks. This determination renders it possible to analyze what the actual possibilities to achieve accountability in the case of Syria are and what avenues are blocked due to the Syrian (non)accession to treaties.

First, as described in relation to IHL and the Rome Statute, the classification of the armed conflict is relevant for the application of Geneva Conventions and applicable war crimes provisions in the Rome Statute. In addition, some customary rules apply only in IACs, although this is not the case with the prohibition of the use of chemical weapons. However, the difference between IACs and NIACs is not especially relevant for the purposes of this work since the relevant rules relating to the use of chemical weapons from the viewpoint of jurisdictional issues relating to individual criminal responsibility are similar in IACs and in NIACs.

Therefore, it is enough to state that according to the ICRC, the situation in Syria reached the threshold of a NIAC in July 2012,[252] and handling the conflict as a NIAC is the most widely accepted approach. However, in reality, the classification of the conflict is often crucially important and done case-by-case, based on the actual facts on the ground. In addition, the level of the armed conflict is not usually the same in every part of the country in question, but as the case is in Syria, there exist several overlapping NIACs that have been fought in the country during the conflict between different armed groups and state forces.[253]

In addition, it is interesting to note that according to some interpretations due to the continuous involvement in the conflict of third states, the Syrian conflict has also included IACs, for example, between Syria and the United States and between Syria and Turkey since both of these states have fought their wars against ISIS and Kurds respectively on the territory of Syria without its consent. In addition, the military strikes of the United States to Syria have led to short-armed conflicts between these states.[254] However, as noted before, there are several simultaneous armed conflicts – as well as military occupations – going on in Syria, and chemical weapons attacks considered in this research have been committed during conflicts between the Syrian Government and opposing armed groups, or during conflicts between armed groups, not during IACs.

First, what comes to the binding rules, it can be noted that the use of chemical weapons is prohibited by the customary law in IACs and in NIACs, and since the customary law binds all states, it is clear that the customary rules were breached in Syria when chemical weapons were used. Relating to older treaties introduced in chapter 3.2.1, it is enough to note that they bind only their State Parties during IACs, but since these treaties have generally held to have become part of the custom, and in the sense of banning the use of chemical weapons they have also lost their importance after entry into force of the CWC, there is no need to consider their applicability to the Syrian conflict further in this context.

252 'Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting' (International Committee of the Red Cross, 17 July 2012)
253 'Conflicts' (The Geneva Academy, 1 May 2009)
254 Ipid.

Similarly, as described in chapter 3.3.4, the Geneva Conventions and Additional Protocol I apply during the IACs, as the common article 3 and Additional Protocol II are in force during NIACs. As their enforcement from the perspective relevant for this work, i.e., from the perspective of individual criminal responsibility in international law, happens through the Rome Statute, the applicability of these conventions to the case of Syria is not important. It can, however, be stated that Syria was a party to Geneva Conventions and to Additional Protocol I even before the start of the conflict, but not to the Additional Protocol II, so as the conflict in Syria is generally determined to constitute a NIAC, only applicable part of this set of treaties is the Common article 3, which applies to all internal conflicts that are more than "*riots or other internal tension or disturbances*."[255]

The Rome Statute, on its part, establishes a different set of war crimes in IACs and NIACs, but as described in chapter 3.3.2 use of chemical weapons is a war crime in both kinds of conflicts. What is important is, however, the threshold of NIAC, which, in relating to paragraph 8 (c) is "*internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature*"[256] and relating to article 8 (e) it is in addition to this threshold required, that the conflict takes "*place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups*."[257] As in the case of Syria, it seems quite clear that these requirements are fulfilled, although – as previously noted – in reality, the determination is a detailed and often complex process. However, the Syrian Arab Republic has only signed, not ratified the Rome Statute, and therefore, the only way the provisions would become binding on Syria is if it decided to join the treaty or allow its jurisdiction separately by a declaration, or if the case was referred to the ICC by the UNSC.

Relating to CWC instead, it is already mentioned that Syria joined the treaty in 2013,[258] and therefore, chemical weapons attacks that took place after that time were clear substantial

255 'Non-international armed conflict' (ICRC)
256 Rome Statute Art. 8 (d)
257 Ipid. Art. 8 (f)
258 Daryl Kimball, 'Chemical Weapons Convention Signatories and States-Parties' (Arms Control Association, June 2018)

breaches of the CWC, as the treaty prohibits the use of chemical weapons "*under any circumstances*," including the conflict in Syria.

This chapter has characterized the Syrian conflict as a NIAC and concluded that in the case of Syria, the use of chemical weapons was a breach of a customary norm and the CWC, and possibly of the Common article 3. In addition to these Syrian treaty accensions mean that the ICC cannot exercise its jurisdiction towards Syria without its own consent or UNSC referral, although the use of chemical weapons is a crime under the jurisdiction of the ICC.

4.2 The International Criminal Court and Syria

As described in chapter 3.3.2 the cases of the use of chemical weapons fall under the jurisdiction of the ICC, as they constitute war crimes and, depending on the situations, possibly also crimes against humanity or genocide described in articles 6-8 of Rome Statute. Since the ICC statute does not recognize immunities or other obstacles for jurisdiction, all natural persons over 18 years old[259] who commit crimes under the jurisdiction of the court or participate in them as described in article 25 of the Rome Statute may be held criminally responsible for such acts.

However, a crucial issue remains. As described in chapter 3.3.2, the jurisdiction of the ICC is not universal but tied to its State Parties through principles of territorial and personal jurisdiction. The Syrian Arab Republic has only signed but not ratified the Rome Statute, nor has it given a special declaration to allow the ICC to investigate crimes committed during the Syria civil war,[260] and so even the use of chemical weapons is a crime under the Rome Statute, the Court does not have jurisdiction over the case of Syria.

Even Syrian Arab Republic would decide to join the ICC, investigation of the crimes would not be possible retroactively if Syria would not especially declare that the court has jurisdiction also over crimes committed before entering into force of the Rome Statute.[261]

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259 Rome Statute Art. 26 Exclusion of jurisdiction over persons under eighteen
260 Ipid. Art. 12
261 'Joining the International Criminal Court Why does it matter?' (The International Criminal Court, 1 May 2009) 4

However, like mentioned in chapter 3.3.2, the UNSC has the mandate to refer the case to the ICC,[262] and previously referrals have been made relating to the cases of Sudan (2005) and Libya (2011).

Indeed, during the years of the raging conflict, several actors, such as SG of the UN, High Commissioner for Human Rights, several member states, and the HRC, have urged the UNSC to refer the case to the ICC, but so far, these requests have been unsuccessful.[263] In addition, in 2014, thirteen members of the UNSC created a draft resolution S/2014/348, backed up by more than 60 countries[264] to refer the case of Syria to the ICC, but the draft decision was vetoed by permanent members of the UNSC, Russia, and China.[265] Because, in total, by September 2020, Russia and China had vetoed ten draft UNSC resolutions and Russia independently additional 6[266] relating to Syria, it is unlikely that a new resolution to refer the case would succeed due to the special political interest relating to the case.

However, because the ICC also has jurisdiction over crimes committed by nationals of its State Parties, there exists a possibility that people who have committed crimes in Syria while being nationals of a member state of the ICC could be brought before the court. Mostly, this possibility would, however, relate to foreign fighters of ISIS, but because the highest actors of the organization are mainly Iraq or Syria nationals, possibilities are limited. This is especially so because the ICC is meant as a forum for most serious crimes, and individual crimes committed by separate ISIS members would not likely reach the threshold of the ICC investigations.[267] This is even more so because of the principle of complementarity, members states of the ICC have the primary responsibility for prosecuting the crimes, and ISIS members found in an ICC State

262 Rome Statute Art. 13
263 'Chronology of Events Syria' (Security Council Report, 2 April 2018), Edith M. Lederer, 'UN chief calls for Syria referral to International Court' (AP News, 27 January 2018)
264 UNSC S/2014/348 (22 May 2014) UN Doc S/2014/348
265 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 981
266 'R2P Monitor, Issue 53' (Global Centre for the Responsibility to Protect, 15 September 2020) 12
267 Mark Kersten, 'Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?' (Justice in Conflict, 17 October 2016)

Parties territory would likely be surrendered to their national states to be prosecuted or prosecuted in the state where they were found.[268]

In addition, even not related to chemical attacks, it is worth noting that in 2019 *The Guernica Centre for International Justice* filed two communications to the ICC Prosecutor asking her to open an investigation relating to the deportation of Syrian civilians to neighboring Jordan, that is a State Party to the ICC.[269] The request followed the recent decision of the ICC to allow the investigation of crimes committed relating to situation Myanmar, where alleged crimes against humanity, such as deportation and persecution, had taken place at the territory of the ICC State Party, neighboring Bangladesh.[270]

This chapter has briefly discussed the possibilities of referring the case of Syria to the ICC. As the court is a forum meant exactly to investigate and prosecute grave breaches of international law such as Syria, the ICC could serve as a potential avenue for securing individual criminal responsibility of the chemical weapons attacks in Syria. However, as Syria is not State Party to the Rome Statute and the referral through UNSC seems unlikely due to political interest, the road to the ICC is at least currently blocked.

4.3 *Ad hoc* and Hybrid Tribunals and Syria

This chapter discusses the possibility of establishing an *ad hoc* or hybrid tribunal for Syria and refers to actual discussion about this possibility. First, it is, however, important to remind that as statutes of the *ad hoc* and hybrid tribunals are created separately for each organ, limits of the jurisdiction of the possible organ cannot be yet known. Because of that, the prerequisite for the accountability for the use of chemical weapons through this type of organ would clearly be that the use of chemical weapons would be listed as a crime over which the tribunal has jurisdiction.

During the years, there has also been some discussion about the establishment of an *ad hoc* or hybrid tribunal to investigate and prosecute crimes committed during the Syrian conflict.

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268 Sergey Sayapin, 'A "Hybrid" Tribunal for Daesh?' (EJIL:Talk! 4 May 2016)
269 Toby Cadman, 'The Guernica Centre Files Second Submission on the Situation in Syria/Jordan to the ICC Prosecutor' (The Guernica Group, 18 July 2019)
270 The International Criminal Court, 'Bangladesh/Myanmar, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar ICC-01/19'

However, the discussion has mostly related to finding an avenue to prosecute ISIL from its action in Iraq and Syria,[271] but also already in 2013 proposition was presented about the establishment of Special Tribunal for Syria in the form of *Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes*,[272] related to United States' Congress resolution "*Immediate Establishment of a Syrian War Crime Tribunal."* The blueprint is a draft statute for the Syria tribunal, and it follows in many ways the model of the *Special Court for Sierra Leone*.[273]

What is noteworthy is that the draft statute only specially mentions the "*Employing poison or poisoned weapons*" and "*Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices*" war crimes in IACs,[274] although it includes other war crime charges under which the use of chemical weapons could fall, as argued in chapter 3.3.2, such as attacking civilians not participating in hostilities.[275]

However, no too far-reaching interpretations of this choice should be made, considering the blueprint is dated on 27 August 2013,[276] which is only a couple of days after the first chemical weapons attacks in Syria that gained wide international knowledge, before the ratification of the CWC by Syria,[277] and before the chemical weapons attacks become a regular and widely condemned element of the conflict, which today is counted as one of the gravest breaches continuously committed during the war.

However, by May 2021, the discussion about the tribunal has not moved forward due to the lack of political will of the UNSC and Syrian Government for the establishment of any kind of

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271 See for example**:** Sergey Sayapin, 'A "Hybrid" Tribunal for Daesh?' (EJIL:Talk! 4 May 2016), Mark Kersten, 'Options on the Table: A Hybrid Tribunal to Prosecute ISIL fighters' (Justice in Conflict, 18 September 2019), or Bashir Ali Abbas, 'Prosecuting the Islamic State: The Case for a Hybrid Tribunal' (IPCS, 16 May 2019)
272 'The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes' (27 August 2013)
273 Elzayat Omar, 'Establishing an International War Crime Tribunal for Syria' (2020) 2-3
274 'The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes' (27 August 2013) Art. 20 (b) (18) and (19)
275 'The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes' (27 August 2013) Art. 20 (d) (1)
276 'The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes' (27 August 2013)
277 Which happened on September 2013, CWC entry into force for Syria was on October 2013

tribunal to investigate crimes committed during the Syrian conflict. As noted in chapter 3.3.3, the UNSC is the only organ with a mandate to establish such a tribunal without a consent of a state the proceedings would be directed to.[278] As neither of these elements is present in the case of Syria, also this road for accountability has been blocked. As noted within the ICC, there are no special reasons to believe that Russia and China would allow the resolution to establish a tribunal pass the UNSC,[279] or reason to believe that the Assad regime would put itself at risk of prosecution by allowing the establishment of the tribunal for Syria.[280]

The likelihood for the UNSC decision is also diminished by the fact that also Russia has allegedly committed war crimes within Syria – as is the US and several other countries – and therefore establishment of an *ad hoc* or hybrid tribunal would also expose them for risk of prosecution,[281] at least if the mandate of the tribunal would not be expressly limited to crimes committed by Syrian nationals, which on its part, would cut the ground off from the comprehensive and equal proceedings.

In theory, any other country – according to its national laws – is able to establish a special tribunal for crimes committed in Syria, but without the UNSC or Syrian consent, same issues and obstacles as with the separate proceedings at national courts, discussed in the following chapter, based on universal jurisdiction would apply. Even this kind of, a more comprehensive forum for universal jurisdiction and proceedings by other states would have its benefits compared to separate universal jurisdiction proceedings, the biggest issues especially relating to chemical weapons use are, that the most responsible ones stay firmly on the Syrian soil and are therefore not under the reach of any such tribunal if they were not voluntary to leave the country. Also, issues of immunity would remain, and therefore, the proceedings could at their best include low-level perpetrators.

278 Patrick Wall, 'US House of Representatives Overwhelmingly Calls for War Crimes Tribunal for Syria (with Jurisdiction to Try Americans, Apparently)' (Opinio Juris, 22 March 2016)
279 Ibid.
280 Mark Chadwick, 'Justice in Syria: five ways to prosecute international crime' (The Conversation, 10 July 2017)
281 Patrick Wall, 'US House of Representatives Overwhelmingly Calls for War Crimes Tribunal for Syria (with Jurisdiction to Try Americans, Apparently)' (Opinio Juris, 22 March 2016)

By the same token similar arrangement, based on the universal jurisdiction, could also be taken by a group of states.[282] Treaty between states to open proceedings was already the basis for Nuremberg Tribunal to which Germany did not consent. An important difference to the case of Syria, however, is that Germany at the time "*was under occupation with its sovereignty being held essentially in trust by the occupying powers that collectively created the Tribunal*."[283] Also, Extraordinary African Chambers were established with a treaty between the African Union and the Government of the Republic of Senegal to investigate and prosecute the most responsible for international crimes committed in Chad. However, for this type of approach to work effectively, persons accused would need to be under the custody of a state willing to take part in court proceedings.[284] As long as the Syrian Arab Republic remains as a sovereign state unwilling to participate in such proceedings, no other arrangement than the UNSC resolution under Chapter VII can force it to cooperate with any tribunal.

This chapter has considered the possibilities for an *ad hoc* or hybrid tribunal arrangement for Syria. Based on the discussion, similar difficulties, namely bloc of the UNSC, the unwillingness of Syria to accept such proceedings, and possible issues of enforcement of the courts' orders – remain as obstacles to the possibility. As will be discussed in chapter 5.1.2, an *ad hoc* or hybrid arrangement could, however, include a lot of benefits and, if mandated properly, serve as an efficient way for accountability of the use of chemical weapons in Syria.

4.4 Principle of the Universal Jurisdiction and Syria

As described before, the use of chemical weapons is a war crime in IACs and NIACs, and according to approved interpretation, it could be investigated and punished through universal jurisdiction in states which legislation allows such proceedings. This chapter introduces actions relating to proceedings based on universal jurisdiction relating to the use of chemical weapons in Syria.

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282 Beth Van Schaack, 'A Mixed Chamber for Syria: An Idea Whose Time Has Come?' (Just Security, 28 May 2014)
283 Ibid.
284 Chambres Africaines Extraordinaires/Extraordinary African Chambers' (Hybrid Justice)

As discussed before, as the other channels for justice have been blocked in Syria, since 2012, several states have started to collaborate and start proceedings to investigate and prosecute international crimes committed during the Syrian conflict under the principle of universal jurisdiction, and in some cases also under principles of nationality and territoriality. Proceedings have been launched, for example, by Syrian survivors, their relatives, human rights lawyers, NGOs, and international organizations,[285] and they have been initiated in several countries, including Sweden, Norway, Netherlands, Switzerland, Germany, and France.[286] By the time of writing, also several convictions have been issued, for example, in Sweden, and in Germany.[287] According to TRIAL International's report of universal jurisdiction of 2020, at least preliminary examination was opened in 25 cases – 20 based on universal jurisdiction, others on passive or active nationality principles – relating to the Syrian conflict in different European countries. In France and Germany also structural investigations, which are investigations not relating to certain suspects, are conducted.[288]

Investigations and prosecutions have included crimes against humanity and war crimes, such as torture, unlawful detention, and more recently also the use of chemical weapons as a war crime and crime against humanity.[289] Investigated persons have been members of ISIL,[290] members of Syrian armed forces, and members of opposition armed groups,[291] and the main aim of the proceedings has been to search for people who might be in Europe and give arrest warrants to persons still in Syria or otherwise absent.[292] Most of the proceedings have been launched against low-level perpetrators that are often nationals of countries investigating the crimes or persons that have arrived in a country in question as refugees, but some of them have

285 Universal Jurisdiction in Sweden: Victims of Syria's Chemical Weapons Attacks Demand Justice' 4
286 'Q&A: First Cracks to Impunity in Syria, Iraq Refugee Crisis and Universal Jurisdiction Cases in Europe' (Human Rights Watch, 20 October 2016)
287 'Syria Events of 2017' (Human Rights Watch) Patrick Kroker & Alexandra Lily Kather, 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany' (EJIL:Talk! 12 August 2016)
288 Howard Varney and Katarzyna Zduńczyk 'Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes' (2018) International Center for Transitional Justice 31
289 Universal Jurisdiction in Sweden: Victims of Syria's Chemical Weapons Attacks Demand Justice' 4
290 Often prosecuted under terrorism regulations, Patrick Kroker & Alexandra Lily Kather, 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany' (EJIL:Talk! 12 August 2016)
291 'Assad's senior intelligence officers accused of torture – Syrian torture survivors file criminal complaint in Norway' (ECCHR, 12 November 2019)
292 Charlotte Bailey, 'European cases to test the reach of prosecuting Syria war crimes' (The New Humanitarian, 22 April 2020)

also been aimed towards senior officials of the Syrian army. For example, Germany has issued an international arrest warrant against a senior official still in Syria.[293]

In addition to other proceedings, a series of criminal complaints calling for opening a formal criminal investigation of chemical weapons attacks in Syria have been issued in Germany (October 2020, attacks in Al-Ghouta in 2013 and Khan Shaykhoun in 2017),[294] in France (March 2021, attacks of Ghouta and Douma in 2013) and in Sweden (April 2021, attacks in Al-Ghouta in 2013 and Khan Shaykhoun in 2017)[295] by a group of NGOs and survivors of chemical weapons attacks.

Complaints claim that the use of chemical weapons establishes a war crime and a crime against humanity, and they are backed with detailed investigations, a wide range of evidence, as well as information identifying chains of command and alleged persons responsible for attacks within a Syrian government.[296] Complaints also call for a joint investigation[297] of the alleged crimes in cooperation with other countries where these complaints have been filed.[298] As the criminal complaints call for arresting and prosecuting Syrian government officials,[299] they also include a possibility to investigate even the Syrian President Bashar al-Assad and his close circle and high-ranking military officials.[300] This, however, is not unproblematic, and issues relating to immunities and prosecutions of high-rank officials, and especially heads of states, are further discussed in chapter 5.1.3.

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293 See for example: Mark Chadwick, 'Justice in Syria: five ways to prosecute international crime' (The Conversation, 10 July 2017) Andreas Buerger, 'German court issues guilty verdict in first Syria torture trial' (Reuters, 24 February 2021), Patrick Kroker & Alexandra Lily Kather, 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany' (EJIL:Talk! 12 August 2016)
294 German Criminal Investigation into Chemical Weapons Attacks in Syria' (Open Society Justice Initiative)
295'French Criminal Investigation of Chemical Weapons Attacks In Syria' (Open Society Justice Initiative)
296 Swedish Criminal Investigation of Chemical Weapons Attacks In Syria' (Open Society Justice Initiative, 1 May 2009)
297 Read more: Joint Investigation Teams - JITs' (Europol)
298 'French Criminal Investigation of Chemical Weapons Attacks In Syria' (Open Society Justice Initiative), Swedish Criminal Investigation of Chemical Weapons Attacks In Syria' (Open Society Justice Initiative, 1 May 2009)
299 'French Criminal Investigation of Chemical Weapons Attacks In Syria' (Open Society Justice Initiative)
300 Marlise Simons, 'Criminal Inquiries Loom Over al-Assad's Use of Chemical Arms in Syria' (The New York Times, 2 March 2021)

As proceedings based on universal jurisdiction are clear progress in a situation where other channels for accountability are blocked, national proceedings as the main channel for accountability for severe war crimes include several issues, such as possible immunities and acceptance of the proceedings, as well as practical issues relevant especially to cases where the prosecuting country does not have custody of the prosecuted, as will be further discussed in chapter 5.

This chapter has briefly introduced ongoing proceedings on national courts based on universal jurisdiction, which has so far been the only way towards accountability at the international level within the Syrian conflict. The proceedings have been possible because their launch is only dependent on national laws, unlike their actual enforcement if the accused is not in the custody of the forum state. As will be discussed more detailed manner later, the proceedings based on universal jurisdiction may, however, face several difficulties, such as customary immunities, refusals of cooperation, and unclear limits of the principles' reach. In a situation where other channels are blocked, the principle may, however, offer an additional route towards justice.

4.5 Other Efforts to Contribute Accountability in Syria

Even the attempts to refer the case of Syria to the ICC or to secure accountability some other way have not so far been successful, as the criminal complaints in European courts are at the time of writing still pending, there have been diverse attempts to contribute to the accountability through other types of mechanisms. Different actors, such as the UN and the OPCW, as well as several individual states and NGOs, have been active in their efforts of trying to solve the accountability gap since the beginning of the Conflict in Syria in 2011.

To form a complete picture of the available possibilities to enhance the possibilities for accountability of the use of chemical weapons in Syria, in this chapter, contributions outside the attempts to initiate criminal proceedings to stop the use of chemical weapons are discussed by introducing different actions taken by the OPCW, different organs of the UN, individual states and NGOs.

4.5.1 The Organization for the Prohibition of the Chemical Weapons and Syria

When discussing the use of chemical weapons, the role of the OPCW cannot be passed. The OPCW has been actively involved in the situation in Syria from the beginning, and in this chapter, the role of the OPCW in fighting for accountability of the use of chemical weapons in Syria, as well as its other efforts relating to the situation, are briefly introduced.

For the OPCW, the use of chemical weapons in Syria was a shocking surprise since the chemical weapons were last time used in a wide-scale attack decades ago, in the 1980s, during the Iraq-Iran war. However, as described in chapter 2, after Syria acceded to the CWC in 2013, the OPCW was able to fast establish, in cooperation with the UN, the Joint-Mission to secure the destruction of the Syrian chemical weapons stockpiles. Despite some inconsistencies of Syrian declarations and delays of destruction, the process of destruction of Syrian chemical weapons and facilities under difficult circumstances only in some months' timeframe was a remarkable success.

Also, after the mandate of the Joint-Mission ended, the OPCW acted actively in Syria, in close cooperation with the UN, and its efforts have contributed to the accountability of the use of chemical weapons importantly. The investigations of the OPCW, especially the FFM, have collected important evidence to be utilized in forthcoming trials and the work of the FFM served also as a basis for mechanisms to assign the guilt, namely to the JIM and the IIT.

Of the mechanisms of the OPCW, the IIT is the most far-reaching effort to contribute to the eventual accountability, and even its findings have already been described in chapter 2, it deserves some further consideration, as its mandate has raised some controversy.

The mandate of the IIT is to identify the origin – individuals or entities – of those chemical weapons attacks that the FFM has determined or determines to have at least likely taken place, excluding those which perpetrators the JIM has already determined during its time in action. In addition, the cooperation with the UN is continued and guaranteed, as the IIT delivers evidence

it collects to the IIIM and may do the same to any other possible investigatory mechanisms or organs of the UN.[301]

The IIT was established in 2018 by the decision of the CSP after the concerns of the use of chemical weapons in Syria continued, and no other mechanism was able to assign the blame for the attacks after the JIM's mandate had ended.[302] As the proposal that led to the establishment of the IIT by decision C-SS-4/DEC.3 allocated new powers, i.e., power to allocate the responsibility of the attacks, to the OPCW,[303] some states have claimed its establishment as an illegal act.[304] These claims are mostly based on the idea of the OPCW as a technical organization that should not deal with the allocation of responsibility.[305] It is, however, important to note that the IIT is not mandated to assign criminal responsibility, nor it is able to make decisions about the possible non-compliance of the State Parties of the CWC, but the findings of the IIT are transferred to the Executive Council, the CSP and to the UN, where further action can be decided.[306] And indeed, in April 2021, the CSP took an exceptional decision when the rights and privileges of the Syrian Arab Republic under the CWC were temporarily terminated as a result of its failure to clarify the situation surrounding the findings of the IIT.

This chapter has briefly introduced different actions taken by the OPCW in Syria. Although the OPCW is generally considered as a technical organization meant to aim for the complete disarmament of chemical weapons, it has used its mandate in new ways and, in addition to taking care of its traditional tasks, taken steps to participate in efforts to eventually enable assigning criminal responsibility for the use of chemical weapons in the future.

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301 'Investigation and Identification Team (IIT)' (OPCW)
302 Ibid.
303 'Global chemical weapons watchdog adds new powers to assign blame, following attacks' (UN News, 27 June 2018)
304 Francesco Femia and Caitlin Werrell, 'The Use of Chemical Weapons in Syria and the Need for Unity Against Them' (Council on Strategic Risks, 29 April 2021)
305 Ibid.
306 'OPCW Releases First Report by Investigation and Identification Team' (OPCW, 8 April 2020)

4.5.2 The United Nations Reactions to Chemical Weapons Use in Syria

In addition to the OPCW, different organs of the UN have taken numerous resolutions and statements considering the conflict and the use of chemical weapons in Syria and established different mechanisms to contribute to conflict resolution and investigation of crimes committed during the conflict. Although the use of chemical weapons is part of the wider framework and also several general decisions relating to the conflict in Syria are also connected to the use of chemical weapons, in this chapter only brief look at the most central actions of the UN relating to securing accountability to the use of chemical weapons during the conflict is taken.

4.5.2.1 United Nations Security Council

The UNSC is the organ entrusted with a primary responsibility to maintain international peace and security,[307] and as it is widely known, it has been importantly divided on the matters considering Syria and blamed continuously for inefficiency in the face of a serious situation. The UNSC had, however, by March 2021, issued 26 resolutions considering the situation in Syria, and in several of those, it has referred to the responsibility of the Government of Syria to protect its people. However, implementation of the resolution has not been complete.[308] Also, by 2020 Russia – alone or together with China – had vetoed 16 different UNSC resolutions on the situation in Syria,[309] several of which also concerned the use of chemical weapons. This chapter offers a brief look at actual actions and attempts to act of the UNSC relating to the use of chemical weapons in Syria.

First, ideas that the UNSC should impose targeted sanctions and arms embargo on Syria were expressed already in 2011 in the form of a draft resolution that, however, was not voted on.[310] When the chemical attack in Ghouta in August 2013 killed more than 1000 people, a military response of the United States seemed possible, as Russia had announced, that it would veto a

307 ‘United Nations Security Council’ (The United Nations)
308 ‘Syria’ (Global Centre for the Responsibility to Protect, 15 March 2021)
309 Ibid.
310 ‘Chronology of Events Syria’ (Security Council Report, 2 April 2018)

resolution allowing forceful measures in Syria.[311] However, soon after, the United States and Russia agreed on a deal about the destruction of Syria's chemical weapons by June 2014.[312]

The United States and Russia agreed *Framework for Elimination of Syrian Chemical Weapons*[313] was formalized with a UNSC Resolution 2118 and OPCW Executive Council Decision on *Destruction on Syrian Chemical Weapons*[314] , which included a detailed plan for the destruction of Syrian chemical arsenal and provided the UN and the OPCW access to Syrian chemical weapons sites.[315]

Earlier drafts of Resolution 2118 also included referral of the case of Syria to the ICC,[316] but the addition did not make it to the final draft. The final resolution, however, stated that the UNSC would impose measures under Chapter VII of the UN Charter in the case of non-compliance with the resolution.[317] In addition, the resolution concluded that the use of chemical weapons constitutes a threat to international peace and security and demanded accountability of chemical weapons attacks.[318] The resolution also authorized the destruction of the Syrian chemical arsenal outside of its territory by third states and the deployment of an UN-OPCW team to assist with the destruction process.[319] Following the resolution, Syria voluntarily ratified the CWC and became a State Party to the CWC in October 2014.[320]

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311 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 966
312 Kelle Alexander, 'Power in the chemical weapons prohibition regime and the Organisation for the Prohibition of Chemical Weapons' (2018) 55 International Politics. 413
313 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 966
314 OPCW EC-M-33/DEC.127 Decision Destruction of Syrian Chemical Weapons 27 September 2013
315 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)
316 Security Council fails at fresh attempt to renew panel investigating chemical weapons use in Syria' (UN News, 17 November 2017)
317 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)
318 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 969
319 Makdisi Karim, Pison Hindawi Coralie, 'The Syrian chemical weapons disarmament process in context: narratives of coercion, consent, and everything in between' (2017) 38 Third World Quarterly 1697
320 Kelle Alexander, 'Power in the chemical weapons prohibition regime and the Organisation for the Prohibition of Chemical Weapons' (2018) 55 International Politics 413

The resolution and decision to let Syria, just accused of terrifying chemical weapons attack, committed with a nerve agent sarin, to become a party to the OPCW with full rights were not however praised everywhere, and for example, the then Director-General of the OPCW would have preferred an approach, where Syria would have gained the full rights after reasonable time its chemical weapons were destroyed, and no new allegations would have emerged.[321]

In 2014 Russia and China vetoed the resolution that would have referred the case of Syria to the ICC,[322] voted in favor of all other UNSC members.[323] Nevertheless, in March 2015, the UNSC was able to issue resolution 2209, where it condemned the use of chlorine in Syria and implied again that it would take action under Chapter VII if the chemical weapons were used again, and the obligations of resolution 2118 were not obeyed.[324]

Also, in August 2015, after the FFM reports confirmed the continuous use of chlorine in Syria,[325] the UNSC adopted Resolution 2235, which established the JIM, mandated to investigate and identify those involved in the use of chemical weapons in Syria in cases the FFM has confirmed the use, and again reaffirmed the threat of it responding to the use of chemical weapons with Chapter VII measures. In addition, the resolution used language implying the importance to hold perpetrators of chemical weapons attacks accountable and urged all states to cooperate with the JIM.[326] Originally, the JIM was meant to stay active only for a year, but its mandate was renewed in Resolution 2319 until November 2017.[327]

In 2017 Russia vetoed several resolutions, first the one that would have imposed sanctions against persons and entities that the JIM was connected to the use of chemical weapons. The second vetoed resolution was one to condemn the recent attack in Khan Sheikhoun, urge Syria to allow investigations, and declare that the UNSC is determined that the perpetrators of the

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321 Francesco Femia and Caitlin Werrell, 'The Use of Chemical Weapons in Syria and the Need for Unity Against Them' (Council on Strategic Risks, 29 April 2021)
322 SC/11407 (22 May 2014) 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution'
323 'UN Security Council: Ensure Justice for Syria Atrocities' (Human Rights Watch, 30 August 2016)
324 SC/11810 (6 March 2015) 'Adopting Resolution 2209 (2015), Security Council Condemns Use of Chlorine Gas as Weapon in Syria'
325 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 971
326 UNSC Res 2235 (7 August 2015) UN Doc S/RES/2235
327 UNSC Res 2319 (17 November 2016) UN Doc S/RES/2319

attacks need to be held accountable.[328] Later on the same year, Russia vetoed two draft resolutions to extend the mandate of the JIM, and therefore the mandate of the mechanisms ended in November.[329]

Also, in 2018 Russia used its veto power, and the draft resolution to establish the *UN Independent Mechanism of Investigation* failed. In the same meeting, Russia proposed a mechanism that would have let the UNSC be the one to determine the responsibility and another resolution that would have urged the FFM to investigate the recent situation in Douma. Neither of these resolutions did receive enough votes to pass, and in the case of the latter one, the reason was that the launching of the investigation was already announced by the OPCW.[330]

The UNSC holds regular meetings on the use of chemical weapons in Syria, but it has not been able to effective action. As this chapter has taken only a brief look into the actions of the UNSC relating to the use of chemical weapons in Syria, it is shown that the UNSC has been – against the regular view – quite active relating to the case of Syria. What is lacking is the possibility to pass resolutions. Several UNSC (draft) resolutions imply the will to stop the breaches of international law in Syria and to secure accountability of such acts. In addition, it is fair to mention that the UNSC has been able to issue several important resolutions relating to other elements of the conflict, such as cross-border humanitarian aid.[331]

As the main issue of UNSC's incapability to act in Syria clearly is the use of veto power by permanent member(s) of the organ, it is also worth mentioning that even threatened to do so in several resolutions, the UNSC has not actively aimed to secure the full implementation of its passed resolutions or to use its powers under Chapter VII. Considerations where reasons for this can be found are, however, outside the scope of the current research.

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328 'Russia blocks Security Council action on reported use of chemical weapons in Syria's Khan Shaykhun' (UN News, 12 April 2017)
329 Daryl G. Kimball, 'Timeline of Syrian Chemical Weapons Activity, 2012-2021' (Arms Control Association, May 2021)
330 Ibid.
331 See a list for example from: https://www.securitycouncilreport.org/un_documents_type/security-council-resolutions/?ctype=Syria&cbtype=syria

4.5.2.2 United Nations General Assembly

In addition to the UNSC, the UNGA, the main policymaking organ of the UN,[332] has been active relating the chemical weapons use in Syria, and it has issued several resolutions during the years where it has condemned the use of chemical weapons and called for accountability.[333] In this chapter, a brief look is taken at the actions of the UNGA relating to the chemical weapons use in Syria.

During the years, the UNGA has passed several resolutions where it has taken a stand on the issue of the use of chemical weapons, and it has, for example, condemned the inability of the UNSC to refer the case of Syria to the ICC,[334] urged it to taken action to stop the human rights violations in Syria[335] and condemned the failure of the UNSC to react on Syria.[336]

It is, however, held that the most important decision of the UNGA relating to the case of Syria is resolution A/RES/71/248 that was issued in December 2016.[337] The resolution voted on 105 in favor and 15 against, with 52 abstentions, established *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011* (IIIM).[338] The mandate of the IIIM is to assist investigations and prosecutions of war crimes and crimes against humanity taking place in Syria and, in cooperation with the CoI, **"***collect, consolidate, preserve and analyse evidence pertaining to violations and abuses of human rights and humanitarian law*."[339] In addition, the IIIM is also tasked to contribute to possible criminal proceedings in a national, international, or regional court or tribunals by

332 'Functions and powers of the General Assembly' (The United Nations)
333 'R2P Monitor, Issue 53' (Global Centre for the Responsibility to Protect, 15 September 2020) 12
334 UNGA Third Committee (November 2015) UN Doc A/C.3/70/L.47
335 UNGA (18 December 2013) UN Doc A/RES/68/182
336 UNGA (7 August 2012) UN Doc A/RES/66/253 B
337 UNGA (21 December 2016) UN Doc A/RES/71/248
338 'Syria: UN approves mechanism to lay groundwork for investigations into possible war crimes' (UN News, 22 December 2016), 'Mandate' (IIIM)
339 UNGA (21 December 2016) UN Doc A/RES/71/248

preparing court files[340] and by transferring material it has collected to those tribunals.[341] Chemical weapons attacks are part of the IIIMs mandate.[342]

The establishment of the IIIM, however, raised some criticism since some saw UNGA overstepping its mandate.[343] According to this view, the IIIM could have been established only by the UNSC or with Syrian consent, as its functions are prosecutorial.[344] The IIIM, however, cannot prosecute or does not have "*compulsory or binding authority to investigate*," but it only gathers evidence based on other actors' voluntary cooperation with it.[345] Although it was the first time the UNGA decided to establish an organ with a mandate to clearly contribute to criminal proceedings[346] more widely than not, it is considered to had an authority to do so, as according to Article 22 of the UN Charter, the UNGA has a right to "*establish such subsidiary organs as it deems necessary for the performance of its functions*."[347] As the UNGA also has a right to "*discuss any question relating to international peace and security and, except where a dispute or situation is currently being discussed by the Security Council, make recommendations on it*,"[348] establishment of the IIIM can be seen to fell into the competence of the UNGA.[349]

This chapter briefed the actions of UNGA relating to the chemical weapon use in Syria, mainly the IIIM, and the practice of the UNGA relating to the case of Syria shows the topic has been in its interest. However, as the UNGA has only limited powers to take binding decisions, even the legality of the IIIM was questioned by some. The establishment of the IIIM, however,

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340 Ipid.
341 Frequently asked questions' (IIIM)
342 'International tools for fighting against impunity for the use of chemical weapons-guiding document for outreach (The international Partnership against Impunity for the use of chemical weapons) 6
343 Beth Van Schaack, 'The General Assembly & Accountability for International Crimes' (Just Security, 27 February 2017) 7
344 Alex Whiting, 'Russia Maintains Objection to General Assembly's Mechanism for Syria' (Just Security, 24 February 2017)
345 Ibid.
346 Whiting Alex, 'An Investigation Mechanism for Syria: The General Assembly Steps into the Breach' (2017) 15 Journal of International Criminal Justice
347 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) Art. 22
348 Ipid. Art. 11
349 Interesting debate about the legitimacy of the IIIM: GA/12139 (23 April 2019) Seventy-third Session, 76th & 77th Meetings – Head of International Mechanism on Syria Describes Progress Documenting Crimes Committed by Both Sides, as General Assembly Takes Up Report

suggests that the organ is willing to take an innovative and different approach to secure some action relating to mass atrocity crimes when the UNSC has proved incapable of acting. Discussion about the possibilities of UNGA continues in chapters 5 and 6.

4.5.2.3 United Nations Secretary-General

As a third main organ of the UN, the role of the United Nations Secretary-General (SG) should also be considered relating to the case of Syria, and this chapter introduces the main actions taken by him relating to the chemical weapons use in Syria.

After the first allegations of the use of chemical weapons in Syria had emerged, in March 2013, the Government of Syria asked the SG to launch an investigation under the *Mechanism for Investigation of Alleged Use of Chemical, Biological and Toxin Weapons* about the alleged use of the chemical weapons in Aleppo, Khan Al-Asal area (19.3.2013), allegedly committed by rebel forces.[350] France and the United Kingdom, on their part, requested the SG to open an investigation relating to the alleged use of chemical weapons by Syrian armed forces in Khan Al-Asal and Otaybah on 19 March 2013 and in Homs on 23 December 2012.[351] On the next day, the *UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic* (Secretary-General's Mechanism, SGM) was established by the SG in cooperation with the WHO and the OPCW.[352]

The SGM conducted investigations and affirmed the use of chemical weapons in several incidents in 2013,[353] but its mandate did not allow it to assign guilt of the attacks. After Syria

350 Makdisi Karim, Pison Hindawi Coralie, 'The Syrian chemical weapons disarmament process in context: narratives of coercion, consent, and everything in between' (2017) 38 Third World Quarterly 1696
351 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 963 ja Makdisi Karim, Pison Hindawi Coralie, 'The Syrian chemical weapons disarmament process in context: narratives of coercion, consent, and everything in between' (2017) 38 Third World Quarterly 1696
352 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 963
353 'United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic – Final report' (12 December 2013) 1

joined the CWC in October 2013, the SGMs mandate to investigate ceased while the mechanisms of the OPCW took its place.[354]

What comes to the mandate of the mission, at the time the SGM was established, Syria had not yet joined the CWC. The power of the SG to carry out investigations relating to the use of chemical weapons relates to article 99 of the UN Charter, under which the SG decided about investigations about "*alleged use of chemical weapons in the 1980s*."[355] The establishment of the SGM has also been confirmed by the UNGA resolution A/RES/42/37C in 1987 and by the UNSC resolution 620 (1988),[356] based on which the SG can "*carry out investigations in response to reports that may be brought to his attention by any UN Member State concerning the possible use of chemical and biological weapons that may constitute a violation of the 1925 Geneva Protocol or other relevant rules of international law in order to ascertain the facts of the matter and to report promptly the results of any such investigations to all UN Member States*."[357] The involvement of the OPCW in the mechanism on its part was based on the CWC and on the Relationship Agreement between the UN and the OPCW.[358]

Even not relating to chemical weapons, it should also be shortly mentioned that in 2019 when the violence in Syria was intensifying and civilian object were regularly targeted the some UNSC members requested the SG to investigate those attacks, as the reaction through UNSC was blocked due to a likely use of Russian veto power. *The Board of Inquiry* (BoI) was created in September 2019 to investigate specific incidents that had taken place in Syria. The BoI, however, is not considered a great success since its mandate prohibited it to "*include in its report any findings of law*," which meant that it could not define the attacks in terms of IHL or war crimes framework.[359]

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376 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 968
355 Ipid. 963
356 Key Documents Relating to the Secretary General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons''
357 'Frequently Asked Questions about the United Nations Mission to Investigate the Allegations of the Use of Chemical Weapons in the Syrian Arab Republic' (Unoda, 20 September 2013 1
358 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 966
359 Jahaan Pittalwala, 'How a UN Board of Inquiry Failed to Address the Real Problem in Syria' (Global Centre for the Responsibility to Protect, 28 April 2020)

This chapter has shown that the SG, like UNGA, lacks the mandate to make binding resolutions and establish judicial organs on its own, but it has also shown that additional measures can be taken when traditional ways are blocked. Especially, the establishment of BoI, although its mandate was extremely limited, shown an additional route for some level of activity in the cases the road through the UNSC is blocked.

4.5.2.4 The Human Rights Council

Independent, International Commission of Inquiry on the Syrian Arab Republic (CoI) was established by the *Human Rights Council* (HRC) already in 2011, and even the mandate of the CoI is not specifically related to the use of chemical weapons it has also contributed to the issue. Therefore, this chapter takes a look at actions of CoI in Syria, especially relating to the use of chemical weapons.

In 2011 the HRC adopted a resolution A/HRC/RES/S-16/1 after SG had issued a statement calling investigations in Syria. In its resolution, the HRC requested the Office of the United Nations High Commissioner for Human Rights to send a mission to Syria as soon as possible, and in its 17th Special Session, the HRC established CoI with a mandate "*to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable*."[360]

The HRC was able to establish the CoI as it has been given the mandate to establish Fact-Finding Missions even without the consent of the state in question, and UNGA has issued a declaration where states are requested to offer such mission their full support. However, as has been stated earlier, only the UNSC can oblige the state to offer assistance, and therefore, as

360 Van Schaak Beth, 'Mapping War Crimes in Syria' (2016) 92 International Law Studies 284

Syria has been unwilling to cooperate, the CoI has not been able to enter Syria to conducts its investigations.[361]

The CoI has collected large number of evidence[362] indicated responsibility for several mass atrocity crimes and expressed its willingness to transfer the list to the ICC if the case of Syria in the future ends up to the Court.[363] The CoI has also issued several reports on chemical weapons use, and in addition to confirming their use, it has also named the Government of Syria responsible for several attacks.[364]

In addition to the establishment of the CoI, the HRC had, by March 2021, adopted a total of 35 resolutions where it has condemned the continuous atrocities taking place in Syria,[365] in addition to numerous updates and statements relating to the situation in the country.[366]

This chapter has introduced the actions of HRC and especially CoI relating to Syria, and most importantly, it is interesting to note that the mandate of the CoI to also identify the perpetrators has not raised similar resistance than the case was, for example, with the IIT. As the possibilities of the HRC to further contribute to the accountability are similar to the possibilities of UNGA and SG, it has, since the beginning of the conflict, collected remarkable amounts of information to be utilized by other later established mechanisms or perhaps by some upcoming tribunals.

4.5.3 The Partnership Against the Impunity for the Use of Chemical Weapons

In this chapter, *The Partnership Against the Impunity for the Use of Chemical Weapons* is shortly introduced, as the initiative offers a slightly different point of view to the accountability efforts and deserves to be mentioned even its approach is different from mechanisms introduced in the previous chapters.

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361 Bailliet Cecilia, Mujezinović Kjetil Larsen, Promoting Peace Through International Law (Oxford University Press 2015) 381
362 'Chronology of Events Syria' (Security Council Report, 2 April 2018)
363 Adams Simon, 'Failure to Protect: Syria and the UN Security Council' (2015) Global Centre for the Responsibility to Protect Occasional Paper Series No. 5 19
364 UNGA Human Rights Council (8 August 2017) UN Doc A/HRC/36/55
365 'Syria' (Global Centre for the Responsibility to Protect, 15 March 2021)
366 'Independent International Commission of Inquiry on the Syrian Arab Republic' (UN News, 12 April 2017)

The partnership against the impunity for the use of chemical weapons was launched in 2018 from a French initiative, and it constitutes of 40 States and European Union. The purpose of the initiative is to complement the existing framework and act as a forum for cooperation in dealing with the issues of impunity of the use of chemical weapons.[367]

States participating in the initiative have, for example, committed to collect information relevant for holding perpetrators of chemical weapons attacks responsible, designate sanction against different actors – individuals, governments, groups, and entities alike – involved in the use or proliferation of the chemical weapons and publish the names of sanctioned, share the relevant information and aim to enhance capabilities of other participating states' to secure accountability of those involved in the use of chemical weapons.[368]

Above, only a short description of the main aims of the Partnership is given, but although the partnership is a completely voluntary initiative, it is an important contribution to the list of mechanisms that contribute to the accountability of the use of chemical weapons. The willingness of states to commit to fighting against impunity is an important signal that further action is needed. In addition, the commitments of the Participating States to cooperate, share information, and support each other efforts towards accountability can also have practical meaning, as the unwillingness of states to cooperate can be an important obstacle to many accountability possibilities. The information-gathering efforts of the Partnership may also contribute to the work of other mechanisms, such as the IIIM, and commitments of Participating States to use their domestic legislation in a fight against the impunity of the use of chemical weapons could potentially create some deterrence.[369]

In addition, as ultimately the states are the ones creating the international law, their reactions and actions are important in forming new rules and strengthening the old ones. Although the most important way for states to act effectively at the international level is through international

367 'International partnership against impunity for the use of chemical weapons' (International Partnership against Impunity for the use of chemical weapons)
368 Ipid.
369 Anthony Ian, Hart John, 'Strengthening the ban on chemical weapons: The case of Syria' (2018) Stockholm International Peace Research Institute

organizations, as these formal routes can be more or less ineffective, the French Partnership is a great example of new approaches and will of states voluntarily act for accountability.

4.5.4 Non-Governmental Organizations

In this chapter, different mechanisms established by different actors relating to the use of chemical weapons in Syria have been briefly introduced, and it is also fair to devote a couple of lines for the work done by different NGOs and even individuals who had remarkably contributed to the possible accountability of chemical weapons attacks – as well as other atrocities – committed during the Syrian conflict.

In Syria, the role of the NGOs has been extremely important, as they have importantly contributed to gathering and analyzing evidence, building legal cases, collecting testimonies, and revealed the chains of command in Syria.[370] For example, *the Syrian Archive* has documented over 200 chemical weapons attacks and offers its collection of documentation, which consists of documentation from 190 sources and contains, for example, almost 1,5 million videos relating to chemical weapons attacks,[371] as an open-source format to be utilized by any actor. Also, other NGOs, such as the *Commission for International Justice and Accountability,*[372] have collected millions of documents relating to the atrocities during the conflict and issued criminal complaints often together with the Syrian survivors.[373] Especially, the fact that the NGOs have been able to investigate circumstances and collect evidence on the ground in Syria has been extremely important, as the admission to Syria of official investigative bodies has faced some difficulties.

The collections of evidence collected by the NGOs have been used in complaints at the national courts,[374] and their existence saves remarkable amounts of time and resources and makes the

370 Revill James, Katz Rebecca, Fasoli Elena, Mohammed Einas, Shiotani Himayu, Menon Aditya, 'Tools for Compliance and Enforcement from Beyond WMD regimes' (Unidir 2021) 31, Thomas Abgrall, 'War crimes in Syria: a step on the road to justice for the victims?' (Equal Times, 12 April 2021)
371 'Chemical Weapons Database' (Syrian Archive)
372 'Commission for International Justice and Accountability' (Commission for International Justice and Accountability)
373 Thomas Abgrall, 'War crimes in Syria: a step on the road to justice for the victims?' (Equal Times, 12 April 2021)
374 Marlise Simons, 'Criminal Inquiries Loom Over al-Assad's Use of Chemical Arms in Syria' (The New York Times, 2 March 2021)

proceedings possible even at the national level, which would otherwise be impossible due to the complexity of cases.[375] For example, collecting the evidence used in chemical weapons attacks criminal complaints in Sweden took more than three years of work from the NGOs filing the complaint.[376]

5. Limitations and Benefits of Different Possibilities Towards Accountability

5.1 Limitations and Benefits of Accountability Efforts Through Different Channels

In the previous chapters, this research has focused on international rules relating to the use of chemical weapons, possible avenues for accountability in international law, and actual efforts and possibilities for accountability for the chemical weapons use in Syria. In this chapter, previous considerations are drawn together, and a comparison of the regulation to actual efforts in Syria committed in chapter 4 is used as a starting point for further analysis about the obstacles and benefits of each accountability possibility. The analysis based on the case of Syria will help to perceive where the practical problems lie when considering the possibilities of international law to hold perpetrators accountable and whether they can fundamentally be located in the field of ICL or in the field of international politics. The ultimate aim of the first part of the chapter is, therefore, to answer the question of where the practical problems lie when considering the possibilities of international law to hold perpetrators accountable.

Finally, based on the analyzed case, different possibilities, and located issues, conclusions are made about how well-adapted the current system is to hold perpetrators of chemical weapons attacks accountable. Based on these considerations, chapter 6 discusses some points of further development in international law to enhance accountability possibilities within the system.

375 Thomas Abgrall, 'War crimes in Syria: a step on the road to justice for the victims?' (Equal Times, 12 April 2021)
376 Universal Jurisdiction in Sweden: Victims of Syria's Chemical Weapons Attacks Demand Justice' 2

5.1.1 The International Criminal Court – Limitations and Benefits

Based on the comparison of the situation in Syria and the articles of the Rome Statute it was concluded in chapter 4.2. that even the ICC was established to deal with such serious cases like Syria, the court does not have jurisdiction over the use of chemical weapons during the Syrian conflict, as Syrian Arab Republic is not a state party to the ICC or accepted its jurisdiction over the special case by declaration. Further, the UNSC has not been able to refer the case of Syria to the ICC, as the veto power has prevented it from doing so, and therefore, there are no possibilities for comprehensive action by the ICC.

As described in chapter 4.2. there, however, remains a possibility that the ICC would investigate and prosecute acts of nationals of the state parties committed in Syria. This would, however, enable only limited proceedings, which would leave most of the perpetrators outside the proceedings, and the proceedings could raise serious questions about their fairness.[377] In addition, as the ICC is meant to deal with large and serious cases, it is unlikely that separate crimes committed by nationals of ICC's state parties would activate the ICC proceedings.

To analyze challenges of the international criminal system from a wider than purely jurisdictional perspective, this chapter analyses challenges and benefits of the ICC proceedings in a case the referral to the court was, however, made. Especially, the focus is on the personal reach of the possible proceedings, as well as possible practical obstacles within the ICC proceedings.

First, the ICC statute does not recognize immunities or other obstacles for jurisdiction as stated in Article 27 of the Rome Statute. In addition, According to Article 29, crimes under the ICCs jurisdiction are not subject to any statute of limitations. Therefore, when it comes to a personal jurisdictional point of view, there are no important limitations to the possible array of persons prosecuted at the court. While the ICC usually focuses on prosecutions of the most responsible ones, due to the complementary of its jurisdiction, lesser perpetrators could still be charged in national courts.

377 Patrick Wall, 'US House of Representatives Overwhelmingly Calls for War Crimes Tribunal for Syria (with Jurisdiction to Try Americans, Apparently)' (Opinio Juris, 22 March 2016)

However, even the ICC Statute lifts the immunity from high-ranking officials, the question of whether the Rome Statute can have a "horizontal effect" that overrules the customary rule of immunity has raised some questions, especially relating to the current head of states. The ICC issued a first arrest warrant on Sudanese President Omar al-Bashir already in 2009,[378] but several states where al-Bashir visited refused to surrender him, arguing it would be against customary law, no matter the referral of case of Sudan was issued to the ICC by the UNSC.[379]

After States refused to surrender al-Bashir, the ICC confirmed its interpretation by its Appeals Chamber decision where it held that al-Bashir did not enjoy immunity under customary law and he should have been surrendered to the ICC.[380] As of early 2020, Sudan finally decided to surrender al-Bashir to the ICC,[381] but so far, it has not yet done so.[382] The reactions of other States to the case leave the customary status unclear because other states did not condemn nor approve the behavior of states refusing to surrender al-Bashir, nor did they react to the Appeals Chamber decision.[383]

This case surrounding the immunities relates importantly to the perhaps biggest issue of the ICC to enforce comprehensive proceedings: the court cannot by itself implement its decisions, arrest persons, collect evidence or transfer them at the territory of its State Parties, but it relies importantly on States' cooperation.[384] The unwillingness of states to cooperate with the court might raise issues in all stages of proceedings, from evidence gathering and investigations to actual proceedings, which the court cannot pursue *in absentia*, although it may confirm charges even if the accused was not present.[385] Within the ICC, a refusal to cooperate can be quite easily reasoned, as the jurisdiction of the court is complementary and the state can simply decide to

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378 The International Criminal Court, 'Al Bashir Case. The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09'
379 Adil Ahmad Haque, 'Head of State Immunity is Too Important for the International Court of Justice' (Just Security, 24 February 2020)
380 Prosecutor v. Omar Hassan Ahmad al-Bashir (The Appeals Chamber Judgment) 6 May 2019 1
381 Samy Magdy, 'Official: Sudan to hand over al-Bashir for genocide trial' (AP News, 11 February 2020)
382 The International Criminal Court, 'Al Bashir Case. The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09'
383 Adil Ahmad Haque, 'Head of State Immunity is Too Important for the International Court of Justice' (Just Security, 24 February 2020)
384 Swart Bert, 'General Problems' in Cassese Antonio, Gaeta Paola and Jones John R.W.D. (eds), The Rome Statute of the International Criminal Courts: A commentary, Vol. II (Oxford University Press 2002) 1589
385 Sluiter Göran, Friman Håkan, Linton Suzannah, Vasiliev Sergey and Zappala Salvatore, International Criminal Procedure - Principles and Rules (Oxford University Press 2013) 108

try persons within its own courts, although the possibility for ICC proceeding in a case a state conduct proceedings only to avoid the ICC's jurisdiction can be found from Rome Statute.[386]

State Parties to the ICC have, however, a wide obligation to cooperate "fully" with the ICC in investigation and prosecution,[387] as well as with the request of arrest and surrender of suspects,[388] and offer other types of assistance if requested.[389] After receiving an arrest warrant, for example, issued by the Pre-Trial Chamber of the Court,[390] State Parties need to immediately take steps for the arresting of the person in question.[391] Moreover, national authorities, when receiving a request to arrest or surrender a person, do not have the competence to examine if the grounds for ICC's material jurisdiction are present, nor decide if the arrest is necessary, but this power is retained for the ICC itself.[392] Therefore the state parties have an obligation to surrender the suspect to the ICC if the arrest warrant is issued.[393]

However, the duty to cooperate only binds State Parties to the Rome Statute, and even the ICC may invite non-state-parties to cooperate they are not required to do so. The only exemption for this is that the obligation to cooperate is laid down by binding UNSC resolution under Chapter VII of the UN Charter, which can relate to the UNSC referral to the ICC or be a separate act in cases where the UNSC concludes that international cooperation is needed when the case is considered to amount a threat to international peace and security.[394]

In practice, if a State Party to the Rome Statute or a state that has entered into an *ad hoc* arrangement or agreement with the ICC does not fulfill its cooperation obligations only thing

386 Radziejowska Maria 'Awaiting Justice: Prospects for Prosecuting War Crimes in Syria' (2013) The Polish Institute of International Affairs Policy Paper No. 31 5
387 Rome Statute Art. 86
388 Ipid. Art. 89 (1)
389 Ipid. Art. 93
390 Ipid. Art. 58 and 59
391 Swart Bert, 'Arrest proceedings in the custodial state' in Cassese Antonio, Gaeta Paola and Jones John R.W.D. (eds), The Rome Statute of the International Criminal Courts: A commentary, Vol. II (Oxford University Press 2002) 1251
392 Ipid. 1253-54
393 The International Criminal Court, 'Al Bashir Case. The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09'
394 Ciampi Annalisa, 'The obligation to Cooperate' in Cassese Antonio, Gaeta Paola and Jones John R.W.D. (eds), The Rome Statute of the International Criminal Courts: A commentary, Vol. II (Oxford University Press 2002) 1611

the ICC can do is to inform the Assembly of State Parties or if the case question is a UNSC referral, the UNSC about the situation, and wait for their possible reactions.[395] In addition, the Rome Statute establishes consultation and dispute settlement procedures, but they may take time,[396] and if the issue cannot be resolved, the ICC can refer the case of non-compliance to the Assembly of States Parties, which can settle the dispute, make recommendations on its settlement, or further it to the ICJ.[397]

Even the most relevant cooperation partner to the ICC in the case of Syria would be Syria itself, this would not – theoretically – constitute an issue, as if Syria joined the ICC, it would also be obliged to cooperate, and if the referral was made through the UNSC, cooperation could be forced through it. In practice, however, if the government was unwilling to cooperate with the ICC, the possibilities to force it to do so would be extremely limited. Past cases have shown that especially when investigations are committed towards government still in power, unwillingness or refusal of the State to cooperate can importantly hinder the quest for justice.[398]

This chapter has discussed some obstacles and benefits of the possible proceedings at the ICC. As has been stated, the ultimate problem relating to the case of Syria is, however, the lack of its jurisdiction over the case, as Syria is not a State Party to the Rome Statute, nor has the case been referred to the court by the UNSC. However, if the case would end up on the desk of the ICC Prosecutor, the ICC could serve as a logical forum for the proceedings since the case of Syria represents exactly the kind of case the ICC was established for. In addition, due to the bar of immunities and other obstacles to exercising its jurisdiction, the ICC could initiate proceedings against a wide array of perpetrators of chemical weapons attacks – and beyond. Due to a complementary of the ICC's jurisdiction, other perpetrators could still be charged at the national level.

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395 Rome Statute Art. 87 (5) (b) and 87 (7)
396 Sluiter Göran, Friman Håkan, Linton Suzannah, Vasiliev Sergey and Zappala Salvatore, International Criminal Procedure - Principles and Rules (Oxford University Press 2013) 99
397 Rome Statute Art. 119
398 Radziejowska Maria 'Awaiting Justice: Prospects for Prosecuting War Crimes in Syria' (2013) The Polish Institute of International Affairs Policy Paper No. 31 5

However, proceedings at the ICC would also include obstacles, as there are no effective ways to force unwilling states to cooperate with the court if they decide not to do so. Past cases have shown that even the Rome Statute establishes a formal duty for its State Parties to cooperate, enforcement of this obligation may be extremely difficult.

5.1.2 *Ad hoc* and Hybrid Tribunals – Limitations and Benefits

As the case is with the ICC, also with *ad hoc* or hybrid tribunals, the fundamental issue relating to the case of Syria is that the UNSC has not been able to create such a tribunal, although the Draft Statute was introduced already in 2013. Neither Syria itself is not willing to contribute to establishing such a mechanism, and possible efforts to establish the tribunal by third states under their national laws would face serious issues of enforcement.

This chapter, however, discusses the benefits and issues of *ad hoc* or hybrid tribunal solution if such an organ would be established. First, however, it is important to recognize that the jurisdiction, mandate, and structure of these tribunals may vary, and no general model exists. Therefore, considerations of this chapter can only be made at the general level, and they are dependent on the model according to which the tribunal would be established.

First, in the case of *ad hoc tribunals,* their clear benefit is their strong international support and mandate that derives from the UNSC. If such a tribunal was to be established by the UNSC, the obligation to follow its orders would stem from the powers of the UNSC, namely from article 25 of the UN Charter, which contains an obligation of Member States to accept and enforce decisions of the UNSC, and these decisions include decisions of established subsidiary organs if their mandate is derived from binding powers of the UNSC.[399]

Usually, in order to enable *ad hoc* tribunals to work, a wide duty to cooperate with them is issued to the states. In the case of ICTY, for example, states were required to cooperate "*without undue delay with any request for assistance or an order issued by a Trial Chamber*."[400] Usually, *ad hoc* tribunals do not also have reciprocity requirements, and parties receiving a request to

399 Sluiter Göran, Friman Håkan, Linton Suzannah, Vasiliev Sergey and Zappala Salvatore, International Criminal Procedure - Principles and Rules (Oxford University Press 2013) 99
400 'Updated Statute of the International Criminal Tribunal for the Former Yugoslavia' (September 2009) Art. 29

cooperate do not have a right to interpret its scope by themselves. However, usually, the tribunals themselves cannot take measures in case of non-compliance,[401] but the UNSC holds the responsibility to secure compliance with tribunals it has established.[402] The lack of own enforcement mechanisms of the tribunals may, however, cause difficulties, similarly as already discussed relating to the ICC. In addition, if the tribunal is established with the consent of the state in question and without the UNSCs presence, the statute of the tribunal cannot even include an obligation to cooperate with it, and then issues of cooperation do not stem only from the practice but also from the jurisdiction.

Similar issues relating to arrest warrants may also occur within these kinds of tribunals as with the ICC, even possibility to lift immunities and try also high-ranking state officials – also former heads of states – is a common element also for *ad hoc* and hybrid tribunals.[403] However, no *ad hoc* or hybrid tribunal so far has been able to commit proceedings *in absentia,*[404] at least if the accused does not willingly waive his right to be present in the proceedings.[405]

What comes to mandate of the *ad hoc* or hybrid tribunals, the fact that the Statutes of such tribunals are drafted from the start each time, although old statutes can be used as a model, may be seen as an advantage or disadvantage, as can possible limitations to the tribunals' mandates. Possibility to draft the Statute of the tribunal from scratch gives an opportunity to take specific circumstances into account in a flexible manner,[406] and if the mandate is specifically limited to a certain area, timeframe, or to certain persons, some issues relating to determining the most serious cases for the court to deal with might be reduced as clear and framed mandate gives the tribunal a possibility to focus only on a given situation.

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401 Sluiter Göran, Friman Håkan, Linton Suzannah, Vasiliev Sergey and Zappala Salvatore, International Criminal Procedure - Principles and Rules (Oxford University Press 2013) 105
402 Ipid. 09
403 Radziejowska Maria 'Awaiting Justice: Prospects for Prosecuting War Crimes in Syria' (2013) The Polish Institute of International Affairs Policy Paper No. 31 5
404 Sluiter Göran, Friman Håkan, Linton Suzannah, Vasiliev Sergey and Zappala Salvatore, International Criminal Procedure - Principles and Rules (Oxford University Press 2013) 107
405 Cassese Antonio, International Criminal Law (Oxford University Press 2003) 402
406 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 133

For example, the Syrian conflict has raged for over a decade, and a countless number of different international crimes are committed by a wide spectrum of different actors. Therefore, to comprehensive proceedings court which would only focus on the particular case would have clear benefits, and it might be able to prosecute a greater number of cases and a wider range of lower and higher-level perpetrators than the ICC or separate individual proceedings.[407] Although more limited mandate – such as a mandate to investigate only those most responsible – can help with costs and lack of resources, if only low or only high ranking persons are targeted, the goal of comprehensive accountability, as well as their felt legitimacy among people could be questioned and accusations on biased system raised. [408]

In addition, as the *ad hoc* and hybrid tribunals are always established case by case, they may be located within the area they are investigating. Locating the court near the place where crimes were committed has clear, practical advantages, such as nearness of evidence and witnesses. This is, however, not always possible, for example, due to security or financial concerns. In addition, locating the tribunal to countries where the crimes under its jurisdiction have taken place may expose the proceedings to pressure or interference.[409] However, especially in the case of hybrid tribunals mixing local and international law and located within the area the crimes were committed, the proceedings may be easier to accept, as they can allow the "ownership" of the process of locals[410] and even help with the wider process of reconciliation of the society.[411]

While also international elements – law and personnel – are present, the international audience can acknowledge the legitimacy of the proceeding.[412] While local personnel is familiar with the culture and circumstances, the involvement of international staff can help to guarantee the

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407 Patrick Wall, 'US House of Representatives Overwhelmingly Calls for War Crimes Tribunal for Syria (with Jurisdiction to Try Americans, Apparently)' (Opinio Juris, 22 March 2016)
408 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 135
409 Howard Varney and Katarzyna Zduńczyk 'Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes' (2018) International Center for Transitional Justice 5
410 Public International Law & Policy Group, 'Hybrid Tribunals: Core elements. Legal Memorandum' (June 2013) i
411 Smeulers Alette, Fred Grünfeld, International Crimes and Other Gross Human Rights Violations: A Multi- And Interdisciplinary Textbook (BRILL 2011) 473
412 Public International Law & Policy Group, 'Hybrid Tribunals: Core elements. Legal Memorandum' (June 2013) 2-3

independence and impartiality of proceedings,[413] although it may not always be easy to combine national and international legal concepts, as significant differences may exist.[414] The presence of the international personnel can, however, also contribute to the rebuilding of the society,[415] for example, by strengthening the existing judicial systems by allowing knowledge transfer from international experts to locals. In a country recovering from a long-lasting civil war, rebuilding judicial infrastructure is important because a strong legal system can fight impunity and have a deterrent effect on future crimes.[416]

However, it is also true that effective functioning of a tribunal in a dysfunctional and war riven legal system may be difficult, and there are no guarantees that local – or foreign – authorities would effectively and willingly cooperate with the system, and in the past, the lack of cooperation has hindered the effectiveness of international tribunals.[417]

Of course, the proceedings are also expensive, and lack of resources such as money or personnel can negatively affect the outcome.[418] In addition, if funded by western powers, allegations can arise about the impartiality of the tribunal, and it is undoubtedly true that individual tribunal might be more vulnerable to political manipulation, than for example, the permanent ICC.[419]

This chapter has discussed some benefits and issues relating to the possibilities of *ad hoc* and hybrid tribunals, but due to different possible structures and mandates, it is difficult to conclude their biggest benefits or issues, as everything depends on their jurisdictional base, the scale of their mandate and ways they are organized. However, as previous considerations imply, if well-structured and supported by the international community, UNSC especially, they might offer a personalized way for accountability that can serve the special needs of the situation in question

413 Smeulers Alette, Fred Grünfeld, International Crimes and Other Gross Human Rights Violations: A Multi- And Interdisciplinary Textbook (BRILL 2011) 472-73
414 Cassese Antonio, International Criminal Law (Oxford University Press 2003) 345
415 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 134
416 Public International Law & Policy Group, 'Hybrid Tribunals: Core elements. Legal Memorandum' (June 2013) 5-6
417 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 135-136
418 Ibid. 135
419 Mark Kersten, 'Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?' (Justice in Conflict, 17 October 2016)

and allow more comprehensive proceedings where a wider range of perpetrators could face justice. In addition, the establishment of such tribunals near the area where the crimes have been committed would allow participation of the local population, ease the evidence gathering, and support from the international community could help with rebuilding the society.

However, serious issues may occur – similarly as with the ICC – if relevant states are not willing to cooperate with the tribunals. Proceedings may also be vulnerable for political manipulation or to serve "victor's justice," and especially considering the hybrid tribunals their financing, or combining international and national law may cause issues. In addition, and most importantly, the establishment of such tribunals requires the consent of the State in question or mandate deriving from the UNSC. If established without such a mandate, the lack of obligation to cooperate with the tribunal would be a serious obstacle to its proceedings.

5.1.3 Principle of the Universal Jurisdiction – Limitations and Benefits

The principle of universal jurisdiction is the only mechanism through which any action relating to the use of chemical weapons in Syria has so far taken place. While the chemical weapons use cases based on universal jurisdiction in Sweden, Germany, and France are still pending, the previous cases imply that some level of effective action can be taken at the national level. This chapter examines some important obstacles of the universal jurisdiction but recognizes its value as an avenue towards accountability when other avenues are blocked.

Even the principle of universal jurisdiction, in theory, gives states wide discretion and the possibility to prosecute international crimes, in practice, several factors hinder these possibilities. Even the proceedings in national courts are clearly a step forward with accountability efforts, national proceedings as the main channel for accountability include several issues, such as possible immunities and acceptance of the proceedings, as well as practical issues relevant especially to cases where the prosecuting country does not have custody of the prosecuted, and due to the practical difficulties, the principle of universal jurisdiction is hardly is an ideal channel for accountability for severe war crimes.

First, the principle of universal jurisdiction raises controversy because it interferes with sovereignty.[420] In addition, the use of universal jurisdiction is quite vulnerable to political considerations and pressure from, for example, other states, which can have an effect on states' decisions to use – or not to use – this possibility.[421] Also, the principle is often followed by political considerations, and states may decide to use the possibility on a case-by-case basis because the breach of international law is a necessary condition for the use of universal jurisdiction but not a sufficient requirement.[422] Therefore, even several states have laws allowing the use of universal jurisdiction, it is not widely used.[423] Reasons for that are not only related to politics but also practical difficulties relating inevitably to the use of the principle of universal jurisdiction.

It is generally held that there exist two versions of universal jurisdiction. The less disputed form is the use of this jurisdiction when the accused is in custody, or at least at the territory of the state.[424] The second version, however, allows the prosecution of international crimes even in cases the alleged perpetrator is not present.[425] This issue related to the use of universal jurisdiction *in absentia* is somewhat unclear. In the Arrest Warrant case, the court was divided on the matter,[426] and it remained questionable if *in absentia* prosecutions are permitted if the search for perpetrators from States' territory is not successful.[427] Today, there exists no general rule for *in absentia* proceedings, but several countries allow the use of universal jurisdiction relating to many crimes also *in absentia*.[428] However, at least common law countries require always that the accused is present at the trial, and the importance of this is also emphasized by

420 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 97
421 'Applying Universal Jurisdiction to Prosecute International Crimes and the Implications for Syrian Victims' (International Center for Transitional Justice, 23 December 2020)
422 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 468
423 Smeulers Alette, Fred Grünfeld, International Crimes and Other Gross Human Rights Violations: A Multi- And Interdisciplinary Textbook (BRILL 2011) 476
424 Simma Bruno, Müller Andreas Th., 'Exercise and limits of jurisdiction' in James Crawford and Martti Koskenniemi (eds), The Cambridge companion to International law (Cambridge University Press 2012) 146
425 Cassese Antonio, The Oxford Companion to International Criminal Justice (Oxford University Press 2009) 452
426 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 469
427 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 31
428 'National Courts and Foreign Policy: Prosecuting Foreign State Leaders for International Crimes' (2015) FIIA Briefing Paper 187

the international courts.[429] Often investigation and request for extradition and arrest warrants *in absentia* are separated from actual trials *in absentia*, from which the first-mentioned is more accepted,[430] as actual trials *in absentia* are often prohibited.[431]

Reasons, why most countries require for investigations and/or prosecutions that the accused is present at their territory, are partially legal but also practical. Even the state had a right to initiate proceedings based on universal jurisdiction, it does not create an obligation for other states to assist.[432] States cannot in general act, for example, arrest persons in other states' territory, unless there is consent from the territorial state,[433] and therefore assisting with the investigations or, for example, surrendering the person is in consideration of the state to which the request for cooperation is issued to.

The unwillingness to cooperate is also not the only possible issue, but national laws have their own procedures and conditions, for example, for surrendering persons,[434] and they often include some statutory exceptions and other conditions and state that receives the request to assistance can evaluate the request and grounds for its executability independently. And although there exist different cooperation mechanisms relating, for example, arrest warrants and extradition, there are no effective possibilities to force other states to cooperate; surrendering a person requested always requires at least some will for the state to do so.[435]

Even persons prosecuted or of whom an arrest warrant is issued sometimes arrive to the reach of the prosecuting state, those rarely are the perpetrators that bear the greatest responsibility, as they might fear the get surrendered to the trial, they often know to stay away. Letting most responsible persons walk free and committing selective justice is problematic from the viewpoint of legitimacy. Even some countries' legislation allows them to start proceedings and

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429 Cassese Antonio, International Criminal Law (Oxford University Press 2003) 400
430 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 108
431 Sluiter Göran, Friman Håkan, Linton Suzannah, Vasiliev Sergey and Zappala Salvatore, International Criminal Procedure - Principles and Rules (Oxford University Press 2013) 312
432 Howard Varney and Katarzyna Zduńczyk 'Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes' (2018) International Center for Transitional Justice 24
433 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 478-79
434 Sluiter Göran, Friman Håkan, Linton Suzannah, Vasiliev Sergey and Zappala Salvatore, International Criminal Procedure - Principles and Rules (Oxford University Press 2013) 313
435 Ibid. 96

issue arrest warrants on persons not present in the country based on universal jurisdiction, as has been done in, for example, in Germany, the effectiveness of these proceedings can be questioned for beforementioned reasons.[436] Issuing international arrest warrants on high-rank officials can, however, have a deterrence effect, send a strong signal for the perpetrators and to victims, and of course, limit perpetrators' possibilities to travel since they might be extradited to the country having ongoing proceedings against them.[437]

However, relating to possible universal jurisdiction-based proceedings against high-level perpetrators also another issue is present: immunities of customary international law. The relationship between the concepts of immunities and international crimes is controversial, and there exists a lot debated tension between public international law and ICL.[438]

The matter is currently controversial,[439] and it has been argued that functional immunity does not bar prosecutions of international crimes.[440] The view, however, is not fully supported by the state practice[441] but confirmed by the courts of several states and supported, for example, by the UNGA.[442] Relating to personal immunity, the current situation seems quite clear, and it is quite widely acknowledged that it bars also the prosecutions of international crimes as long as the person in question remains in office.[443] This view has also been supported by several national courts that have upheld personal immunity even in cases of serious international crimes.[444] In

436 Patrick Kroker & Alexandra Lily Kather, 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany' (EJIL:Talk! 12 August 2016)
437 Universal Jurisdiction in Sweden: Victims of Syria's Chemical Weapons Attacks Demand Justice' 7
438 Olasolo Héctor, Martínez Vargas Juan Ramón, Quijano Ortiz Laura, 'The tension between State Durties to Investigate and Prosecute ius Cogens Crimes and Immunity of the Highest State Representatives from Foreign Criminal Jurisdiction' (2020) 20 International Criminal Law Review 841 and Howard Varney and Katarzyna Zduńczyk 'Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes' (2018) International Center for Transitional Justice 22
439 Olasolo Héctor, Martínez Vargas Juan Ramón, Quijano Ortiz Laura, 'The tension between State Durties to Investigate and Prosecute ius Cogens Crimes and Immunity of the Highest State Representatives from Foreign Criminal Jurisdiction' (2020) 20 International Criminal Law Review 859
440 Cassese Antonio, The Oxford companion to International Criminal Justice (Oxford University Press 2009) 450
441 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 688
442 Howard Varney and Katarzyna Zduńczyk 'Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes' (2018) International Center for Transitional Justice 22
443 Cassese Antonio, The Oxford Companion to International Criminal Justice (Oxford University Press 2009) 451
444 Crawford James, Brownlie's Principles of Public International Law (8th ed. Oxford University Press 2012) 689

addition, the view is also confirmed by the ICJ in the Arrest Warrant case (2000), which related to the arrest warrant of the Congolese minister of foreign affairs issued by Belgium. In the complaint issued by Congo, it claimed that the arrest warrant was illegal and against the principle of immunity. The ICJ held that the personal immunity reaches to foreign ministers, and importantly that s/he is protected by the immunity.[445] The ICJ, however, recognized four situations when the immunities can be lifted: when persons' own countries waive the immunity, when they are prosecuted in their own national courts, when s/he leaves the office after which the prosecutions are possible considering crimes committed before or after s/he took office or while s/he was in office relating to cases committed in "private capacity," or when proceedings are conducted in international criminal courts.[446] The decision, however, was not unanimous and raised some criticisms.[447]

Since 1990 several heads of states have also been charged with serious crimes in their home countries and abroad, in hybrid and national courts. Probably the most famous case is the Pinochet-case from 1998 when the United Kingdom denied the functional immunity of the former Chilean dictator based on the severity of crimes in question (torture and crimes against humanity)[448] by arguing that torture could not be seen as part of the official functions of a head of state.[449] Also, after the Pinochet-case, there have been numerous cases of foreign national jurisdictions investigating and/or prosecuting former highest representatives of foreign states after they have left their office.[450] Most of the cases have been rejected, and only a few have led to actual criminal proceedings.[451]

However, current criminal complaints issued in France and Germany about the use of chemical weapons have implied even the possibility of charges against President al-Assad himself, as

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445 Smeulers Alette, Fred Grünfeld, International Crimes and Other Gross Human Rights Violations: A Multi- And Interdisciplinary Textbook (BRILL 2011) 477
446 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Judgment) [2002] ICJ Rep 61
447 Ibid.
448 Other examples see 'National Courts and Foreign Policy: Prosecuting Foreign State Leaders for International Crimes' (2015) FIIA Briefing Paper 187
449 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 107
450 Olasolo Héctor, Martínez Vargas Juan Ramón, Quijano Ortiz Laura, 'The tension between State Durties to Investigate and Prosecute ius Cogens Crimes and Immunity of the Highest State Representatives from Foreign Criminal Jurisdiction' (2020) 20 International Criminal Law Review 857
451 Ibid. 845

they are importantly aiming at high-rank officials.[452] Like mentioned before, these complaints are at the time of writing only pending, and even the general view is that al-Assad is protected by customary immunity as long as he stays in office, the investigations can importantly contribute to possible proceedings when he leaves the office.[453]

This chapter has discussed some issues surrounding the applicability of the principle of universal jurisdiction, such as their possible political dimensions, issues caused by customary immunities, and the unwillingness of other states to cooperate, especially relating to cases *in absentia*. Especially, the lack of clear preconditions and limits for the applicability of the principle hinders possibilities of its use.

While there are serious issues stemming from the lack of enforcement possibilities, the clear benefit of the universal jurisdiction is that through it, the proceedings are at least possible, was their enforcement possible or not. Even the enforcement would stay in the middle way, for example issuing arrest warrants to persons absent may have a deterrence effect and send a strong signal that certain actions are not acceptable. The principle of universal jurisdiction certainly has an important role as a possibility of a last resort when other possibilities are not present.[454]

5.1.4 Considerations on Contributions Towards Accountability of Other Actors

In this chapter, the importance of the other efforts to contribute to accountability in the case of Syria is briefly discussed in order to analyze the system from a more comprehensive perspective. As was done with the jurisdictional measures, also here benefits and main issues hindering the effectiveness of presented actions or actors are discussed based on considerations presented in chapter 4.5. As is already referred, the international criminal system does not exist in a vacuum, nor it is a separate action taken outside of other contexts, and therefore other types

452 Marlise Simons, 'Criminal Inquiries Loom Over al-Assad's Use of Chemical Arms in Syria' (The New York Times, 2 March 2021)
453 26.5.2021 Bashar al-Assad was re-elected for a 4th seven-year term as President of Syrian Arab Republic. Integrity of the elections was questioned.
454 Smeulers Alette, Fred Grünfeld, International Crimes and Other Gross Human Rights Violations: A Multi- And Interdisciplinary Textbook (BRILL 2011) 476

of contributions than efforts to initiate judicial proceedings are also important in order for the system to function effectively and for the accountability to be possible.

First, in securing accountability for Syria in the future, the importance of the work of the OPCW cannot be underestimated. In addition to the "*surprisingly successful*"[455] disarmament process, the OPCW was able to carry out in Syria under an extremely tight timeline, and in difficult circumstances,[456] the OPCW has contributed importantly to efforts towards accountability through different mechanisms.

As described in previous chapters, the OPCW is not judicial or not even a quasi-judicial organ and cannot take action on criminal responsibility. The establishment of the IIT, however, signaled a strong interest to contribute to accountability, as it, by indicating the responsibility and sharing the information it collects to the IIIM and possibly other future investigative bodies of the UN, contributes clearly to possible future criminal proceedings.[457]

When it comes to actions of different UN bodies, it has already made clear that the incapability of the UNSC to act has been the biggest stone on the way to the accountability of the use of chemical weapons in Syria through international courts and tribunals. As the UNSC holds almost an autocracy over action relating to issues of international peace and security, it is clear that its incapability to take effective action is a serious concern. However, the UNSC action of sending a demarche to the SG to request for setting up the BoI in 2019 was an interesting effort from the UNSC to by itself try to circumvent its stalemate.

In addition, the UNSC has repeatedly condemned the use of chemical weapons in Syria in its several resolutions and threatened to use its chapter VII powers if its resolutions were not followed. These threats have so far not become a reality, but issued resolutions of the UNSC, however, have political – and in some context possibly even legal – weight. Especially the establishment of JIM to identify the perpetrators of the chemical weapons attacks in Syria was

455 Makdisi Karim, Pison Hindawi Coralie, 'The Syrian chemical weapons disarmament process in context: narratives of coercion, consent, and everything in between' (2017) 38 Third World Quarterly 1698
456 Kelle Alexander, 'Power in the chemical weapons prohibition regime and the Organisation for the Prohibition of Chemical Weapons' (2018) 55 International Politics 416
457 Investigation and Identification Team (IIT)' (OPCW)

clearly a positive step from the UNSC to contribute to the accountability. However, not at any point did the UNSC comment on what could possibly be done after JIM had attributed the responsibility.

As of other UN organs, especially UNGA by establishing the IIIM has shown an innovative approach and will to take action in difficult situations, and the establishment of the IIIM has widely seen as a welcomed step and reach of UNGAs mandate as long as possible. The decision to establish IIIM truly was "*historic and unprecedented*"[458] as it clearly has a connection to future accountability proceedings, as it not only preserves the evidence but also prepares files and is meant to distribute its material to the national or international courts.[459] In addition, the IIIM works kind of as a contact point between NGOs that have collected the evidence and between the judicial actors.[460] From one point of view, the fact that the IIIM is not a tribunal – and that the UNGA does not hold powers to establish one – is a prove of the issues and stagnation of the system, but from one point of view, it implies innovative approaches and will to seek for new solutions.

Also, within the UN system, efforts of the SG and HRC have been important in condemning the atrocities, authorizing investigations, and collecting evidence of crimes committed in Syria. Indeed, as it is described, in Syria, several different Fact-Finding Mechanisms, with different mandates and outcomes have been established, and although they all have had their clear purpose, one might argue that in addition to their primary purpose – collect and preserve evidence – they were needed to show that something is done. OHCRH publication about the commissions of inquiry states that asserting blame of someone of international crimes, especially by the UN, is a serious matter and often used as a measure in the fight against impunity.[461] As the information collected by different mechanisms may be transferred to

458 Mark Kersten, 'United We Stand, Divided We Fall — The UN General Assembly's Chance to Bring Justice to Syria' (Justice in Conflict, 30 December 2016)
459 'International tools for fighting against impunity for the use of chemical weapons-guiding document for outreach (The international Partnership against Impunity for the use of chemical weapons) 6
460 Revill James, Katz Rebecca, Fasoli Elena, Mohammed Einas, Shiotani Himayu, Menon Aditya, 'Tools for Compliance and Enforcement from Beyond WMD regimes' (Unidir 2021) 32
461 'Who's responsible? Attributing individual responsibility for violations of international human rightsand humanitarian law in united nations commissions of inquiry, fact-finding missions and other investigations' (United Nations Human Rights Commissioner, 2018) 15

international – or national courts, they clearly serve a purpose in the fight against impunity. However, Fact-Finding Missions may also serve other purposes such as influencing political processes, eventually affecting reconciliation,[462] serving as a starting point for further mechanisms, or having a strong symbolic value.[463] It might be said that if no Fact-Finding Missions were deployed, the future – and ongoing – proceeding relating to the search for accountability for the use of chemical weapons would be a lot more difficult, if not impossible.

Even different UN bodies have been active in searching for accountability possibilities, the issue that the UNSC is the only actor holding power to enforce cooperation or to establish judicial organs remains. Even different investigative mechanisms have importantly contributed to the evidence gathering and send a message of condemnation of the situation, evidence is not much of use if there will be no organ to use them. However, as collecting the evidence and addressing the perpetrators is the prerequisite for future proceedings, the value of different – not legally binding – mechanisms and missions should not be underestimated.

As the inefficiency of the UNSC, however, is a severe issue, new contributions and openings are needed to solve the issues within the UNSC. For now, the situation where legal proceedings are precluded by political considerations does not seem to serve justice.

5.2 Considerations About the Effectiveness of the Current System

As described, there exists several different organs, mechanisms, and possibilities to secure accountability when the core principles of international law are breached, but their functioning in practice does not always go hand in hand with mandates or rules written in the declarations and treaties, as the case of Syria has clearly shown.

Based on the previous analysis, this chapter considers how well-adapted the current state of international law is to hold perpetrators of chemical weapons attacks accountable for their

462 Bailliet Cecilia, Mujezinović Kjetil Larsen, Promoting Peace Through International Law (Oxford University Press 2015) 368-369
463 Ibid. 370-371

actions. Based on the outcome, suggestions for improvement of the system are presented in the next chapter.

From the viewpoint of the international courts and tribunals it seems, that a diverse set of effective – or at least potentially effective – mechanisms exists if the door to their circle of jurisdiction can be opened. Analysis based on the previous chapters has shown that the expectations for an effective accountability channel to convict the perpetrators of the chemical weapons attacks in Syria, at least in the near future, are not especially high. As the system in itself offers different options, in practice, either the political will of the UNSC or the will of the country in question are required prerequisites for effective action. Therefore, the biggest obstacles for the proceedings through international courts or tribunals can be located to the UNSC and to the principle of state sovereignty, as approval of the proceedings or the establishment of the tribunal need to be gained from the UNSC or from the state itself.

In this context, the principle of state sovereignty seems to raise different issues. First, and most pressingly, the consent of the state is needed for criminal proceedings at the international level if the UNSC is not backing up the case. In addition, as sovereign entities, the states may decide not to cooperate with relevant actors, for example, during the investigations or preliminary proceedings. As states clearly should have a right to decide about their treaty obligations and also with who and how they want to cooperate, the permission of a state for proceedings considering its own organs, such as its head-of-state in cases involving international crimes, seems undoubtedly problematic. While there does not exist a system where the state itself could be condemned as a criminal, it does not seem appropriate that neither individual cannot be held accountable. It seems that balancing must be made between the maintenance of the sovereignty as it is and between considering some acts so serious breaches of international law and order that they are a concern of an international community as a whole, as these two do not seem to work effectively together.

What comes to the complexities surrounding the UNSC, the situation where the organ that holds the main responsibility for taking care of international peace and security, but is unable to act, can rightfully be condemned. This is even more so since there does not exist another organ that could take care of UNSCs functions when it renders incapable of acting. This puzzle between

the UNSC and its relationship with the judicial system at the international law is, of course, well known, and the fundamental issue here lies in the complex relationship between international law and politics.[464]

From the viewpoint of the universal jurisdiction, however, a slightly different puzzle occurs. While state sovereignty is still the factor sometimes hindering the effective action, especially through unwillingness to cooperate and surrender accused to the proceedings, here it is *not* argued that states should give up their sovereignty from this perspective. Although the principle of universal jurisdiction is meant for an avenue to prosecuting crimes not on behalf of a state, but on behalf of the international community, it is still an individual – sovereign – state that commits such proceedings, and there is nothing to guarantee that the proceedings would not be to some extent politically colored. Therefore, as the ultimate issue may simultaneously be the only option that can be considered justified, the notion should be taken about the possibility that the problem and hindering effect could also be located to unclarity. In a situation where states are not certain what the law says, even they could be willing to act according to, and interpretations about the actual content of the scale of the principle of universal jurisdiction vary, collisions are inevitable. However, as the universal jurisdiction seems to be the only currently free avenue for even possible accountability cases like Syria, it is – despite its issues – a necessary contribution to the system.

As referred several times in the previous chapters, although there exists a lot of difficulties, there also exists possibilities. Investigations can be concluded without specific limitations, platforms of cooperation exist and are continuously enhanced, and different organs show flexibility for taking innovative approaches. However, also here, the ultimate obstacle for more effective action seems to be the UNSC, as it is the only organ within the current system with enforcement powers and the capability to establish organs with judicial powers at the international level.

As the prohibition of chemical weapons is strong and wide, and avenues for jurisdiction are diverse, it is hard to argue that international rules are lacking. Rather the issue seems to be in

464 Bailliet Cecilia, Mujezinović Kjetil Larsen, Promoting Peace Through International Law (Oxford University Press 2015) 357

the enforcement mechanisms and the political considerations involved. The case of Syria seems like a lecture book example of the weakness of the legal system in front of the politics, and it might be justifiably asked whether the current state of law, where legal proceedings are subordinate to political considerations, is the ideal situation that best serves common interest to live in a world without mass atrocity crimes. As noted above, the international community is facing difficult challenges, and careful balancing needs to be made between the traditional values and new humanitarian concerns. It needs to be considered if there are ways to organize peaceful coexistence in some other manner that would also allow better accountability possibilities when the important rules of the system are ruthlessly breached.

What then is the answer for the question of how well-adapted the current state of international law is to hold perpetrators of chemical weapons attacks accountable for their actions? Taking into account all the considerations and analysis within this research, it might be argued that the law on the books looks good, but the law in action not so much.

It is interesting to note that the fundamental issues relating to the impunity of crimes in Syria do not seem to stem from the field of ICL itself but from the fundamental building blocks of the international system, namely from the structure of the UNSC or from the separation of powers in UN in general, and from the state sovereignty. Although it must be admitted that there are no easy solutions, in the next chapter, based on these considerations, some ideas are however presented about the possibilities to strengthen the system of international law from the point of view more effectively securing individual criminal liability.

6. Room for Developments in International Law?

6.1 Restructuring the United Nations

As it was concluded in the previous chapter, the main obstacle for the establishment of an effective accountability mechanism for Syria has been the UNSC, more precisely the use of veto power of its permanent members. From a slightly different perspective, it might also be said that the fundamental issue is the sharing of responsibilities within the UN system in general.

Therefore, even the topic is widely discussed, difficult, and importantly politically colored, this chapter discusses the possibility of abandoning the veto power or reconstruct the UN system in some other way to enhance its possibilities to act in cases of serious breaches of international law. In the first subchapter, some possibilities relating to the UNSC are considered, and then some considerations are given about the role of UNGA.

6.1.1 United Nations Security Council, Veto Power and Responsibility to Protect

In general, as an organ responsible for maintaining international peace and security, the UNSC is the only body in an international system that is considered to have powers to force the establishment of international courts and tribunals and refer the cases to the ICC when individual states are unwilling to such proceedings. However, as it is well known, sometimes the UNSCs possibilities to act and fulfill its role are frozen due to the use of veto power of its permanent members.

Some have even argued that the failure of the UNSC to react in Syria was the reason the government dared to use progressively more force as the previous atrocities were not answered by the international system.[465] Also, for example, the former prosecutor of the ICTR and ICTY *Carla Del Ponte* has blamed – while resigning from CoI – the UNSC for preventing the actions in Syria and keeping the CoI alive as an "*alibi for inaction*."[466] No matter how one takes these – and several other – accusations, it is, however clear, that a situation where legal proceedings may be prevented by political considerations is unbearable. Therefore, in this chapter, some considerations are devoted to the possibilities to enhance the actions of the UNSC.

Issues surrounding the veto power are certainly not new, but the issue has concerned the international community already some time,[467] and the discussion around it is ongoing within

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465 Adams Simon, 'Failure to Protect: Syria and the UN Security Council' (2015) Global Centre for the Responsibility to Protect Occasional Paper Series No. 5 5

466 Reuters Staff, 'Syria investigator del Ponte says enough evidence to convict Assad of war crimes: SonntagsZeitung' (Reuters, 13 August 2017). For further information about the issues of CoI from the point of view of Del Ponte, see: Del Ponte Carla, Gli Impuniti – I crimini in Siria e la mia lotta per la verità (Sperling & Kupfer 2018)

467 Thakur Ramesh, The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect (Cambridge University Press, 2005) 122

the UN organs.[468] In addition, within the UN, there have actually been initiatives to make the permanent members of the UNSC voluntarily abstain from the use of their veto power in cases involving grave human rights breaches, genocide, crimes against humanity, or war crimes. So far, only two permanent members – the United Kingdom and France – have supported these initiatives.[469]

The use of veto is also one issue recognized by the UNGA in its initiative to reform the UNSC suggested in decision 62/557. In addition to the veto power, the decision calls for reforms and further considerations relating to "*categories of membership; regional representation; size of an enlarged Security Council and its working methods; and relationship between the General Assembly and the Security Council*."[470]

The idea of a list of unaccepted activities where the veto power should not be used is also closely related to the doctrine of responsibility to protect (R2P), described in the 2005 World Summit Outcome Document. R2P is a principle based on three pillars which are the states' responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity; international communitys' commitment to assist states with their responsibilities and responsibility of the international community in taking collectively "*a timely and decisive*" response when a state is manifestly failing its responsibilities.[471] Further, when peaceful means prove to be inadequate, the international community has an obligation to react with stronger measures, such as those of Chapter VII of the UN Charter.[472] The concept of R2P has rooted in international law,[473] and it has become a part of a common vocabulary relating to mass atrocity crimes. In May 2021, the UNGA reaffirmed the principle by adopting

468 'The Veto' (Security Council Report, 16 December 2020)
469 Ibid.
470 UNGA A/62/49 Resolutions and Decisions adopted by the General Assembly during its sixty-second session Volume III 23 December 2007 – 15 September 2008 General Assembly Official Records Sixty-second Session Supplement No. 49 (Vol. III)
471 'Implementing the Responsibility to Protect The 2009 General Assembly Debate: An Assessment' (Global Centre for the Responsibility to Protect, August 2009) 5
472 UNGA (16 September 2005) UN Doc A/RES/60/1 138-139
473 Bailliet Cecilia, Mujezinović Kjetil Larsen, Promoting Peace Through International Law (Oxford University Press 2015) 116

a resolution where the member states of the UN agreed on adding the R2P to the UNGA's annual agenda.[474]

The discussion about the implementation of the principle, however, often includes considerations about the use of veto power at the UNSC[475] – as well as other elements of the UNSC – and it is generally held that the case of Syria has been a remarkable example of the failure of the international community to fulfill its responsibility to protect.[476] Enhancing an effective application of the R2P would solve issues relating to UNSCs powers but also contribute to the issue of sovereignty discussed in chapter 5.2. If states were, preferably with the support of the UNSC, required to take care of their responsibility to protect their populations, the contradiction between sovereignty and quest for accountability in the situations where the state itself is involved in the atrocities would be solved, or at least diminished.

As stated above, so far, only 2/5 of the permanent members of the UNSC have been willing to even voluntarily manner to restrain themselves from the use of the veto power even in cases involving serious crimes. The possibility to force such a requirement to the working methods of the UNSC without the consent of its permanent members does not seem likely either, as the veto power derives straight from the UN Charter.[477] Surely also changing the UN Charter is possible, but according to its Article 8, amending the Charter requires – in addition to 2/3 majority of the UNGA – an acceptance of all permanent members of the UNSC.

6.1.2 Considerations of the Role of the United Nations General Assembly

As noted in the previous chapter, changing the working methods or restructuring the UNSC is difficult due to the need of its permanent members' acceptance to such changes and therefore, it is also useful to consider is there some possibilities within UNGA to contribute to solving the issues discussed in this research. In general, the UNGA has been more willing to contribute to

474 UN General Assembly Adopts New Resolution on the Responsibility to Protect' (Global Centre for the Responsibility to Protect, 18 May 2021)
475 'Implementing the Responsibility to Protect The 2009 General Assembly Debate: An Assessment' (Global Centre for the Responsibility to Protect, August 2009) 2
476 Adams Simon, 'Failure to Protect: Syria and the UN Security Council' (2015) Global Centre for the Responsibility to Protect Occasional Paper Series No. 5 3
477 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) Art. 27 (3)

the prevention and accountability of mass atrocity crimes, as described relating to the case of Syria in chapter 4.5.2.2. This chapter introduces some considerations relating to the powers of UNGA, and indeed, while struggling with the timely inefficiency of the UNSC, different ideas have been expressed on how the other actors, mainly UNGA, could take a step forward and solve the inefficiency issue.

Most discussion has been circling around the possibility of UNGA to create an *ad hoc* or hybrid tribunal in case the UNSC is unable to do so. The starting point for such considerations is Article 22 of the UN Charter, according to which the UNGA "*may establish such subsidiary organs as it deems necessary for the performance of its functions*." As some have seen that the article could be read as allowing the establishment of a tribunal, it is relevant to note that dealing with peace and security issues is not part of the UNGAs functions but of UNSCs. Generally, it is also held that the UNGA may only grant organs it may establish similar power it itself has, and not to widen them.[478]

A similar debate took also place when UNGA established the IIIM, and as explained in chapter 4.5.2.2., the decision raised some controversy about the UNGAs mandate to establish an organ that has connections to prosecutorial functions. As also argued in the mentioned chapter, the IIIM, however, is not a prosecutorial organ, nor does it enforce any cooperation with it. The IIIM can, however, be seen as a continuation of UNGAs occasional steps to take a stand on human rights and peace and security-related issues.[479] In the past, UNGA has, for example, created, together with the SG, an organ to examine international crimes in Cambodia, which was also tasked to make recommendations about possibilities of individual accountability, and been involved in the establishments of the *Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* ("ECCC") and t*he International Commission Against Impunity in Guatemala* (CICIG).[480] These

478 Simma Bruno, Khan Daniel-Erasmus, Nolte Georg, Paulus Andreas, Wessendorf Nikolai, The Charter of the United Nations: A Commentary, Vol.1 (2nd ed. Oxford University Press 2002) 427-28
479 See for example Resolution 3 (Feb. 13, 1946), Resolution 95 (Dec. 11, 1946), Resolution 3074 (1973), Resolution 60/147 (2005)
480 UNGA (23 September 2009) UN Doc A/64/370 and Beth Van Schaack, 'The General Assembly & Accountability for International Crimes' (Just Security, 27 February 2017)

situations, however, differ importantly for the case of Syria, since no coercive force was needed as Cambodia and Guatemala respectively were accepting such an action.

In addition to these considerations, the famous Uniting for Peace -resolution deserves some thoughts. The resolution was taken in 1950 as a result of a veto-blocked situation at the UNSC relating to the Korean War.[481] The resolution states that in the case the UNSC fails to act due to the use of veto power, the UNGA may take action if the situation at hand involves a threat to peace, breach of peace, or an act of aggression. If these requirements are fulfilled, the UNGA may "*consider the matter with a view to making recommendations to Members for collective measures to maintain or restore international peace and security*."

The powers established by the resolution have been used a total of 12 times, and based on it, for example, peacekeeping mission has been established, the mandate of the UN mission has been confirmed, troops withdrawals have been called, and the Member States are called to take measures against other states.[482] Among the actions taken there, however, does not exist an action including judicial powers, and what kind of action would be possible through the Uniting for Peace resolution is unclear, since the resolution was an innovation without statutory support and it might be assumed that actions that can be taken are considered case by case. One might, however, argue, that especially if the UNSC requested UNGA to awake the resolution and take action, as it has done in most of the past cases when the concept has been used, the UNGA might *recommend* the establishment of an international tribunal for Syria. How the tribunal could be established and how it could work without coercive powers of the UNSC backing it is, however, a difficult question. Perhaps the support and "blessing" from UNGA could give such an organ enough legitimacy to work, perhaps not. In addition, it is easy also to argue that if UNGA, or members of the UNSC supporting such action for Syria, deemed this to be possible, the request or decision would have already been made.

An interesting idea, although not in practice likely due to the need for UNSC permanent members' consent in amending the UN Charter, is also changing the division of work and

481 UNGA (3 November 1950) UN Doc 377 (V)
482 'Security Council Deadlocks and Uniting for Peace: An Abridged History' (Security Council Report, October 2013)

responsibilities between the UNSC and UNGA in some cases. If the power to take also coercive action in cases relating to mass atrocity crimes, or for example, in the cases of veto blocking the UNSC in such cases, was formally given to UNGA, and the vote was made, for example, by a majority of 5/6, or more, the decisions for such an action might enjoy more legitimacy, as the UNGA is consisted of all of its Member States, and the composition of the UNSC is famously criticized not anymore mirroring todays' relative strengths of the States.

As the mandates and possible actions of organs of the UN are vulnerable to political considerations and their legal limits are somewhat vague, and to some extent based on the respective organs' own interpretations, it is difficult to argue what kind of action, in reality, would be possible. Especially relating to UNGA, it can, however, based on the past cases, be concluded that the organ is capable of creating new innovations and often willing to test the limits of its mandate in forms of different mechanism that sometimes can contribute even to judicial issues. It remains to be seen what kinds of new inventions are created in the future.

6.2 Advancing the Doctrine of the Universal Jurisdiction

As has suggested in previous chapters, without the UNSC approval establishment of new channels for accountability is not – at least without a serious doubt – possible within the limits of the current state of law. Respectively, the referral to the case of a non-state party to the ICC is not possible without the consent of the state in question or action of the UNSC.

Therefore, even suggested in previous chapters that the universal jurisdiction is not the best possible option for accountability in cases involving large amounts of atrocities and possible accused, and even practical issues relating to its enforcement are previously discussed in detail, it is however relevant to discover the principle from the point of view of its possible strengthening. As it is concluded in chapter 5.2. that the biggest issues relating to the principle can be located either to the state sovereignty or to the clarity of the state of the law in respect to the contents of the principle, in the following subchapters ideas for clarification of the limits of the universal jurisdiction, as well as the possibility of creating a new forum for its enforcement are studied.

6.2.1 Clarifying the Limits of the Universal Jurisdiction

As noted, the reach of universal jurisdiction and its relationship with immunities under international law often raise controversies. Therefore, rules to clarify the accepted scope of the principle could improve the possibilities of states to apply it and perhaps also solve some issues relating to the enforcement of the principle, as states would at least know what they *should* do. Some efforts for creating those rules have already taken place such as Princeton Principles and Cairo-Arusha Principles of Universal Jurisdiction in Respect of Gross Human Rights Offences,[483] but some of their articles are not consistent with the current practice.[484] This chapter discovers further possibilities for creation rules to help the implementation of the principle in national courts.

The rules of the application of the universal jurisdiction could, for example, be drafted and accepted by the UN when they would include a stronger international mandate. Indeed, this has been requested by several states, and in 2010 a working group under the UNGA was established to clarify the issues relating to universal jurisdiction[485] , and the working group for "*the scope and application of the principle of universal jurisdiction*" is currently continuing its work.[486]

It remains to be seen what the outcome of the work of the UNGA working group will be, but as the possibility to use the universal jurisdiction in the case of lack of other possibilities is an important addition to the toolbox of ICL, the preferred approach would be to draft the guidelines in the form of minimum threshold describing the situations when the principle should be applied, rather than from a restrictive perspective. It is, however, suggested that some caution should be applied especially relating to prosecutions of foreign head-of-states since the political aspects of such proceedings are always present.[487]

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483 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 130-131
484 Ipid. 130
485 'National Courts and Foreign Policy: Prosecuting Foreign State Leaders for International Crimes' (2015) FIIA Briefing Paper 187
486 Sixth Committee (Legal) — 73rd session - The scope and application of the principle of universal jurisdiction (Agenda item 87)
487 'National Courts and Foreign Policy: Prosecuting Foreign State Leaders for International Crimes' (2015) FIIA Briefing Paper 187

Another possibility for the clarification of the current state of accepted reach of the universal jurisdiction would also be the creation of a separate treaty, where guidelines for the adoption of the principle would be legally formed and, as a result, adopted similarly in the national laws of all the State Parties. Within the same treaty framework also issues relating to immunities, proceedings *in absentia,* and other difficult elements surrounding the principle could be issued. If the treaty would follow the current state of customary law, also non-state parties would be bound by the same rules.[488] Within the treaty framework, also a body to supervise it could be established, and it could be given the power to interpret the convention and to solve disputes relating to it.[489] A specific body to supervise the application of the principle would have clear benefits, as it would help to solve the practical issues, such as refusing the arrest warrants or cooperation with evidence gathering, relating to the universal jurisdiction proceeding by solving disputes that might arise between the State Parties to the treaty.

If common rules were not to be agreed on, it has also been suggested that some type of center for gathering information, sources and practices, and monitoring cases of universal jurisdiction could be established.[490] Eventually, this type of collection could serve as a basis for the common rules, and before that, it could at least help national authorities with implementing the principle without itself taking a stand about the correct contents and reach of the principle.

This chapter has briefly discussed some possibilities to create common rules for the application of the principle of universal jurisdiction. It seems clear that a common framework for the applicability of the principle could encourage more states to apply it as they would not need to interpret its possible contents individually and risk being condemned by other states and exposed for political pressure not to continue with their proceedings. It remains to be seen if the UNGA working group will finish its work and what the outcome will be, but clearly ramified principle of universal jurisdiction would be a valuable addition to the framework of ICL, which sometimes may end up a deadlock.

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488 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 133
489 Ibid. 128
490 'Advancing Global Accountability The Role of Universal Jurisdiction in Prosecuting International Crimes' (2020) International Center for Transitional Justice Research Report

6.2.2 Creating a New Forum for the Universal Jurisdiction

The previous chapter has discussed creating common rules for the application of the principle of universal jurisdiction, and in this chapter, another possibility to strengthen the principle of universal jurisdiction by creating a forum to apply it is discussed. The idea of creating a new universal jurisdiction body is more controversial than quite a wide agreement that issues relating to the universal jurisdiction should somehow be clarified. The idea stems from the fact that as most of the practical problems relating to universal jurisdiction stem from the fact that it is implemented through national courts, and therefore it has been suggested that an own forum to implement the principle could solve these issues.

First, some discussion has taken place about the possibility of allowing the ICC to implement the principle of universal jurisdiction. Although this was never the intention behind the ICC, and the idea was rejected when the treaty was negotiated, the possibility is, however, interesting to consider.[491] During the negotiations of the Rome Statute, Korea proposed to let the ICC apply universal jurisdiction when one of the following conditions were fulfilled relating to the state party of the ICC: the state was a territorial state, a state of passive personality or nationality, or the state had custody over the alleged offender. As we know, the proposition did not pass, and it should be taken into account that the ICC exercises its jurisdiction only in cases of particular gravity,[492] so some of the possible cases of universal jurisdiction would stay outside of its scope. This would not, however, be a particular issue since the complementarity of the ICC would still allow the states to investigate and prosecute cases remaining outside the ICC radar.

Even the proposition did not make it to the Rome Statute, it still pops out now and then as one of the theories of the sources of the jurisdiction of the ICC is the idea of it stemming from universality. This view is based on the idea that the international community holds a right to punish those who breach its laws and that this common right could be exercised through the ICC. The idea is that even the ICC can only exercise its jurisdiction within the given limits of the Rome Statute, its jurisdiction does not derive from its States Parties. This approach that the

491 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 116-117
492 Ibid. 118

ICC might consider its jurisdiction stemming from *ius puniendi* start to resonate more in 2019 when the Appeals Chamber of the ICC relating to the Omar Al Bashir case noted that the ICC "*exercises its jurisdiction 'in no other circumstance than on behalf of the international community*." The actual meaning of the notion is, however, unclear, and in addition, it is questionable how much this interpretation would even change the situation in practice since, as noted, the ICC could still only exercise its jurisdiction within the limits of its statute.[493]

What comes to the idea of intentionally and separately making the ICC as a forum for the universal jurisdiction, it might turn out to be problematic, since already as it is, the cases where the court interprets its jurisdiction in a wide manner often gain disapproval. This is lately seen, for example, within the case of Afghanistan, where the ICC interpreted that its jurisdiction allows it to investigate citizens of the United States – not a State Party to the ICC – as alleged crimes were committed in the territory of the ICC State Party.[494]

As allowing the principle of universal jurisdiction as a basis for ICC's jurisdiction would solve the biggest issue hindering it to effectively prosecuting the "worst of the worst" and render possible more effective utilization of the principle of universal jurisdiction, several issues relating to the willingness of states to cooperate with the court, as well as questions relating to its resources would remain.

In addition to the ICC, a possible body for implementing the universal jurisdiction could also be created separately. The Court of Universal Jurisdiction might work as an enforcer of states' decisions relating to the cases of universal jurisdiction if issues with their application were to occur and handle complaints and appeals relating to the application of the principle.[495] Within the current state of issues and unclarity of the contents of the principle, the establishment of such an organ would, however, be problematic, as common and generally accepted limits to the principle do not exist. If only a handful of states was willing to accept the jurisdiction of the new organ, its value would be infinitesimal.

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493 Monique Cormier, 'Testing the boundaries of the ICC's territorial jurisdiction in the Afghanistan situation' (Questions of International Law, 28 February 2021)
494 Ibid.
495 Kmak Magdalena, The scope and Application of the Principle of Universal Jurisdiction (Hakapaino 2011) 126

The third option worth to consider is that the mandate to settle disputes relating to the principle of universal jurisdiction was given to some other already existing body than to the ICC. As the mandate to do so is considered, the ICJ or some UN organ would be the most central options. In this case – as with the previous option – it should, however, be noted, that as there currently are no clear rules for the application of the principle, the chosen organ would actually be the one creating the rules by its practice, and special care should be taken in deciding its composition to avoid bias and condemnation of its work. Therefore, the preferred approach would be to create the common rules first, and after they have been agreed on, solutions for their implementation more effectively could be searched for either from a dispute settlement body or from a special court.

This chapter has discussed some possibilities to create an enforcement body for the principle of universal jurisdiction, and as the presented ideas are interesting and would solve some wide issues relating to the effectiveness of the international criminal system, their acceptance is anything but clear, as the limits of the principle of universal jurisdiction itself remain unclear and disputed. Therefore, as suggested, the first step should be the clarification of rules the possible organ would apply.

In addition, if the body enforcing the universal jurisdiction was not the ICC, careful consideration should be given to their relationship to avoid overlaps – or inconsistencies – within their mandates and jurisdictions. Also, ensuring the enforcement possibilities of the organs' decisions would be crucial – if it would not take a form of only an advisory body – as the last thing the international system needs is more organs to end up in a deadlock. However, if the implementation body of the universal jurisdiction was some truly independent and impartial body, states cooperation with it could reasonably be asked, as the body would aim for a common good instead of furthering its own political goals.

6.3 The Chemical Weapons Convention and the OPCW

As this research has discussed the use of chemical weapons almost solely from the viewpoint of ICL, without giving much thought to the regime of disarmament, it is justified to finish this journey of searching accountability by considering the relationship between international

efforts to stop the impunity and the field of disarmament, and its possible prospects to contribute to securing the accountability of the use of chemical weapons as an international crime.

As the actions of the OCPW have been carried along with the research, no thoughts have been given to the possibilities of the CWC to contribute and draw closer to the ICL perspective. As the CWC is a disarmament treaty between states, it only requires its state parties to penalize and punish its breaches in their national legislation.[496] As the CWC is nearly universal, the impact of the requirement, if followed correctly, is remarkable as it requires almost all the states in the world to penalize the use of chemical weapons by natural *and legal* persons. The requirement, however, applies only to crimes committed under the jurisdiction of a State Party or by its nationals,[497] and what the CWC misses is the *aut dedere aut judicare* requirement which would oblige State Parties to the CWC either prosecute or extradite all the persons suspected breaching articles of the CWC. The requirement would clearly contribute also the area of ICL remarkably.

In addition, while the difficulties to stop impunity of the use of chemical weapons in Syria have become apparent, a far-reaching idea has emerged in the minds of some. As it is stated before, the OPCW is not a judicial or quasi-judicial organ, nor is it in any way meant for an avenue for individual or any kind of criminal responsibility.

An idea that the *International Chemical Weapons Tribunal* could be derived from the OPCW has, however, emerged. The idea is based on the Article XII of the CWC, which permits the CSP to take "*necessary measures* [– – –] *to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention*."[498] Possible measures in this respect, according to the same article, include, for example, "*In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I"* a recommendation to State Parties

496 Chemical Weapons Convention Art. I, VII
497 Chemical Weapons Convention Art. VII
498 Ibid. Art. XII (1)

to take collective measures.[499] According to the CWC, the decisions on substance matters in the CSP are taken preferably on consensus, but if it is not possible, by 2/3 majority vote.[500]

It is rather easy to argue that the establishment of an impartial tribunal in response to serious and continuous war crimes when other avenues for such an action are blocked could be considered as a "*necessary measure*,"[501] as the use of chemical weapons is also the ultimate breach of the CWC. Clearly, this kind of step would be exceptional and mean considering the mandates of international organizations from a new perspective. The OPCW, however, is an exceptional organization in the sense that it has an almost universal reach, and therefore decisions of the CSP – consisting of all of its States Parties – may be seen to enjoy some level of legitimacy. The tribunal could also be seen as a natural continuation for the establishment of the IIT, and jurisdictional limits could be tight to the previous work of the FFM and IIT, respectively.

However, as interesting as the idea may sound, it should be taken into account that already the establishment of the IIT, as described in chapter 4.5.1, raised a lot of controversy regarding the OCPW overstepping its purpose and mandate. This may imply that efforts to change the OPCW as a forum for individual criminal responsibility would not be received only with excitement. In addition, the current state of law suggests – as argued before – that currently, the UNSC seems to be the only organ accepted to have the mandate to establish judicial organs such as tribunals when coercive power for their establishment is needed.[502]

In any case, maintaining and enhancing the CWC and OPCW and researching their possibilities to contribute also to the individual criminal responsibility is important and should be widely supported, since even the OPCW was seen solely as a technical organization, it should be kept in mind, that if the ultimate aim of the OPCW "*to achieve a world permanently free of chemical*

499 Ibid. Art. XII (3)
500 Ibid. Art. VIII (B) (18)
501 Naqvi Jasmin, 'Conflict in Syria, Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 International Review of the Red Cross 989-90
502 Whiting Alex, 'An Investigation Mechanism for Syria: The General Assembly Steps into the Breach' (2017) 15 Journal of International Criminal Justice

weapons"[503] was achieved, it would certainly also be much more difficult for anyone to commit international crimes with them.

7. Conclusions

This research has studied the use of chemical weapons in the Syrian Civil War to find out what kinds of obstacles in practice stand in the way of accountability of serious international crimes and find possibilities to enhance the fight against impunity. More specifically, this research has studied the prohibition of the use of chemical weapons in the treaty and customary law, mapped different channels and mechanisms to contribute to the individual criminal responsibility within an international system, and weighted their benefits and issues through case analysis. The aim behind all of this has been to answer the fundamental questions of how well-adapted the current system is to hold perpetrators of chemical weapon attacks accountable and how international law could be strengthened from the point of view more effectively secure accountability of the use of chemical weapons by different actors. For this quest to locate the gaps in accountability, the still ongoing conflict in Syria has offered a practical point of departure.

This research has discovered that the prohibition of the use of chemical weapons has a solid base in international law, as it is prohibited by different instruments, most notably by the CWC, the Rome Statute, and by customary international law. In addition, this research has recognized the ICC, different *ad hoc* and hybrid tribunal solutions, as well as the principle of the universal jurisdiction as possible channels to individual criminal responsibility in an international system.

By studying the actual measures taken in the Syrian conflict, this research has found out that in Syria, several different mechanisms have been established by different organs to contribute to the accountability for the use of chemical weapons. By researching the conflict and comparing the theoretical possibilities to possibilities in an actual real-life situation, this research has studied jurisdictional limits of different accountability options and recognized also other possibilities, such as different Fact-Finding mechanisms, as essential contributions to accountability efforts.

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503 'Mission A world free of chemical weapons' (OPCW)

Although this research has found several different avenues for accountability, especially in Syria, serious gaps in the accountability possibilities remain. This research has located the most remarkable practical obstacles for holding perpetrators of chemical weapon attacks accountable, and, based on the analysis of the case of Syria, these obstacles are considered to include: the distribution of responsibilities in the UN, especially the role of the UNSC and the veto right, and the principle of state sovereignty as an obstacle for effective proceedings without the consent of the state. While these issues relate especially possibilities to access international courts and tribunals, issues relating to applicability of the principle of universal jurisdiction seem to relate most importantly to the lack of clarity of the contents and scope of the principle and lack of a venue for its effective enforcement.

It is important to notice that these serious issues of the current system do not locate especially to international criminal law, but on the fundamental structure and principles of the current system. Therefore, this research has concluded that the current state of *the law in the books* seems to be quite well-adapted to hold perpetrators of chemical weapons attacks accountable for their actions, but *the law in practice* does not. Quite the opposite, the situation where the jurisdiction of different judicial organs is often dependent upon the will of the UNSC is in flagrant contradiction to the fact that the use of chemical weapons is widely prohibited by treaty and customary law and holding perpetrators of such crimes accountable seems to be the general interest of the international community. Subjugating the criminal proceedings to political considerations severely harms the credibility of the international system and makes respecting humanitarian values extremely difficult.

Although the recognized issues of the system are in most parts fundamental by their nature, this research also sought to suggest solutions to contribute to resolving the found issues, or at least to ease some tensions surrounding the difficulties. Development suggestions presented in this research included the reorganization of the UN system and the UNSC, enhancing the doctrine of R2P, clarifying the limits and scope of the universal jurisdiction, and considering creating or assigning an independent body to ease its implementation, as well as utilizing the framework of the CWC in contributing to securing accountability for the use of chemical weapons.

However, the relationship between international law and politics is complex, and some see international law only as a weak, state-centered system meant as a forum for states to emphasize their interests. On the other hand, some see the system as a humanitarian-value-guided continuous effort towards peace and justice. In any case, the international law is at least much more negotiable than the law at the national level, and sometimes, as has been shown, states' interests and moral values may collide, and sometimes they may coincide.[504] Based on the previous analysis, it may be suggested that the ultimate question for the international community to resolve is about values and will. Although the system's problems stem primarily from political considerations, if the values of humanitarianism are prioritized over other considerations, international law could be drawn slightly further away from the politics if it was so decided. The strong suggestion is, that this is also done.

Although the research found fundamental and serious issues from the very basics of the system, it also revealed positive and encouraging elements, as some of the analyzed mechanisms showed, that when facing difficult challenges, the international organizations sometimes show capability for innovative and new approaches, and even often so claimed, the research suggests that the international system is not so petrified as often suggested. For example, ongoing investigations on chemical weapons attacks at the national level, as well as actions of the UNGA and the OPCW to stretch their mandates imply, that new measures to secure accountability are continuously searched and that the international community is ultimately able to develop when there is a will to do so.

As this research indicates, the fight against impunity in international law does not happen solely within the international system but also at the national and grassroots levels. As different Fact-Finding Mechanisms and actions of the NGOs might sometimes be considered actions that only purpose is to fill the hole of inactivity, their role, in reality, seems to be surprisingly necessary for possible forthcoming legal proceedings. However, even joint efforts would lead to a slight opening of the door to the jurisdiction circle, it is unfortunately so, that the issues do not stop there. Even though this research has not – outside of some enforcement and cooperation-related

504 Charlesworth Hilary, 'Law-making and sources' in James Crawford and Martti Koskenniemi (eds), The Cambridge companion to International law (Cambridge University Press 2012) 187

considerations – discussed issues of actual proceedings, their existence is recognized. The view can be however taken, that once the basis is fixed, the process may also move to other areas.

The use of a comparative approach in analyzing the functions of international law in practice offered an interesting viewpoint and helped to understand actual difficulties faced by the international criminal system and the functioning of international law in practice. The chosen approach to put together complex conflict with huge accountability gaps and a solid international norm revealed disturbing elements on the fundamental structure of the system. Even the inefficiency of the UNSC relating to the case of Syria is well known, conducting a detailed study on the issue and unraveling the situation piece by piece showed that the issues indeed are not special for Syria but present at the very structure of the international system.

However, using the ongoing conflict as an example brought along some difficulties since new events continued to occur and analysis could not be completed, as the – hopefully – following resolution of the conflict and accountability gap is still coming. In addition, balancing between analyzing and staying careful not to speculate future actions excessively was sometimes a difficult task. The time for completing this research was indeed interesting, as the freshly issued criminal complaints in Sweden, Germany, and France about the possible investigations of the use of chemical weapons, perhaps even against the head-of-state of Syria, are still pending, and no matter what their outcome will be, they would have somehow affected the considerations offered within this work.

What comes to further study possibilities, this research has only touched one side of the accountability, and searching possibilities from the state responsibility doctrine would be an interesting addition to the thematic discussion about accountability for Syria. As states cannot be held criminally liable and different legal concepts and effects come to question, the doctrine of state responsibility is evolving. Especially, this approach has close connections to several themes touched upon also in this work. Most importantly, it is the state who breaches the CWC, and as the recent decision of the CSP to ban Syrias rights showed, the OPCW has decided to do something about it. In addition, considerations about state responsibility can be linked to the R2P doctrine, which, unfortunately, was only briefly mentioned within this researches' framework. The theme is also in other ways currently linked to Syria since Canada, and the

Netherlands have recently decided to bring the case of Syria before the ICJ relating to its alleged breach of the UN Convention Against Torture.[505]

Even this research has mainly referred to the need to prosecute and held liable high-ranking officials of the Syrian army, it needs to be kept in mind that for comprehensive accountability, all the parties involved in atrocities in the country need to be held liable. In the case of Syria, these other actors do include not only members of the opposing armed forces but also members of the terrorist organizations, third states involved in the conflict, as well as transnational corporations, which for example, have traded chemicals to Syria.

While it is impossible to know through which – if any – channel the accountability for the chemical weapon attacks in Syria will finally be reached, it could be said that the case of Syria is a model example of the conflict the ICC was established to deal with.[506] However, at the ICC, only high-level perpetrators would likely face justice, and proceedings would take place far away from Syria in the Hague, while the *ad hoc* or hybrid tribunal could offer a possibility for local presence and participation in proceedings and special circumstances relating to the conflict could be taken into account. Although a special tribunal for Syria would seem like a logical next step for the launched investigative organs, as has been discussed, at least at the time of writing, chances for its creation – or for ICC referral – by the UNSC seem highly unlikely.

As it remains to be seen what will happen in the future, in the meantime, it is important to continue efforts of tying up the Syrian accountability gap, and currently, it seems that national courts might be the only way to do it. Even these proceedings can likely have only limited reach, they send a strong signal and make sure that the issues are not forgotten. While other more comprehensive avenues remain blocked, universal jurisdiction can, if proceedings ought to be successful, serve an important role as a guarantor of at least some level of accountability.

However, it is also important to remember that accountability cannot be the only goal for Syria, but peace and then rebuilding of the war riven society has to be kept on the top of the priority

505 Mia Swart, 'Canada, The Netherlands take Syria to International Court of Justice' (Al Jazeera Centre for Public Liberties and Human Rights, 15 March 2021)
506 Matt Killingsworth, 'Justice, Syria and the International Criminal Court' (Australian Institute for International Affairs, 24 December 2019)

list. In addition, although the route through retributive justice – prosecuting and punishing – is often seen as only correct and just mean,[507] it is not the only option. The restorative justice approach focuses on other kinds of non-judicial measures, and for example, truth and reconciliation commissions and commissions of inquiry belong to its methods to deal with the past atrocities.[508] In addition, sometimes a route through amnesties and pardons, forms of traditional justice, compensation, or apologies can be chosen. [509]

Still, holding the perpetrators of serious crimes in Syria accountable would be a way to provide justice to victims and their families and also contribute to international peace and security at the general level. This could be the beginning of the process of bringing back the credibility of the international system.

Although the current state of international law has been described with alarming terms, as has been stressed relating to innovative approaches of some organs, the situation is not hopeless. When the change that has taken place during the past 30 years – during which an era of certain impunity has passed – is considered, it is easy to recognize a remarkable difference. Although accountability for international crimes is not yet today certain, it is at least possible.[510] From this point of view, we might not yet know how the system will look like after the next 30 years, but the course is right: national courts are stepping up when the system is frozen, organs take actions not expected from them, responsibility to protect has been raised on the agenda of the General Assembly, cooperation takes place between different actors and mass atrocities gain wide condemnation and responses from the grass level to the top. Perhaps the time comes when we witness justice for the victims of chemical weapons attacks in Syria. Perhaps justice will find its way. For now, the battle may be lost, but the war against impunity continues.

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507 Smeulers Alette, Fred Grünfeld, International Crimes and Other Gross Human Rights Violations: A Multi- And Interdisciplinary Textbook (BRILL 2011) 492
508 Ibid.
509 Ibid. 460
510 Thakur Ramesh, The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect (Cambridge University Press, 2005) 132