

# Syrian Situation and the International Criminal Court

Responsibility to referral and to investigate

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# Introduction

## Situation in Syria

- Since the start of the Syrian civil war in 2011 the commission of war crimes and crimes against humanity by both the government and pro-government forces and the anti-government military groups has continued to escalate, leading to the worst humanitarian crisis since the Rwandan genocide.<sup>1</sup> In the past two and a half years more than 100,000 people have been killed,<sup>2</sup> more than 4.5 million people have been displaced inside the country<sup>3</sup> and more than 2.2 million people have fled to neighbouring countries.<sup>4</sup>

- Many Organizations, such as Amnesty International,<sup>5</sup> Human Rights Watch (HRW)<sup>6</sup> and the Independent International Commission of Inquiry on the Syrian Arab Republic (Commission of Inquiry on Syria)<sup>7</sup> have reported the commission of gross violations of human rights and war crimes by both sides of the conflict. They have also urged the International Community to prosecute those responsible, nevertheless this has not yet happened.

- According to the International Organizations, government forces and affiliated militia have committed murder, torture, rape, forcible displacement, and enforced disappearance as part of a widespread or systematic attack against civilian populations thereby constituting crimes against humanity. They have also committed the war crimes of torture, hostage-taking, murder, execution without due process, arbitrary arrest and detention, rape, attacking protected objects and pillage and destruction of property.

- The same Organizations have identified the commission of war crimes by the anti-government armed groups, including torture, hostage-taking, murder, execution without due process, arbitrary arrest and detention, attack protected object and pillage and destruction of property. There have been also reported the commission of crimes against humanity by the these groups.

- The inability of the International Community to refer the current situation to justice permits the perpetrators of these violations and crimes, on all sides, to act in defiance of international law without fearing accountability.

## Statement of position

- It is imperative to stop tolerating these crimes and to prosecute those responsible for them. The United Nations Security Council as well as the Office of the Prosecutor of the International

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1 António Guterres, United Nations High Commissioner for Refugees “Remarks to the United Nations Security Council” 16 July 2013. See <http://www.unhcr.org/51e569919.html>

2 Global Centre for the Responsibility to Protect. R2P. Monitor Bulletin, Issue 11, 15 September 2013. See [http://www.globalr2p.org/media/files/r2p\\_monitor\\_sept2013.pdf](http://www.globalr2p.org/media/files/r2p_monitor_sept2013.pdf)

3 UN's Office for the Coordination of Humanitarian Affairs. Report of Humanitarian Bulletin Syria Issue 35 | 24 September - 07 October 2013 - See [http://reliefweb.int/sites/reliefweb.int/files/resources/Syria%20Humanitarian%20Bulletin%20N.35\\_0.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Syria%20Humanitarian%20Bulletin%20N.35_0.pdf)

4 United Nations High Commissioner for Refugees. See <http://data.unhcr.org/syrianrefugees/regional.php> (accessed October 30th, 2013).

5 Amnesty International Report 2013. See <http://www.amnesty.org/en/region/syria/report-2013>

6 To see all the reports and documents of Human Rights Watch about the syrian civil war visit <http://www.hrw.org/en/middle-eastn-africa/syria>

7 To see all the reports and documents of the Independent International Commission of Inquiry on the Syrian Arab Republic visit <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>

Criminal Court have the duty to investigate those responsible for war crimes and crimes against humanity committed since the start of the Syrian civil war in 2011.

- Considering the strong evidence that serious crimes have been committed in Syria and the pervasive climate of impunity in the region, it is necessary for the United Nations Security Council to use the power accorded to it under the Rome Statute and Chapter VII of the United Nations Charter in order to give jurisdiction to the International Criminal Court.

- As expressed by article 15 of the Rome Statute, “the Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court”. Taking into account the participation of Jordanian national in particular and of any other nationals of State Parties to the ICC fighting in anti-government military groups, the Prosecutor has the power to initiate investigations about their responsibility for the crimes already indicated.

- Even though Syria has not ratified the Rome Statute yet, it signed it on October 2<sup>nd</sup>, 2000. Article 18 of the Vienna Convention on the Law of Treaties (acceded to by Syria on October 2<sup>nd</sup>, 1970) affirms that a State that has signed a treaty is obligated to refrain from acts which would defeat the object and purpose of the treaty. Syria has violated its interim obligation created by its signature and the Prosecutor may investigate the crimes committed during the war.

## Crimes against humanity

### Government forces

- Since the start of the war the UN and the International Organizations already mentioned have reported the commission of crimes against humanity by the government forces and affiliated militia. Some examples of these grave breaches are:

1. **Murder:** HRW documented mass executions of civilian non-combatants in the towns of Al-Bayda and Baniyas between May 2<sup>nd</sup> and May 4<sup>th</sup> 2013.<sup>8</sup> The UN also reported “the use of artillery fire against unarmed civilians” in the city of Deraa during April 2011.<sup>9</sup>

2. **Torture:** in the “Torture Archipelago” Report, HRW demonstrated the torture of man, woman and children detainees in 27 detention facilities.<sup>10</sup> All the former detainees interviewed by the Organization “reported being deprived of proper food (a commonly described meal was a piece of stale bread, half an egg, or a tomato, provided once a day), potable water, and regular access to a toilet.”<sup>11</sup> In addition, almost all the former detainees interviewed told HRW that “they had been subjected to torture, meaning the deliberate infliction of severe pain, during their detention and witnessed the torture of others.”<sup>12</sup>

4. **Forcible displacement:** displacements of Sunni population after the attacks in Al-Bayda and Baniyas between May 2<sup>nd</sup> and May 4<sup>th</sup> 2013 were identified by HRW.<sup>13</sup>

5. **Enforced disappearance:** in the “Torture Archipelago” report, HRW reported enforced disappearances, “in the vast majority of detention cases documented by Human Rights

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8 Human Rights Watch. “No One's Lefts” Report of September 13<sup>th</sup> 2013. See [http://www.hrw.org/sites/default/files/reports/syria0913webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/syria0913webwcover_0.pdf)

9 United Nations. “Syrian army carrying out major military operations against key city – UN official”. April 27<sup>th</sup> 2011. See <http://www.un.org/apps/news/story.asp?NewsID=38201&Cr=Syria&Cr1=#.UnEIMJSvGdN>

10 Human Rights Watch. “Torture Archipelago” Report of July 3<sup>rd</sup> 2012. See: [http://www.hrw.org/sites/default/files/reports/syria0712webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/syria0712webwcover_0.pdf)

11 Ibidem p 10.

12 Ibidem p 10.

13 Ibidem p 8.

Watch, family members could obtain no information about the fate or whereabouts of the detainees and detainees were not allowed any contact with the outside world. Many of the detentions can therefore be qualified as enforced disappearances”.<sup>14</sup> The Commission of Inquiry on Syria also informed that enforced disappearance was carried out by government forces, including Air Force and Military Intelligence, and by National Defence Forces, “in Aleppo, Damascus, Dara’a, Dayr az Zawr, Hamah and Homs, civilians were arrested following army raids. Individuals were abducted in their homes, at checkpoints, in mosques and in hospitals. Victims were taken to unknown locations, their whereabouts undisclosed.”<sup>15</sup>

6. **Rape:** the Commission of Inquiry on Syria documented that “sexual violence was committed against women during raids by pro-government forces in Dara’a, Hamah and Tartus. “A woman was raped by a security officer during a raid in Dara’a in December 2012. A National Defence Force fighter attempted to rape a woman in her home in Tartus during a raid in May”<sup>16</sup>

## Anti-government forces

The most recent HRW report of October 11, 2013,<sup>17</sup> accused five opposition army forces of crimes against humanity in the Latakia Countryside area. The report shows evidence of summary executions, indiscriminate shooting and hostage taking as part of a systematic and planned attack on a civilian population on August 4, 2013. These five groups are Ahrar al-Sham, Islamic State of Iraq and Sham, Jabhat al-Nusra, Jaish al-Muhajireen wal-Ansar and Suqour al-Izz.

## War crimes

### Government forces

- According to the UN and many others international organizations, war crimes have been also committed by the government forces and its affiliated militia. Some of these crimes are:

1. **murder:** the Commission of Inquiry on Syria documented the killing of more than 100 residents of Daraya whom may have been defector or anti-Government armed group members from 20 to 24 August of 2012.<sup>18</sup>
2. **torture:** the Commission of Inquiry on Syria identified the use of torture and other forms of ill-treatment specially during the interrogations by intelligence agencies. “Many reporting torture and other forms of ill-treatment in official detention centres were detained in intelligence agencies in Damascus and Aleppo. Several described being tortured in Military Security Branch 235, also known as “Palestine branch”, in Damascus.”<sup>19</sup>
3. **hostage-taking:** the Commission of Inquiry on Syria informed that the government forces are abducting and holding individuals under threat of death to receive money or to exchange

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14 Ibidem p 10.

15 Commission on Inquire in Syria. 6th Report, September 11<sup>th</sup>, 2013 - A/HRC/24/46. See <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>

16 Ibidem p 15.

17 Human Rights Watch. “You Can Still See Their Blood. Executions, Indiscriminate Shootings, and Hostage taking by Opposition Forces in Latakia Countryside”. October 11th, 2013. See

[http://www.hrw.org/sites/default/files/reports/syria1013\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/syria1013_ForUpload.pdf)

18 Commission of Inquire on Syria. 4th Report, February 5, 2013. A/HRC/22/59. See:

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A.HRC.22.59\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A.HRC.22.59_en.pdf)

19 Ibidem p 18.

prisoners. “In February of 2013, in Al-Hajar Al-Aswad (Damascus), two older men in a car were seized while passing through a checkpoint manned by National Defence Forces. Their families were later approached and ransom was sought for their release.”<sup>20</sup> Another case was reported in its the 4<sup>th</sup> report, “security forces holding one former Latakia resident stated to his brother that, unless you surrender, your brother will remain in detention”<sup>21</sup>

4. **execution without due process:** according to the Commission of Inquiry on Syria in 2013 “a “terrorism court” was established in Al-Mezzeh to hear cases that violate the 2012 Anti-Terrorism Law. Accused were not informed of the allegation, nor were they afforded timely access to counsel. The Government also established military field courts. No legal representation, family visits or appeals were allowed, yet judges may confer capital sentences.”<sup>22</sup>

5. **arbitrary arrest and detention:** in its 4<sup>th</sup> report the Commission of Inquiry on Syria demonstrated that twenty-two persons victims of arbitrary arrests.<sup>23</sup>

6. **rape:** sexual violences against men, women and boys are used as a tool to coerce confessions. HRW interviewed eight Syrian victims of sexual violence and more than twenty-five other people with a knowledge of sexual abuse.<sup>24</sup> The Commission of Inquiry on Syria reported that “two women, held at Al-Mezzeh and Branch 235 in Damascus respectively, were told by their interrogators that their daughters would be raped if they did not confess. A nurse held at a police station in Damascus was threatened with gang rape if she failed to reveal whom she was treating”<sup>25</sup>

7. **attacking protected persons and objects:** according to the Commission of Inquiry on Syria the government forces have attacked religious objects,<sup>26</sup> hospitals and medical personnel,<sup>27</sup> cultural property,<sup>28</sup> and journalists<sup>29</sup> with no militar objective.

8. **pillage and destruction of property:** the Commission of Inquiry on Syria reported that “in a now familiar pattern, following shelling and ground attacks, government forces secure an area and conduct house searches. While inside homes, they steal valuables, irrespective of whether the occupants are present. At checkpoints, cars and money are taken from those coming from known opposition neighbourhoods.”<sup>30</sup> It also informed that homes, businesses and cars were been burned.<sup>31</sup>

## Anti-government forces

- The commission of war crimes by the anti-government forces has been also reported by the UN and others international organizations. Some examples of these crimes are:

1. **murder:** the Commission of Inquiry on Syria identified anti-government armed group executions. On June 8<sup>th</sup> 2013, “ISIS fighters executed a 15-year-old boy, Mohamed Qatta, accused of blasphemy.”<sup>32</sup> In June of the same year, “an anti-government armed group killed a

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20 Ibidem p 15.

21 Ibidem p 18.

22 Ibidem p 15.

23 Ibidem p 18.

24 Human Rights Watch. “Syria: Sexual Assault in Detention.” June 15<sup>th</sup> 2012. See:

<http://www.hrw.org/news/2012/06/15/syria-sexual-assault-detention>

25 Ibidem p 15.

26 Commission of Inquire on Syria. 5th Report. June 4<sup>th</sup> 2013. A/HRC/23/58 See [http://daccess-dds-](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/156/20/PDF/G1315620.pdf?OpenElement)

[ny.un.org/doc/UNDOC/GEN/G13/156/20/PDF/G1315620.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/156/20/PDF/G1315620.pdf?OpenElement)

27 Ibidem p 26.

28 Ibidem p 15.

29 Ibidem p 15.

30 Ibidem p 26.

31 Ibidem p 15.

32 Ibidem p 15.

Catholic priest, Father François Murad, in Idlib.”<sup>33</sup>

2. **torture:** the Commission on Inquiry on Syria documented the use of torture and other forms of ill-treatment to government soldiers or member of affiliated militia while detained by anti-government armed groups.<sup>34</sup>

3. **hostage-taking:** the Commission of Inquiry on Syria reported that “in August 2012, 48 Iranian citizens were apprehended by the Al-Bara brigades in Damascus. The Islamic Republic of Iran asserted that the men were pilgrims, while the armed group claimed they were members of the Revolutionary Guard of the Islamic Republic. The men were allegedly threatened with execution unless the Government released detainees.”<sup>35</sup>

4. **execution without due process:** the Commission of Inquiry on Syria informed that FSA fighters had been part of a brigade that had captured “five Alawites” on a road into al-Haffa in Latakia in late July of 2012 and then had interrogated and executed them shortly afterwards.<sup>36</sup>

5. **arbitrary arrest and detention:** according to the Commission of Inquiry on Syria, the number of arbitrary arrest and illegal detention by anti-government armed groups is rising. In April, 2013, “a doctor in Aleppo was detained for refusing to allow Jabhat Al-Nusra to hoist its flag over a field hospital. More than 150 people were detained in the same location, and none had access to counsel.”<sup>37</sup>

6. **rape:** the Commission of Inquiry on Syria demonstrated the commission of the war crime of sexual violence during the assault in Yarmouk (Damascus) in April, 2013. “One interviewee stated that she had been the victim of a sexual assault in Yarmouk (Damascus), in April.”<sup>38</sup>

7. **attacking protected persons and objects:** according to the Commission of Inquiry on Syria the anti-government forces have attacked religious objects,<sup>39</sup> hospitals and medical personnel,<sup>40</sup> cultural property,<sup>41</sup> and journalists<sup>42</sup> with no militar objective.

8. **pillage and destruction of property:** the Commission of Inquiry on Syria reported that after the fighting of March 2013, in Ar Raqqa city, the Shia and Alawite the homes of the resident that had left the cities were confiscated by armed groups, their properties looted and resulting items sold off.”<sup>43</sup>

## UN Security Council

### Referral to the ICC

- According to Article 13 (b) of the Rome Statute when the Security Council considers that there is a situation in which one of more crimes under the jurisdiction of the ICC appears to have been committed, it can refer it to the Office of the Prosecutor of the ICC. As already stated, the ongoing brutalization of civilians in Syria makes it abundantly clear that the world needs the ICC, both to “ensure accountability for the perpetrators of the worst crimes known to humankind and to stem the loss of innocent lives”.<sup>44</sup>

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33 Ibidem p 15.

34 Ibidem p 18.

35 Ibidem p 18.

36 Ibidem p 18.

37 Ibidem p 15.

38 Ibidem p 26.

39 Ibidem p 26.

40 Ibidem p 26.

41 Ibidem p 15.

42 Ibidem p 15.

43 Ibidem p 26.

44 Megan Fairlie. “Security Council referrals to the International Criminal Court: Much ado about Nothing?”. August 9<sup>th</sup> 2012. The Fletcher Forum of Work Affairs. See <http://www.fletcherforum.org/2012/08/09/fairlie/>

- This is not the first time the Security Council has been asked to use its referral authority and throughout its history it mandated the ICC to investigate twice. In March 2005 the Security Council asked the Court to enquire into the situation in Darfur, Sudan, and in February 2011, it did the same with the situation in Libya.

1. Situation in Darfur The war in Darfur started in February 2003 and by March 2005 there were at least 300.000 dead, more than 70.000 civilian victims and uprooted 1.8 million people.<sup>45</sup> The commission of crimes against humanity, war crimes and genocide were widely reported.<sup>46</sup>

2. Situation in Libya The Libyan civil war started on February 15<sup>th</sup>, 2011, nevertheless the violence of the State toward the civil population started at the beginning of 2011, when the protest against the government began. On February 24<sup>th</sup>, 2011 the International Federation for Human Rights estimated that the number of dead people was 6.000.<sup>47</sup>

- It is important to clarify that even though the two Security Council referrals to the ICC were applauded by the International Community, they included provisions that damaged the court. Both referrals imposed “the entire financial burden of the new investigations and prosecutions on the court and its member countries.”<sup>48</sup> They also excluded from the jurisdiction of the ICC the nationals of non-member third countries that were implicated in serious crimes committed in the referred country.

- Finally, the approach of the Security Council to both referrals was inconsistent. While the Council’s February 2011 referral of the Libya situation was prompt and unanimous, “once political circumstances changed in Libya, the Security Council no longer actively supported the ICC investigation and failed to press Libya’s new government to cooperate with the court.”<sup>49</sup> In the same way, the Security Council has undermined the effectiveness of the ICC in reference to the Darfur situation insofar as it has done little to ensure that governments help to enforce Darfur-related ICC arrest warrants.

- Many countries including the United States have argued that despite the commission of war crimes and crimes against humanity, the referral of the Syrian situation could have a negative effect by making it difficult for Syria’s Bashar al-Assad to step down.<sup>50</sup> However, this argument has lost any validity insofar as it is clear he has no desire to cede power. In fact on October 21<sup>st</sup>, 2013 the Syrian president revealed he is considering running for re-election in 2014.<sup>51</sup>

- A different line of argument against the referral to the ICC says it would harm the cause of international justice by instrumentalizing the court as a political pawn of the Security Council thereby losing its independence and integrity. In this sense it is important to clarify that the ICC has jurisdiction to determine its own jurisdiction, therefore it has “the inherent power of judicial review in determining the legality of the Security Council request in relation to the Court’s own purpose, mission, interests of justice and independence”.<sup>52</sup> A Security Council referral to the

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45 House of Commons, International Development Committee. “Darfur, Sudan: The responsibility to protect” Fifth Report of Session 2004–05. See <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/67/67i.pdf>

46 Ibidem p 44.

47 International Federation for Human Rights, Libya: Strategy of scorched earth, desire for widespread and systematic elimination, 24 February 2011. See <http://www.refworld.org/docid/4d6cd0552.html>

48 Mark Kersten. “The UN Security Council and the ICC: Between a Rock and a Hard Place”. Justice in Conflict. May 6<sup>th</sup> 2011. See <http://justiceinconflict.org/2011/05/06/the-un-security-council-and-the-icc-between-a-rock-and-a-hard-place/>

49 Ibidem P 48.

50 Foreign Policy. “Clinton: Calling Assad a war criminal doesn’t help”. February 28th 2012. See [http://bosco.foreignpolicy.com/posts/2012/02/28/clinton\\_calling\\_assad\\_a\\_war\\_criminal\\_doesnt\\_help](http://bosco.foreignpolicy.com/posts/2012/02/28/clinton_calling_assad_a_war_criminal_doesnt_help)

51 France 24. “Assad says -no obstacles- to running for re-election”. 21st October 2013. See <http://www.france24.com/en/20131021-syria-bashar-al-assad-says-no-obstacles-running-election>

52 Sun Kim. Revista Agenda Internacional N XVIII-29, January 2011. Pp 175-212. “Maintaining the Independence of

Prosecutor does not “necessarily mean the prosecutor will actually prosecute a case. The reason of this is the independence and impartiality that the ICC organs enjoys vis-à-vis States and other international legal persons”<sup>53</sup>

- There is no reason to imagine that the ICC referral will automatically stop the war, but it will have a real significance on the legitimacy of both sides of it. The ICC will not offer a short-term solution, but the prosecution of those responsible for the crimes committed in Syria would contribute to the restoration of peace not just in the country but also in the region.

- According to the Responsibility to Protect doctrine, the International Community has an obligation to those citizens subjected to crimes against humanity and or war crimes perpetrated by their own government. However, Responsibility to Protect does not only mean military intervention, it includes all coercive intervention measures such as sanctions and criminal prosecutions.<sup>54</sup> In the same way the Security Council has used this doctrine to refer the two situation mentioned, it should do the same with the current Syrian civil war.

- More than 60 countries have called upon the Security Council to refer the Syrian situation. In a letter of January 2013, 58 countries asked the Security Council to act by referring the situation to the ICC “without exceptions and irrespective of the alleged perpetrators.”<sup>55</sup> In this letter they have not expressly referred to the Responsibility to Protect, but they did apply its doctrine. They acknowledged that accountability is primary a national responsibility but they also pointed out the Syrian unwillingness to do so. Therefore the Security Council “must ensures accountability for the crimes seem to have been and continue to be committed.”<sup>56</sup>

- The need for a referral of the Syrian situation was also mentioned by the UN High Commissioner for Human Rights,<sup>57</sup> the UN Secretary-General Ban Ki-moon,<sup>58</sup> the European Union Foreign Affairs Council,<sup>59</sup> and the League of Arab States.<sup>60</sup> Additionally, the Commission of Inquiry on Syria called the International Community to refer the situation in all its reports, specially the last one of September 11<sup>th</sup> 2013.<sup>61</sup>

## Political issues

- The situation in Syria has reached inhumane and unacceptable levels of criminality and the UN Security Council has the duty to refer it to the ICC. Nevertheless, the power-politics of the Security Council are preventing the ICC from effectively deterring the commission of crimes against

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the International Criminal Court: The Legal and Procedural Implications of an Article 16 Deferral Request”. Pp 188.

53 D. McGoldrick, P. Rowe and E. Donnelly. “The Permanent International Criminal Court: Legal and Policy Issues” Hart Publishing. 2004. Pp 98

54 Report of the International Commission on Intervention and State Sovereignty “The Responsibility to Protect”. December 2001. See <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

55 Letter from Switzerland and 53 other countries to the Security Council. January 14th 2013. See <http://www.news.admin.ch/NSBSubscriber/message/attachments/29293.pdf>

56 Ibidem p 55.

57 UN human rights chief renews call on Security Council to refer Syria to ICC. July 2<sup>nd</sup> 2012. UN News. See [http://www.un.org/apps/news/story.asp?NewsID=42377#.Und\\_2JSvGdM](http://www.un.org/apps/news/story.asp?NewsID=42377#.Und_2JSvGdM)

58 UN Secretary-General Statement of February 12<sup>th</sup> 2013 in New York. See <http://www.un.org/sg/statements/index.asp?nid=6597>

59 Council of The European Union. “Council conclusions on Syria” December 10<sup>th</sup> 2012. See [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/134149.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/134149.pdf)

60 League of Arab States. Council Resolution 7510, Extraordinary Session 22 July 2012. See [http://www.lasportal.org/wps/wcm/connect/las/las/las\\_ar/news\\_reportages/news/hkhalek+22-7-2012+3](http://www.lasportal.org/wps/wcm/connect/las/las/las_ar/news_reportages/news/hkhalek+22-7-2012+3) (arabic)

61 Ibidem p 15.



humanity and war crimes in the Syrian war by both sides.<sup>62</sup>

- The finding by the Security Council that a situation constitutes a threat to international peace and security is not a judicial, but a political decision, “it takes into consideration the political preferences and interests of stakeholders.”<sup>63</sup> This influence of politics in the justice agenda creates a selective and double standards in making referrals which affects the court's impartiality and independence.<sup>64</sup>

- Six current Security Council member have publicly expressed support for an ICC referral of Syrian situation: France, the United Kingdom, Luxembourg, Argentina, Australia and South Korea.<sup>65</sup> However, neither the United States nor China has supported the referral. On the other hand, Russia has said that the effort to seek and ICC referral is “ill-timed and counterproductive.”<sup>66</sup> The future referral of the Syrian war depends on these three countries, which are permanent members of the Security Council and therefore have the power to veto, even though they have not ratified the Rome Statute nor accepted ICC's jurisdiction.

- The role of the three permanent State mentioned in the decision to referral or not a situation has been very criticized and controverted.<sup>67</sup> In this regard Richard Dicker, director of HRW's international justice, has said “when it comes to ICC referrals, the United States, Russia, and China seem more concerned about prosecuting their enemies and protecting their friends. (...) This checkered approach has left victims of abuses in Syria, Gaza and Sri Lanka without recourse of local accountability”<sup>68</sup>

## ICC Prosecutor

### Jordanian fighters

- As stated in the HRW report of October 11<sup>th</sup>, 2013, five opposition groups committed crimes against humanity in the Latakia Countryside area. These five groups are Ahrar al-Sham, Islamic State of Iraq and Sham, Jabhat al-Nusra, Jaish al-Muhajireen wal-Ansar and Suqour al-Izz. These groups among others have also committed war crimes.<sup>69</sup>

- It has been demonstrated that Jordanian fighters are trying to join or did join opposition military groups in Syria, specially the Jabhat al-Nusra group.<sup>70</sup> This front is described as “the most aggressive and successful arm of the rebel force”<sup>71</sup> and as I already mentioned it has been accused

<sup>62</sup>Ibidem p 44.

<sup>63</sup> H. Mistry and D. Ruiz Verduzco. “The UN Security Council and the International Criminal Court”. Chatham House. March 16<sup>th</sup> 2012. Pp 4. See <http://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf>

<sup>64</sup> Ibidem p 48.

<sup>65</sup> Human Rights Watch. Q&A: Syria and the International Criminal Court. September 17<sup>th</sup>, 2013. See <http://www.hrw.org/news/2013/09/17/qa-syria-and-international-criminal-court>

<sup>66</sup> UPDATE 1-Russia opposes Syria crisis war crimes court referral. January 15<sup>th</sup>, 2013. Reuters. See <http://www.reuters.com/article/2013/01/15/syria-crisis-russia-idUSL6N0AKCNB20130115>

<sup>67</sup> Ibidem p 44.

<sup>68</sup> Human Rights Watch. “UN Security Council: Address Inconsistency in ICC referrals.” October 16<sup>th</sup>, 2012. See <http://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals-0>

<sup>69</sup> Ibidem p 17.

<sup>70</sup> Norman Benotman and Roisin Blake. 2013 “Jabhat al-Nusra: A Strategic Briefing” See

<http://www.quilliamfoundation.org/wp/wp-content/uploads/publications/free/jabhat-al-nusra-a-strategic-briefing.pdf>

<sup>71</sup> David Ignatius. November 30<sup>th</sup> 2012. “Al-Qaeda affiliate playing large role in Syria rebellion”. Washington Post. See [http://www.washingtonpost.com/blogs/post-partisan/post/al-qaeda-affiliate-playing-larger-role-in-syria-rebellion/2012/11/30/203d06f4-3b2e-11e2-9258-ac7c78d5c680\\_blog.html](http://www.washingtonpost.com/blogs/post-partisan/post/al-qaeda-affiliate-playing-larger-role-in-syria-rebellion/2012/11/30/203d06f4-3b2e-11e2-9258-ac7c78d5c680_blog.html)

of committing crimes against humanity by HRW.

- Jordan ratified the Rome Statute on April 11<sup>th</sup> 2002. Article 15 expresses that the Prosecutor “may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court”. Article 13 states that the court has jurisdiction when the person accused of committing a crime is a national of a State Party.

- Taking into account the participation of Jordanian fighters in the anti-government military groups and that the court has jurisdiction over them, the Prosecutor has the power to investigate their role in the commission of the crimes mentioned.

## Interim obligation

- The Syrian Arab Republic has not ratified the Rome Statute yet, it only signed it on October 2<sup>nd</sup>, 2000. According to article 18 (a) of the Vienna Convention on the Law of Treaties (VCLT) the signature creates an interim obligation until the Treaty enters into force. Syria acceded to the VCLT on October 7<sup>th</sup> 1970 therefore article 18 (a) should be applied to understand the effects of the Rome Statute.

- Article 18 expresses that “a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty”.

- The obligation of article 18 could also last until the state has made clear its intention not to become a party to the Statute. This is what the United States did in 2002 when it sent a note to the UN Secretary-General saying that it did not intend to become a party to the Statute. In this case, the United States recognized the interim obligation declaring that “...the United States has no legal obligation arising from its signature on December 31<sup>st</sup>, 2000...”<sup>72</sup> Nevertheless, Syria has never manifested its intention to not to become a party.

- One of the most debated points of this article is the nature of the interim obligation. In this sense, it is important to study the drafters’ intention to characterize article 18 as a legal or a moral obligation. The International Law Commission (ILC) drafters intended the interim obligation to be legal in nature saying that signatory countries cannot “sign a treaty and subsequently conduct themselves as if they had no concern with it or as if their signature thereto were merely a clerical act of authentication. (...) Signature of an instrument -even when made subject to subsequent confirmation or ratification- is more than a method of authenticating a text.”<sup>73</sup>

- The ILC gave three additional reasons why the signatures are not just an act of authentication:

1. In signing a treaty, the signatory enjoys the procedural clauses of the instruments, such as the rights of accession, the admissibility of reservations and the conditions of entry into force;
2. The signature has an important effect on other states since it serves as an inducement for the signature of another. Taking this into account, the Commission concluded that “the inducement to compromise and to sign would be significantly diluted if the potential signatory were genuinely concerned that any or all of its earlier concessions might be in vain because of other signatories’ disregard for the treaty’s provision”<sup>74</sup>;

<sup>72</sup> United States’ letter to the UN Secretary-General. May 6th 2002. <http://www.amicc.org/docs/bolton.pdf>

<sup>73</sup> Report by Mr. H Lauterpacht, Special Rapporteur to the General Assembly (1953). 2 V. B. Int’L L Comm’ 90, at 109. U.N. Doc A/CN.4/SER.A/1953/Add.1

<sup>74</sup> Ibidem p 73.

3. Even though the signature does not impose an international obligation to ratify, the act of signing does imply a duty to take some action. This duty is founded on demonstrating a deliberate acknowledgment of the principle that ratification is the natural outcome and purpose of the signature.

- Harvard scholars had a parallel interpretation of article 18. Their draft Convention draft stated that when an authorized representative signs a treaty on behalf of his State, “the signature is not a simple formality devoid of all juridical effect and involving no obligation whatever, moral or legal, on the part of the State whose signature the treaty bears. It would seem that not only the treaty-making organ itself but also the other organs of the State which are competent to act for it, once a treaty has been signed on its behalf, are not, if they observe good faith, entirely free to act as if the treaty had never been signed.”<sup>75</sup>

- Another controversial subject is the applicability of article 18 to multilateral treaties, like the Rome Statute. Some scholars have argued that it was intended to apply primarily to bilateral treaties. However a number of counter-arguments compel a contrary conclusion.

1. In accordance with the rules of treaty construction, proper treaty interpretation requires an initial consideration of the plain language of the text. The plain language of article 18 does not distinguish between forms of treaties intended to be governed by this article. Had the drafters intended such a distinction to be drawn and applied, presumably they would have expressed this intent in the text itself.

2. Reading the examples provided in the commentary to both the Harvard Draft and the International Law Commission's draft we can reach the conclusion that they did not excluded multilateral treaties, insofar as these examples address both bilateral and multilateral treaties.

- It is important to indicate the object and purpose of the Rome Statute to understand how article 18 should be applied and to do so it is necessary to consider its Preamble. <sup>76</sup>The Statute's object and purpose is to ensure that “those responsible for the worst possible crimes are brought to justice in all cases, primarily by states, but, under the underlying principle of complementarity, if they prove unable or unwilling to do so, by the International Criminal Court as a last resort.”<sup>77</sup>

- Article 18 protects the legitimate expectation of the other participants in the treaty-making process that a State which has signed the treaty would not work against the object of the treaty. Therefore, a State's act will defeat the treaty's object and purpose if it renders meaningless subsequent performance of the treaty and its rules. In other words, a State violates the interim obligation when it invalidates the basic presumption of the agreement. The Harvard scholars as well as the ILC gave some examples of acts that go against article 18:

1. “By the terms of a treaty both or all signatories agree to lower their existing tariff rates, but while ratification of the treaty is pending one of them proceeds to raise its tariff duties.”<sup>78</sup>

2. “...a group of countries signed a treaty calling for a reduction of their armed forces and one of them increased their armed forces between the time of signature and ratification.”<sup>79</sup>

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75 Harvard Draft Convention on Law of Treaties.

76 Michael Kourabas. 14 U.C. DAVIS J. INT'L L. & POL'Y 59. Pp 60-93. “A Vienna Convention Interpretation of the “Interests of Justice” provision of the Rome Statute, the legality of domestic amnesty agreements, and the situation in Northern Uganda: a “great qualitative step forward,” or a normative retreat”. Pp 71. See [http://jilp.law.ucdavis.edu/issues/Volume%2014.1/Kourabas3\\_PDF.pdf](http://jilp.law.ucdavis.edu/issues/Volume%2014.1/Kourabas3_PDF.pdf)

77 Amnesty International. “International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes”. August 2002. Pp 3. See <http://www.amnesty.org/fr/library/asset/IOR40/025/2002/fr/3187379a-d7f4-11dd-9df8-936c90684588/ior400252002en.pdf>

78 Ibidem p 75

79 Summary Records of the 788th Meeting, [1965] 1 YB Int'l L Comm'n 87, 92, UN Doc. A/CN. 4/SER. A/1965 (remarks of Manfred Lachs).

- The scope of the obligation to refrain from certain acts has also created many debates, nevertheless and for the purpose of this paper, we will not explain them. This conduct is primarily a passive conduct of States.<sup>80</sup> Article 18 does not require that the acts defeating the object and purpose of a treaty are committed intentionally in bad faith.<sup>81</sup>

- Since the beginning of the civil war, the Syrian Government have never manifested its intention to prosecute those responsible for the crimes stated in the Rome Statute, therefore it has showed a passive conduct. It has defeated the object and purpose of the Statute invaliding the basic presumption of the agreement, which was to prosecute those responsible of war crimes and crimes against humanity. Syria has violated its interim obligation.

## Conclusion

- The civil war in Syria constitutes a threat to international peace and security. Moreover, serious violations of international human rights law and humanitarian law by all parties are continuing and it is necessary that those responsible are brought to justice aiming to demonstrate to them and others that crimes against humanity and war crimes will not go unpunished. The prosecution by the ICC of people allegedly responsible for these crimes would contribute to the restoration of peace in the region inasmuch as sustainable peace requires accountability and justice.

- The Security Council has to refer the Syrian situation to the ICC as soon as possible. The International Community has the responsibility to protect the victims of crimes against humanity and/or war crimes committed by their State.

- In contrast with the last two referrals to the ICC, the Syrian situations must be referred without any provisions that affect the extent and independency of the Court's power to prosecute those responsible for crimes against humanity and war crimes committed in Syria.

- The ICC Prosecutor has the powers to start an investigation for the commission of crimes against humanity and war crimes by the syrian government and the military opposition groups. Syria signed the Rome Statute in 2000 and since that day it has never manifested it intention not to become a party, as the United States did. Syria has violated its interim obligation under the Rome Statute.

- The ICC Prosecutor can also investigate if any of the Jordanian fighters in particular or any other nationals of State Parties to the ICC are responsible for crimes against humanity or war crimes. Jordan ratified the Rome Statute on April 11<sup>th</sup> 2002.

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80 Mark E. Villiger. "Commentary on the 1969 Vienna Convention on the Law of Treaties. 2009. Pp 249

81 Ibidem p 80. Pp 250.